J.Y. Interpretation No. 261 (June 21, 1990)*

Terms of Office of the First Congress Members Case

Issue

Shall the First Congress Members be allowed to exercise their powers indefinitely without being subject to periodic election?

Holding

The terms of office of members of respective congressional bodies are expressly provided in the Constitution. After the members of the First Congress were elected and took office, the nation endured serious upheavals, which militated against election of new members of Congress. In order to keep the constitutional system functioning, it was necessary that all members of the First Congress continue to exercise their powers. However, periodic election of members of Congress is a *sine qua non* to reflect the will of the people and implement constitutional democracy. Neither J.Y. Interpretation No. 31, nor Article 28, Paragraph 2 of the Constitution, nor Section[1] 6, Paragraphs 2 and 3 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion allow the members of the First Congress to exercise powers indefinitely. None of these provisions was intended to change their terms of office or prohibit election of new members of Congress. In fact, since 1969, the Central Government has been

* Translation and Note by Nigel N. T. LI

[1] Editor's note: To be in conformity with the wording used in the original Chinese text of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion, "Section" is used as the corresponding term of "Article" in reference to the Temporary Provisions.

holding regular elections of congressional members in the Free Territory, in order to solidify the congressional bodies gradually. To address the present situation, those members of the First Congress who have not been re-elected shall cease exercising their powers no later than December 31, 1991. Those who have been proven to be incapable of exercising or to have often failed to exercise their powers as revealed by investigations shall be immediately discharged from their offices. The Central Government shall schedule, in due course, a nationwide election of the next members of Congress in compliance with the spirit of the Constitution, the essence of this Interpretation, and all relevant regulations, so that the constitutional system may function properly.

Reasoning

[1] When the Legislative Yuan exercised its budgetary power, it was unsure about the constitutional application of J.Y. Interpretation No. 31, Article 28, Paragraph 2 of the Constitution, and Section 6, Paragraphs 2 and 3 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (hereinafter "Temporary Provisions"). It therefore petitioned for interpretation. Pursuant to the resolution made at the 118th Formal Conference of this Court and Article 4, Paragraph 1, Subparagraph 1 of the Council of Grand Justices Procedure Act, the petition was accepted.

[2] The Constitution provides specific terms of office for members of respective congressional bodies: six years for the Delegates of the National Assembly, three years for the Members of the Legislative Yuan, and six years for the Members of the Control Yuan. Such terms are expressly provided in Article 28, Paragraph 1 and Articles 65 and 93 of the Constitution. After the Constitution took effect, the nation suffered serious upheavals. Upon expiration of the terms of the Members of the First Legislative Yuan and the Members of

the First Control Yuan, it became practically impossible to hold elections for the next congressional members in accordance with the laws. In order to prevent a shutdown of the Five-Yuan system as established by the Constitution, J.Y. Interpretation No. 31 declared, "[U]ntil new members are elected and convene in accordance with the laws, all the Members of both the First Legislative and First Control Yuans shall continue to exercise their respective powers." As for the Delegates of the First National Assembly, they were allowed to continue exercising their powers after their terms expired because Article 28, Paragraph 2 of the Constitution states, "The term of office of the Delegates of each National Assembly shall cease on the date upon which the next National Assembly convenes." On March 23, 1972, the Temporary Provisions were amended to include the following provisions: "The members of the First Congress were elected by the people of the entire nation and have been exercising their powers pursuant to the laws. Those elected through by-elections shall have the same status." (Section 6, Paragraph 2) "Those members of Congress elected as Additional Members shall exercise their powers pursuant to the laws, together with the members of the First Congress." (Section 6, Paragraph 3)

[3] However, periodic election of members of Congress is a *sine qua non* to reflect the will of the people and implement constitutional democracy. That the members of the First Congress were allowed to continue performing their duties was a necessary response to the then-existing situation and served to keep the constitutional system functioning. Since J.Y. Interpretation No. 31 of 1954, the members of the First Congress have been performing their duties for more than three decades. Nevertheless, that Interpretation was not intended to permit the Members of the First Legislative Yuan and the First Control Yuan to exercise their powers indefinitely or to change their respective terms. Article 28, Paragraph 1 of the Constitution expressly states, "The Delegates of the National Assembly shall be elected every six years." Obviously, the true intent of

Paragraph 2 of this Article is to avoid any interruption of the congressional functions owing to the timing of the election of new delegates. It by no means was meant to extend the term of office of the Delegates of the National Assembly indefinitely.

[4] Furthermore, the above-mentioned provisions regarding the members of the First Congress' exercise of powers pursuant to the laws as provided for in Section 6, Paragraphs 2 and 3 of the Temporary Provisions were amended for those members of Congress elected through both by-elections and elections for Additional Members. In the spirit of J.Y. Interpretation No. 31, these two Paragraphs should not be read to allow the members of the First Congress to exercise powers indefinitely. Nor should they be understood to prevent the government from holding elections of new members of Congress. In fact, since 1969, the Central Government has been holding regular elections of members of Congress in the Free Territory, in order to solidify the congressional bodies gradually. To address the present situation, the members of the First Congress who have never been re-elected shall cease exercising their powers no later than December 31, 1991. Those who have been proven to be incapable of exercising or to have often failed to exercise their powers as revealed by investigations shall be immediately discharged from their offices.

[5] As stated above, the members of the First Congress who have never been re-elected shall cease exercising their powers. However, those provisions regarding election of the members of Congress in Articles 26, 64, and 91 of the Constitution are still not entirely applicable at the present time. In light of such circumstances, the Central Government shall make an appropriate plan, following the spirit of the Constitution, the essence of this Interpretation, and all relevant regulations, to hold in due course an election of new congressional members, including a certain number of representatives-at-large, so that the constitutional system may continue to function. It should be noted here that

current members of Congress elected as additional members shall continue to exercise their powers until the end of their terms.

Background Note by the Translator

The Executive Yuan, seeing that the term of the Members of the First Control Yuan would expire on June 4, 1954, pursuant to Article 93 of the Constitution; that the term of the Members of the First Legislative Yuan expired on May 7, 1951, pursuant to Article 65 of the Constitution and was extended by one year three times as a result of consultations the President had with the Legislative Yuan, would again expire on May 7, 1954; and that re-election of the Members of these two Yuans was by no means practicable, filed a petition with the Constitutional Court in January 1954, seeking constitutional interpretation as to whether the Five-Power Constitution would allow the Members of both the First Legislative Yuan and the First Control Yuan to continue exercising their constitutional powers. On January 29, 1954, the Constitutional Court decided in J.Y. Interpretation No. 31 that the Members of both the First Legislative Yuan and the First Control Yuan may continue to exercise their powers when national upheavals militate against election of new members.

Years later, the Legislative Yuan, upon exercising its power in reviewing government budgets, raised significant issues in applying the Constitution in regard to J.Y. Interpretation No. 31, Article 28 of the Constitution, and Section 6, Paragraphs 2 and 3 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion, and filed a petition with the Constitutional Court in April 1990 for constitutional interpretation.

J.Y. Interpretation No. 499 (March 24, 2000)*

Unconstitutional Constitutional Amendments Case

Issue

Are the Additional Articles of the Constitution, promulgated on September 15, 1999, constitutional?

Holding

I. The Constitution is the supreme law of the land. Constitutional amendment greatly affects the stability of the constitutional order and the welfare of the people and must be therefore faithfully carried out by the designated body in accordance with the principle of due process. Constitutional amendment is a direct embodiment of popular sovereignty. The amendment process requires openness and transparency, which enable democratic deliberation through rational communication and thus lay the foundation for the legitimacy of a constitutional state. In accordance with Article 25 and Article 27, Paragraph 1, Subparagraph 3 of the Constitution, as well as Article 1, Paragraph 3, Subparagraph 4 of the Additional Articles of the Constitution (hereinafter "Additional Articles") promulgated on July 21, 1997, the National Assembly, on behalf of the people, is the sole constitutional organ that has the power to amend the Constitution. In the enactment and amendment of the Additional Articles, the process of the National Assembly shall be open and transparent. It shall abide by Article 174 of the Constitution and the Rules of Procedure of the National Assembly (hereinafter "Rules of the National Assembly") so as to live up to the reasonable expectations and the trust of the people. Accordingly, Article 38,

* Translation and Note by Ming-Sung KUO and Hui-Wen CHEN

Paragraph 2 of the Rules of the National Assembly concerning the secret ballot, as enacted by the National Assembly pursuant to Article 1, Paragraph 9 of the Additional Articles promulgated on August 1, 1994, shall be interpreted in a restrictive way, when applied to the readings of any constitutional amendment bill. A constitutional amendment as a state act pertaining to the constitution is null and void inasmuch as a manifest and gross flaw occurs in the amendment procedure. A procedural flaw is considered manifest where the facts of the flaw can be determined without further investigation, whereas it is gross where the facts of the flaw alone render the procedure illegitimate. With such procedural flaws, a constitutional amendment violates the basic norm that underpins the validity of constitutional amendments. The amendment process for the disputed Additional Articles, which passed the third reading by the National Assembly on September 4, 1999, contravenes the principle of openness and transparency as set out above and is not in conformity with Article 38, Paragraph 2 of the Rules of the National Assembly (now defunct). Due to disputed procedural irregularities in which manifest flaws transpired without any further inquiry, the general public was not informed of how the Delegates of the National Assembly (hereinafter "Delegates") exercised their amending power. Thus, the constitutional principle that requires the Delegates to be accountable to both their constituents and their nominating political parties per Article 133 of the Constitution and J.Y. Interpretation No. 331, respectively, was not adhered to. With such a manifest and gross flaw, the act of disputed constitutional amendment violates the basic norm that underpins the validity of constitutional amendments.

II. The National Assembly is a constitutionally-established organ with its competence provided for in the Constitution. The Additional Articles, enacted by the National Assembly via the exercise of its amending power, are at the same level of hierarchy as the original texts of the Constitution. Some constitutional provisions are integral to the essential nature of the Constitution and underpin the

constitutional normative order. If such provisions are open to change through constitutional amendment, adoption of such constitutional amendments would bring down the constitutional normative order in its entirety. Therefore, any such constitutional amendment shall be considered illegitimate, in and of itself. Among various constitutional provisions, Article 1 (the principle of a democratic republic), Article 2 (the principle of popular sovereignty), Chapter II (the protection of constitutional rights), and those providing for the separation of powers and the principle of checks and balances are integral to the essential nature of the Constitution and constitute the foundational principles of the entire constitutional order. All the constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded.

III. Article 1 of the Additional Articles adopted by the Third National Assembly on September 4, 1999, stipulates that, from the Fourth National Assembly on, the seats of the Delegates shall be apportioned according to the popular votes that the candidates nominated by each political party and all the independent candidates receive in the parallel election for the Members of the Legislative Yuan, which differs from the National Assembly in function and competence. The Delegates who are to be selected pursuant to the challenged apportionment method but not directly elected by the people, are merely the representatives appointed by respective political parties according to their share of seats in the Legislative Yuan. Accordingly, this amendment is incompatible with the spirit of Article 25 of the Constitution, which provides that the National Assembly, on behalf of the people, exercises sovereign rights. It leads to a conflict between two constitutional provisions. All the powers conferred by Article 1 of the Additional Articles are presupposed to be exercised by the Delegates elected by the people. Should the Delegates, selected pursuant to the challenged apportionment method, be allowed to exercise the powers of the said Article 1,

the fundamental principles of constitutional democracy would be thereby violated. Hence, the disputed Additional Article amending the method of election for the Delegates is incompatible with the constitutional order of liberal democracy.

IV. Article 1, Paragraph 3, Second Sentence of the Additional Articles provides, "The term of office of the Third National Assembly shall be extended to the day when the term of office of the Fourth Legislative Yuan expires;" Article 4, Paragraph 3, First Sentence provides, "The term of office of the Fourth Legislative Yuan shall be extended to June 30, 2002." Thereby, the term of office of the Third National Assembly will be extended by two years and forty-two days, and the term of office of the Fourth Legislative Yuan by five months, respectively. Pursuant to the principle of popular sovereignty, the power and authority of political representatives originate directly from the authorization of the people. Hence, the legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that the new election must take place at the end of the fixed electoral term unless just cause exists for not holding the election. Failing that, representative democracy will be devoid of legitimacy. J.Y. Interpretation No. 261 held that "periodic election of members of Congress is a *sine qua non* to reflect the will of the people and implement constitutional democracy" to that effect. The just cause for not holding the election alluded to above must be consistent with the holdings of J.Y. Interpretation No. 31, which stipulated, "The State has been undergoing a severe calamity, which has made the election of both the Second Legislative Yuan and the Second Control Yuan *de facto* impossible." In this case, no just cause for not holding re-elections can be found to justify the disputed extension of the terms of both the Third National Assembly and the Fourth Legislative Yuan. Such an extension of the terms as effectuated by amending the said two provisions of the Additional Articles is not in conformity with the principle set out above. Furthermore, the self-extension of its own term by the

Third National Assembly contravenes the principle of conflict of interest and is also incompatible with the constitutional order of liberal democracy.

V. The amendment process of Articles 1, 4, 9, and 10 of the Additional Articles, adopted by the Third National Assembly by secret ballot in its Fourth Session, Eighteenth Meeting on September 4, 1999, is in contravention of the principle of openness and transparency and also violates the then-governing Article 38, Paragraph 2 of the Rules of the National Assembly, to the extent of constituting manifest and gross flaws. It therefore violates the basic norm that underpins the validity of constitutional amendments. Among the disputed Additional Articles, Article 1, Paragraphs 1 to 3 and Article 4, Paragraph 3 are in normative conflict with those provisions of the Constitution that are integral to its essential nature and underpin the constitutional normative order. Such conflict shall be proscribed under the constitutional order of liberal democracy. Hence, the disputed Articles 1, 4, 9, and 10 of the Additional Articles shall be null and void from the date of announcement of this Interpretation. The Additional Articles promulgated on July 21, 1997, shall continue to apply. It is so ordered.

Reasoning

[1] Having doubts as to the constitutionality of the Additional Articles of the Constitution (hereinafter "Additional Articles") promulgated on September 15, 1999, in exercising their powers, some Legislators (hereinafter "the petitioners") filed separate petitions with this Court for interpretation. In sum, the petitioners submit the following five claims. (1) In the predawn hours of September 4, 1999, the National Assembly passed the amendments of the Additional Articles. The method of secret ballot used in the second and third readings was in contravention of the procedural rules governing constitutional amendment. Moreover, after being rejected in the second reading, the said amendments were voted upon again and passed. Such repeat voting was in violation of the Rules of Procedure of the

National Assembly (hereinafter "Rules of the National Assembly"). Hence, the disputed amendment procedures contained manifest and gross flaws. (2) Article 25 of the Constitution provides that the Delegates of the National Assembly (hereinafter "Delegates"), on behalf of the people, exercise sovereign rights. There exists a certain mandate between the Delegates and their constituents. Article 1, Paragraph 1 of the Additional Articles, however, changes the method of election for the Delegates to the "derivative" type of proportional representation. This change not only contradicts Article 25 of the Constitution but also disenfranchises those unaffiliated with any political party or other political associations from being elected as Delegates. Such disenfranchisement violates their right to equality under Article 7 of the Constitution. Some Legislators had introduced a bill to amend related provisions of the Act of Election and Recall of Public Officials. The doubts on the constitutionality of the said change in the method of election for the Delegates need to be clarified in order to determine the constitutionality of the said legislative bill. (3) Article 4, Paragraph 3 of the Additional Articles in dispute provides for the ending date (June 30, 2002) of the Fourth Legislative Yuan and the starting date (July 1, 2002) of the Fifth Legislative Yuan, while it leaves unchanged the presidential power to dissolve the Legislative Yuan. Also, Article 1, Paragraph 3, First Sentence of the Additional Articles provides that should an early election of the Legislative Yuan be called, the Delegates shall be elected anew simultaneously. Yet, Article 1, Paragraph 3, Second Sentence thereof stipulates that the ending date of the Third National Assembly shall be fixed as the expiration date of the term of the Fourth Legislative Yuan. The foregoing provisions create inconsistency and raise interpretive ambiguities. Clarification is needed to eliminate uncertainties concerning the petitioners' exercise of their legislative power, which is contingent on the term of office of the Legislators. (4) Budget deliberation and approval are part of the legislative powers that the Constitution entrusts to the petitioners. The execution of the approved Annual Budget of 2000 will be affected by the

extension of the term of both the Third National Assembly and the Fourth Legislative Yuan by the disputed Additional Articles. Such execution also concerns the petitioners' exercise of their constitutional powers. (5) The extension of the terms of both the Delegates and the Legislators constitutes a breach of the social contract with their constituents. Under the disputed Additional Articles, such an extension will take effect immediately and not from the next term. Article 8 thereof explicitly provides that any increase in remuneration or pay shall not apply until the next term of Legislators. The two provisions seem to be in conflict with each other. If the petitioners intend to exercise their power to propose a constitutional amendment under Article 174, Subparagraph 2 of the Constitution, the said conflict needs to be clarified. The authority concerned, the National Assembly, however, challenges the jurisdiction of this Court. In oral and written statements submitted by its representative, the National Assembly maintains that the disputed Additional Articles were passed in accordance with amendment procedures and hence constitute part of the Constitution. There shall exist no inter-contradiction among various constitutional provisions. Moreover, it argues that under Article 4 of the Constitutional Court Procedure Act, the Court is allowed to interpret only those matters already enumerated in the Constitution. The authority concerned contends the petitions should be dismissed.

[2] Chapter VII of the Constitution concerns judicial powers. Article 78 thereof provides, "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretations of statutes and regulations." Article 79, Paragraph 2, First Sentence thereof provides, "The Judicial Yuan consists of Justices who have jurisdiction over the matters specified in Article 78 of the Constitution." Accordingly, it is evidently clear that the Justices of the Judicial Yuan are vested with the power to interpret the Constitution and unify the interpretations of statutes and regulations. Yet, in order to safeguard the Constitution as the supreme law of the land, to clarify the hierarchical relationship

among various statutes and regulations, and to define the competence of the Constitutional Court, the Constitution further provides for specific competences of the Constitutional Court in provisions other than those in Chapter VII. For example, Article 117 provides, "When doubt arises as to whether or not there is a conflict between provincial ordinances and national legislation, it is subject to the interpretation by the Judicial Yuan." Article 171 provides, "Statutes that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a statute is in conflict with the Constitution, it is subject to interpretation by the Judicial Yuan." Article 173 provides, "The Constitution shall be interpreted by the Judicial Yuan." Of particular pertinence is Article 173. As far as its drafting history is concerned, a thorough survey of the Records of the Constitutional Convention indicates that the text of "[t]he Constitution shall be interpreted by the Judicial Yuan" was placed either in the "Chapter of Miscellaneous Provisions" or in the "Chapter on the Enforcement and Amendment of the Constitution," in all of the earlier versions of the draft Constitution. Such earlier drafts included the draft Constitution of the Republic of China published by the Legislative Yuan of the Nationalist Government on March 1, 1934, and the "May Fifth Draft Constitution" proclaimed by the Nationalist Government on May 5, 1936. The inclusion of the said Articles 78 and 79 of Chapter VII in the Constitution notwithstanding, the text of "[t]he Constitution shall be interpreted by the Judicial Yuan" was retained as the said Article 173 of Chapter XIV concerning the Enforcement and Amendment of the Constitution. Juxtaposed with Articles 78 and 79, Article 173 would seem not to apply to constitutional interpretation or unification of interpretations of statutes and regulations in general. Instead, it refers to the subject of the enforcement and amendment of the Constitution. Doubts or ambiguities arising therefrom are also subject to interpretation by this Court. Accordingly, based upon Article 173, this Court has rendered the following Interpretations on issues concerning the amendment procedures arising under Article 174, Paragraph 1 of the Constitution:

J.Y. Interpretation No. 85 on how the total number of Delegates is to be tallied, J.Y. Interpretation No. 314 on whether the National Assembly, during extraordinary sessions not convened for the purpose of constitutional amendment, can nevertheless exercise its power of amendment, and J.Y. Interpretation No. 381 on whether the quorum requirement for a constitutional amendment may be applied to various readings of the amendment procedure. It is also on the same basis that in J.Y. Interpretation No. 261, this Court addressed substantive issues concerning constitutional amendment. J.Y. Interpretation No. 261 concerns Section 6, Paragraphs 2 and 3 of the Temporary Provisions effective during the Period of National Mobilization for Suppression of the Communist Rebellion (hereinafter "Temporary Provisions"), which were enacted in accordance with the procedure for constitutional amendment and are considered as equivalents of the Additional Articles. While the Temporary Provisions provided that the Members of both the First Legislative Yuan and the First Control Yuan would continue to hold office after the expiration of their original terms of office, this Court, in J.Y. Interpretation No. 261, ruled on the substantive issue of whether the said Temporary Provisions violated the constitutional requirements that elected political representatives shall hold office only for fixed terms and must be subject to re-election at regular intervals.

[3] The primary function of legal interpretation is to resolve the issues of concurrence of norms (*Normenkonkurrenz*) and conflict of norms (*Normenkonflikt*), including doubts as to the gaps resulting from conflicting norms enacted at different times (which is considered an axiom in legal theory. *See* Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed., 1991, S. 313ff.; Emil[i]o Betti, *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*, 1967, S. 645ff.). This is also the province and duty of any constitutional court. As regards the petitioners' claim that manifest and gross flaws existed in the disputed amendment process, it raises the question as to whether the constitutional

amendment in question was faithfully carried out in accordance with the procedural requirements laid down in the Constitution and the Rules of the National Assembly. The answer to that question involves the choice of various standards of constitutional review and will be addressed separately. The other four claims are formed around the inter-provisional conflict or contradiction arising from the newly amended Additional Articles vis-à-vis the provisions of the Constitution and the Additional Articles. They also concern the petitioners' exercise of their powers. It is noted that even the supplementary written statement of the authority concerned dated January 19, 2000, submits that "the Constitutional Court can make interpretations on petitions to resolve the conflicts among, or ambiguities about, constitutional provisions, as long as such provisions are in effect." As the present petitions request this Court to resolve the conflicts or ambiguities caused by the newly amended Additional Articles, the jurisdiction of this Court is beyond question. Though the authority concerned objected to this Court's jurisdiction based on its literal reading of Article 4 of the Constitutional Court Procedure Act, this Court finds that all of the petitioners' claims involve items stipulated in either the Constitution or the Additional Articles. Moreover, the purpose of Article 4 of the Constitutional Court Procedure Act is to preclude those petitions whose subject matter is of no pertinence to the Constitution. This does not limit this Court's jurisdiction only to the textual construction of specific constitutional provisions. The objection of the authority concerned to the admissibility of the present petitions is therefore groundless.

[4] In terms of the Constitution, past J.Y. Interpretations, and legal doctrine, the present petitions for constitutional review met the admissibility requirements as spelled out in Article, 5 Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and were granted review. It is so explained here first.

[5] The Constitution is the supreme law of the land. Constitutional amendment greatly affects the stability of the constitutional order and the welfare of the people

and must be therefore faithfully carried out by the designated body in accordance with the principle of due process. In accordance with Article 25 and Article 27, Paragraph 1, Subparagraph 3 of the Constitution, as well as Article 1, Paragraph 3, Subparagraph 4 of the Additional Articles promulgated on July 21, 1997, the National Assembly, on behalf of the people, is the sole constitutional organ that has the power to amend the Constitution. As such, the power of the National Assembly to approve a constitutional amendment is exclusive, which is distinguishable from the amendment processes of other national constitutions that require the approval of a bicameral parliament or the ratification of a parliamentary-adopted constitutional amendment bill by either a national referendum or state legislatures. Accordingly, it is imperative that the National Assembly observe the requirements of due process in the exercise of its power of amendment and fully reflect the will of the people. In the enactment and amendment of the Additional Articles, the process of the National Assembly must be open and transparent. It shall abide by Article 174 of the Constitution and the Rules of the National Assembly so as to live up to the reasonable expectations and the trust of the people. Under the principle of popular sovereignty (Article 2 of the Constitution), the communication processes in which public opinion is freely expressed and the will of the people is freely formed are the safeguard of popular sovereignty. In other words, the exercise of popular sovereignty, when expressed in a constitutional system and its operation, requires openness and transparency, which enable democratic deliberation through rational communication and thus lay the foundation for the legitimacy of a constitutional state. Considering that constitutional amendment is the direct embodiment of popular sovereignty, the fact that the National Assembly never used a secret ballot in the previous nine rounds of constitutional amendments, including during the enactment and amendment of the Temporary Provisions and the Additional Articles, speaks to the principle of popular sovereignty. When the Delegates and their political parties are accountable to their constituents through such open and

transparent amendment process, the constituents are able to hold them accountable through recall or re-election. Thus, the provision for the secret ballot in Article 38, Paragraph 2 of the Rules of the National Assembly shall not be applied to voting on any constitutional amendment. Not only must the readings for the adoption of a constitutional amendment comply with the Constitution strictly, but their procedures also need to conform to the constitutional order of liberal democracy (*see* J.Y. Interpretation No. 381).

[6] Based on the Records of the National Assembly, there existed various procedural flaws in the amendment of the Additional Articles in question, adopted at the third reading on September 4, 1999. These flaws included: (1) the method of secret ballot was used in the second and third readings; (2) the motion to reconsider was not handled in accordance with the Rules of the National Assembly; (3) precedence was not given to the valid motion to adjourn, notwithstanding the said Rules; (4) defeated amendment bills were voted upon again in contradiction to the said Rules; (5) the textual and linguistic tidying up of the amendment bills after the second reading exceeded the permitted scope. The legal consequences of each said flaw vary according to their degree of severity. Constitutional amendment is the direct embodiment of popular sovereignty and a state act pertaining to the constitution. It shall be null and void inasmuch as a manifest and gross flaw occurs in the amendment procedures (*see* J.Y. Interpretation No. 419, *Compilation of the Interpretations of the Constitutional Court*, *2nd Series*, Vol. 10, p. 332). A procedural flaw is considered manifest where the facts of the flaw can be determined without further investigation, whereas it is gross where the facts of the flaw alone will render the procedure illegitimate. With such procedural flaws, a constitutional amendment violates the basic norm that underpins the validity of constitutional amendments (*see* J.Y. Interpretation No. 342, *id.*, Vol. 8, p. 19). Among the said five procedural flaws, the use of a secret ballot is a manifest and gross one. Within the bounds of

the Constitution and legislation, the National Assembly may make its rules of procedure *ex officio* to carry out its powers on such matters as the quorum, the majority threshold, the introduction of bills, and methods of voting. Article 38, Paragraph 2 of the Rules of the National Assembly provides, "The chairperson shall have the prerogative in deciding the method of voting stated in the last paragraph, be it a show of hands, standing, electronic voting, or balloting. The vote shall remain to be cast by open ballot provided that more than one-third of the Delegates present request to do so, notwithstanding the chairperson's ruling on a secret ballot." While this rule is applicable to voting about general matters, adopting a constitutional amendment by secret ballot is in contravention of the above-stated principle of openness and transparency. As indicated in the Records of the Fourth Session, Eighteenth Meeting of the Third National Assembly, the amendments of the Additional Articles in question were adopted on September 4, 1999, by secret ballot in the second and third readings. Hence, the amendment process of the disputed Additional Articles not only contravenes the principle of openness and transparency, but also violates Article 38, Paragraph 2 of the Rules of the National Assembly. The said Records indicate that a secret ballot had been proposed as the voting method for all the constitutional amendment bills in the second and third readings before the second reading started. Out of the 242 Delegates present, 150 voted in favor of this proposal. In the meantime, a counterproposal was submitted in accordance with Article 38, Paragraph 2 of the Rules of the National Assembly, demanding that all the constitutional amendment bills be voted on by open ballot. Eighty-seven out of the 242 Delegates present, more than one-third of the Delegates present, voted in favor of this counterproposal. In terms of the spirit of the said Article 38, Paragraph 2 of the Rules of the National Assembly, an open ballot must be used, regardless of the chairperson's ruling on the voting. Specifically, this rule is meant for the realization of procedural fairness in the light of respecting minority opinions. Yet, contrary to Article 38, Paragraph 2 of the Rules of the National Assembly, the

secret ballot was adopted by a simple majority as the voting method for the constitutional amendment bills. This also deviated from the voting method used for constitutional amendment bills in constitutional practice. The general public was thus left uninformed as to how the Delegates exercised their power of amendment. As a result, Article 133 of the Constitution, which provides, "The elected officials may be recalled by voters in their constituency in accordance with the statutes," and J.Y. Interpretation No. 401, which held, "[T]he constituents may recall the Delegates elected from their constituency for their speeches and the votes they cast in the National Assembly as provided for in legislation," and J.Y. Interpretation No. 331, which held that each political party is entitled to discipline its members elected as representatives-at-large and representatives of overseas nationals via the party-list system, by disqualifying such representatives through the deprivation of party membership were rendered impotent. In conclusion, the petitioners' claim that the process of amendment in question had manifest and gross flaws is sustained. To this extent, this amendment of the Constitution violates the basic norm that underpins the validity of constitutional amendments.

[7] The authority concerned submits that, according to J.Y. Interpretations Nos. 342 and 381, the amendment procedure falls within the scope of parliamentary autonomy and is thus not subject to constitutional review. It further argues that the amendment process is not justiciable by citing foreign laws and decisions. Also, it contends that the Delegates are free to choose between an open and a secret ballot, as both are constitutionally permissible voting methods. Yet, constitutional amendment must be faithfully carried out by the designated amendment body in accordance with the principle of due process on which the validity of a constitutional amendment hinges. As indicated above, the Constitutional Court has jurisdiction over constitutional interpretation in cases of doubts or ambiguities arising with respect to the procedure of amendment. The

constitutionality of the internal procedures of the authority concerned, such as the scope of parliamentary autonomy and its limits, involves the choice of various standards of review by the Constitutional Court. Not all the internal procedures of the authority concerned fall within the scope of parliamentary autonomy, and thus they do not all avoid the legal effects of manifest and gross procedural flaws. The requirement of the quorum and the majority threshold in the readings in which the authority concerned adopts a constitutional amendment bill must be in conformity with Article 174, Paragraph 1 of the Constitution. As regards the quorum of the first reading, in which the overall structure of a bill is subject to brief discussion before proceeding to committee vetting, the National Assembly, under the principle of parliamentary autonomy, may choose from among Article 174, Paragraph 1 of the Constitution, Article 8 of the National Assembly Organization Act that requires one-third of the total Delegates, and the Rules of the National Assembly. Nonetheless, its dealing with a constitutional amendment bill in the first reading must be in conformity with the constitutional order of liberal democracy (*see* J.Y. Interpretations Nos. 342 and 381). In J.Y. Interpretation No. 254, this Court ruled that a Delegate, who fails to swear an oath of office in accordance with the law or takes it in a manner inconsistent with what was required by law, is not eligible to perform his or her duty, including voting, in the National Assembly. This Court also notes that the issue of whether a Delegate who fails to swear an oath as the law requires is entitled to attend the meetings of the National Assembly, falls within the scope of parliamentary autonomy and must be decided by the National Assembly itself. Thus, the contention of the authority concerned against the jurisdiction of this Court on the ground of the principle of parliamentary autonomy is not sustainable. The authority concerned further argues that the process of amendment is not subject to judicial review, by reference to comparative constitutional law theories and cases. This Court finds that, in countries like Germany, Austria, Italy, and Turkey, the same institution (*i.e.* the parliament) holds both the power to amend the

Constitution and to make laws. In such cases, the processes of constitutional amendment and ordinary legislation only diverge in the requirement for a quorum and a majority threshold, but do not differ in nature. As acknowledged by most of the invited expert witnesses, the constitutional courts in those countries hold jurisdiction over doubts or disputes arising as to the process of amendment. To this observation the authority concerned also has no objection. Moreover, as indicated in the case law of some countries, there are instances when constitutional courts have reviewed the constitutionality of constitutional amendments against the original constitutional texts, on both procedural and substantive grounds. *See. e.g.*, The *Klass* case (*Abhörentscheidung*) issued by the Federal Constitutional Court of Germany on December 15, 1970, 30 BVerfGE 1 (1970), *translated into Mandarin in* Administration Office of the Constitutional Court (ed.), *Compilation of Selected Judgments of the Bundesverfassungsgericht,* Vol. 8, p. 226-283; Judgment No. 1146/1988 issued by the Italian Constitutional Court on December [15][1], 1988, *also* T. Martines, *Diritto Costituzionale*, [updated by Gaetano Silvestri, 9th ed.], 1998, p. 375; Judgment No. 1970/31 of June 16, 1970 and No. 14233 of July 2, 1972[2] issued by the Turkish Constitutional Court, *cited from* Ernst E. Hirsch, "Verfassungswidrige Verfassungsänderung: Zu zwei Entscheidungen des Türkischen Verfassungsgerichts," [98] *Archiv des öffentlichen Rechts* 53 (1973). When it comes to those countries in which ordinary legislation and constitutional amendment follow different procedures and involve various organs, there is no consensus on the justiciability of the amendment process. The United States (hereinafter "U.S.") is a case in point. Citing *Coleman v. Miller*, 307 U.S. 433 (1939), the authority concerned argues that the U.S. Congress has sole and complete control over the

[1] Translators' note: This decision was rendered on December 15, 1988, while the original text of J.Y. Interpretation No. 499 in Mandarin incorrectly identified the date as December 29, 1988.

[2] Translators' note: The second case (No. 14233 of July 2, 1972) cited here was a decision on the constitutionality of statutes, and not of constitutional amendments.

amendment process, subject to no judicial review. Citing a leading scholar in U.S. constitutional law, Laurence H. Tribe, *American Constitutional Law*, Vol. 1, 3rd. ed., p. 105 (2000), the authority concerned further argues that constitutional amendment is a political process. Article V of the U.S. Constitution is independent of normal legal processes, and thus the amendment process is off limits to judicial intervention. Yet, this Court finds no consensus among scholars as to whether the U.S. Supreme Court in *Coleman* did rule that the amendment process was a political one and therefore off limits to judicial review, or whether it was a constitutional question susceptible to judicial interpretation. Moreover, in *Uhler v. AFL-CIO*, 468 U.S. 1310 (1984), which concerned a Californian initiative aimed at amending the U.S. Constitution, Chief Justice William Rehnquist ruled that *Coleman* could not be read expansively to conclude that the amendment process is a political question and thereby preclude judicial review. Taken together, the amendment process in the U.S. is susceptible to judicial review as appropriate in accordance with the Constitution. It is noteworthy that the said leading constitutional scholar in U.S. constitutional law invoked by the authority concerned also notes, "Nor should we expect the courts to defer to a congressional judgment, for example, that ratification by thirty-five out of fifty states satisfies Article V's three-fourths requirement" (Tribe, *American Constitutional Law*, *id.*, p. 105). Also, the same authority further observes, "[C]ommentators on the subject tend to disagree mainly on the *scope* of the undoubtedly limited judicial review that is appropriate in governing the process by which amendments proposed by Congress are ratified by the states." (*Id.*, p. 372) In sum, the practice of U.S. constitutional law invoked by the authority concerned falls far short of casting doubt on the jurisdiction of this Court over the amendment process, let alone the conferral of interpretive authority on this Court with respect to the enforcement and amendment of the Constitution, as discussed above, which is far different from foreign law and jurisprudence.

[8] In response to the argument of the authority concerned for the secret ballot on the basis of free mandate, it is noted that most modern democracies adopt free mandate vis-à-vis imperative mandate, under which political representatives are not merely the delegates of their constituents but are rather elected to represent the entire nation. Although political representatives are privileged from being questioned in any other place about their speeches and the votes they cast in the parliament and are not subject to recall under free mandate, it does not follow that political representatives are completely unconstrained by public opinion or their political parties. More importantly, in contrast to the constitutions of most Western democracies, our Constitution explicitly provides that political representatives at all levels are recallable (*see* Article 133 of the Constitution and J.Y. Interpretation No. 401). Against such a backdrop, the current system is not purely one of free mandate. Hence, free mandate cannot justify the deviation of the authority concerned from the Rules of the National Assembly to adopt a secret ballot.

[9] The Additional Articles, duly enacted by the National Assembly pursuant to the amendment procedures as provided for in Article 174 of the Constitution, are at the same level of hierarchy as the unamended texts of the Constitution. Yet, if a constitutional provision, which is integral to the essential nature of the Constitution and underpins the constitutional normative order, is open to change through a constitutional amendment, permitting such a constitutional amendment would bring down the constitutional normative order in its entirety. Such a constitutional amendment in and of itself should be denied legitimacy. No eternity clause in the Constitution notwithstanding, among other constitutional provisions, Article 1 (the principle of a democratic republic), Article 2 (the principle of popular sovereignty), Chapter II (the protection of constitutional rights), and those providing for the separation of powers and the principle of checks and balances are integral to the essential nature of the Constitution and constitute the

foundational principles of the entire constitutional order. All constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded (*see* Article 5, Paragraph 5 of the Additional Articles and J.Y. Interpretation No. 381). The power of the National Assembly, being a constitutionally-established organ, is conferred by the Constitution and thus must be governed thereby. Upon assumption of office, Delegates swear an oath of allegiance to the Constitution, whereby they are to be loyal to the Constitution. Constitutional loyalty also applies when the National Assembly exercises its amending power *per* Article 174 of the Constitution. In the event that a constitutional amendment only concerns government reorganization, the designated body that makes amendments is entitled to a margin of appreciation (*see* J.Y. interpretation No. 419). Thus, its decision commands deference from other constitutional organs. Yet, in the event that a constitutional amendment contravenes the constitutional order of liberal democracy, as emanating from the said foundational principles, it betrays the trust of the people, shakes the foundation of the Constitution, and thus must be checked by other constitutional organs. Such a check on the designated body that makes amendments is part of the self-defense mechanism of the Constitution. Thus, a constitutional amendment that contravenes the foundational principles of the Constitution and therefore causes normative conflict within the constitutional order shall be denied legitimacy.

[10] Article 1, Paragraph 1, First Sentence of the Additional Articles adopted by the Third National Assembly on September 4, 1999, stipulates:

> The Fourth National Assembly shall have 300 Delegates, to be elected by proportional representation in accordance with the following provisions. The seats thereof shall be apportioned according to the

> popular votes that the candidates nominated by each political party and all the independent candidates receive in the parallel election for the Members of the Legislative Yuan, Articles 26 and 135 of the Constitution notwithstanding.

Article 1, Paragraph 2, First Sentence thereof provides:

> Beginning with the Fifth National Assembly, the National Assembly shall have 150 Delegates, to be elected by proportional representation in accordance with the following provisions. The seats thereof shall be apportioned according to the popular votes that the candidates nominated by each political party and all the independent candidates receive in the parallel election for the Members of the Legislative Yuan, Articles 26 and 135 of the Constitution notwithstanding.

Both provisions concern the application of proportional representation in the allocation of the seats of the National Assembly. In contrast to majoritarian representation and minoritarian representation, proportional representation is the method of election whereby parliamentary seats are allocated in accordance with the total votes cast for each party or for all the individual candidates thereof. Nevertheless, it is still necessary to hold a specific election for such representatives. Insofar as the allocation of seats is not decided by an election specifically held for it but instead according to the election results of the officials of different nature or function, the seats concerned are effectively apportioned with no election being held. No such an electoral system can be found among advanced democracies (*see* The Central Election Commission Letter of 88-Chung-Hsuan-1-8891356, submitted to the Secretary General of the Judicial Yuan on December 28, 1999). Thus, the Delegates elected pursuant to the said apportionment method are merely representatives appointed by individual

political parties, rather than representatives of the people. As the petitioners rightly point out, the National Assembly must consist of Delegates who are directly elected by the people in order to exercise sovereign rights. The implementation of the disputed Additional Articles will result in an evident normative conflict, as the unelected Delegates selected thereunder would only stand in for individual political parties while exercising sovereign rights on behalf of the people. It might not be constitutionally objectionable for such unelected Delegates to perform powers of merely consultative nature. Yet, if they continue to hold the following powers to alter the state territory (Article 4 of the Constitution), to elect the Vice President when the said office becomes vacant, to initiate a recall of the President or the Vice President, to vote on the impeachment of the President or the Vice President, to amend the Constitution, to approve constitutional amendment proposals put forth by the Legislative Yuan, and to confirm presidential appointments to the Judicial, Examination, and Control Yuans (Article 1 of the Additional Articles), which, by nature, should be vested in elected political representatives, it will not only result in evident normative conflict with Article 25 of the Constitution but also contravene the fundamental principle of the democratic state under Article 1 of the Constitution. Hence, the disputed Additional Articles concerning the allocation of the seats of the National Assembly are incompatible with the constitutional order of liberal democracy. It has been argued that, compared to those countries with a bicameral parliament where the first chamber is directly elected and the membership of the second chamber is determined by appointment or even heredity, the allocation of the seats of the second chamber based on the election result of the first chamber, as the disputed method of electing the Delegates exemplifies, is even more democratic. However, in contemporary bicameral parliaments, an unelected second chamber often holds far less power than the first chamber elected by popular vote. There is no instance of an unelected second chamber being entrusted with the power to enact or amend the Constitution, while the elected first chamber only wields

legislative power. Notably, the determination of the membership of a second chamber by appointment or heredity is either a historical legacy or a function of federalism. Such a method has thus been abandoned in most modern democracies. In the written statement of the authority concerned of March 23, 2000, it is noted that there are examples where the parliament consists of two chambers and proportional representation is adopted, including Austria, the Netherlands, Belgium, Ireland, Switzerland, and Spain. It is further argued that a consensus reached in the National Development Conference of December 1996 was that proportional representation shall be used for elections for the National Assembly in the interest of national development. Yet, an examination of the said examples of bicameral parliaments in which one chamber is elected by proportional representation with the other by a separate election or other methods indicates that none of them adopt the "derivative" type of proportional representation as exemplified in the disputed method of electing the Delegates. Nor does any of the said examples contradict the fundamental principle of the democratic state by vesting the unelected chamber with the power to enact the Constitution at the apex of the national legal order. Moreover, the said National Development Conference merely called for switching the method of election for the National Assembly to proportional representation. It did not suggest that the Delegates be appointed with no separate election being held or that their term of office be extended. In sum, none of the foregoing reasons submitted by the authority concerned suffices to justify the switch to the "derivative" type of proportional representation with respect to the election of Delegates. Besides, the purpose of Article 28, Paragraph 2 of the Constitution, which provides that the term of office of the Delegates shall terminate on the day on which the subsequent National Assembly convenes, is to maintain the institutional continuity of the National Assembly as the constitutional organ of sovereign rights. And the disputed Additional Articles are not intended to repeal, by implication, Article 28, Paragraph 2 of the Constitution. Yet, Article 1, Paragraph 3 of the Additional Articles further stipulates that the

term of office for the Delegates is four years; however, in the case that an early election of the Legislative Yuan is called, the Delegates shall be elected anew simultaneously. Accordingly, in the event the President dissolves the Legislative Yuan *per* Article 2, Paragraph 5 of the Additional Articles, the National Assembly will also be dissolved at the same time, resulting in an evident normative conflict with Article 28, Paragraph 2 of the Constitution. Lastly, the disputed Article 1 of the Additional Articles provides that the number of seats for independent candidates in the National Assembly shall be decided according to the percentage of the popular vote received by all candidates in the Legislative Yuan election. Yet, independent candidates, who are not affiliated with any political party or association, have no shared political platform. Under the "derivative" type of proportional representation, individual independent candidates would not be elected based on their own ideas and policies pitched at the electors. Hence, the disputed Article 1 of the Additional Articles is incompatible with the protection of political rights under the Constitution.

[11] The legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that any new election must take place at the end of the fixed electoral term unless just causes exist for not holding the election. Failing that, representative democracy will be devoid of legitimacy. J.Y. Interpretation No. 261 held, "[P]eriodic election of members of Congress is a *sine qua non* to reflect the will of the people and implement constitutional democracy." The just causes for not holding the election alluded to above must be consistent with the holding of J.Y. Interpretation No. 31, which stipulates, "The State has been undergoing a severe calamity, which has made the election of both the Second Legislative Yuan and the Second Control Yuan *de facto* impossible." If the tenure of elected political representatives is extended beyond the end of the fixed electoral term without legitimate grounds, their stay in office will betray the trust of the

electorate and be devoid of legitimacy. It is inconsistent with the principle of popular sovereignty under which the mandate of political representatives must be directly attributable to the people. According to the disputed Additional Articles, the term of office of the Fourth Legislative Yuan will be extended to June 30, 2002, and the term of office of the Third National Assembly will be extended to the day when the term of office of the Fourth Legislative Yuan expires. Thereby, the term of office of the Third National Assembly will have been extended by two years and forty-two days and that of the Fourth Legislative Yuan by five months, respectively. In the oral statement made by its representative, the authority concerned argues that the extension of the term of the Fourth Legislative Yuan was intended to bring its term into line with the change in the fiscal year so that a new Legislative Yuan would be able to review and approve the government budget for the immediate fiscal year following the election. Yet, the extension of the term of political representatives is only permissible on the grounds of just causes as discussed above. The change in the fiscal year is far from the case of the State undergoing a severe calamity, and thus, the disputed extension of the term lacks legitimacy. After the 1997 Additional Articles came into effect, the Legislative Yuan could be dissolved by the President following a vote of no confidence in the Premier of the Executive Yuan. According to Article 2, Paragraph 5 of the 1997 Additional Articles, the term of the new Legislative Yuan shall be reckoned from the day when it is convened. As a result, the actual length of each Legislative Yuan term may vary. Hence, it will be futile to align the term of the Legislative Yuan with the change in the fiscal year. The authority concerned further argues that the self-extension of the term of office of the Third National Assembly is part of parliamentary reform, including the plan to revamp the National Assembly, and contends that the extension of the terms of the First and Second National Assembly stand as precedents in this regard. Notably, parliamentary reform is always underpinned by structural or functional alteration. Yet, in the disputed constitutional amendment, no change has been made as to the

functions of the National Assembly. Granted, changes in the method of election are part of structural alteration, but leaving aside the question as to whether the "derivative" type of proportional representation in the method of election of the National Assembly, which the disputed Additional Articles adopt in the place of the multi-member district electoral system, can be considered a genuine election, the change in the method of election of the National Assembly does not necessarily lead to the disputed extension of the term. Even assuming the argument of the authority concerned that the disputed extension of the term will be conducive to parliamentary reform, there is no sound fit between the means and the end. Previous instances of the extension of the term of the National Assembly took place either during the extraordinary period when martial law and a state of emergency were imposed for national mobilization for suppression of the communist rebellion, or were merely a corresponding measure as a result of the National Assembly being divested of the power to elect the President and Vice President, who have since been elected by a nationwide popular vote. Both situations are different from the present disputed case and fall short of qualifying as constitutional precedents in a state of normalcy. Moreover, avoidance of conflict of interest is a constitutional principle that all officials are required to observe in carrying out their powers. Article 8 of the Additional Articles provides:

> The remuneration or pay of the Delegates of the National Assembly and the Members of the Legislative Yuan shall be regulated by statute. Except for general annual adjustments, individual regulations on the increase of remuneration or pay shall go into effect starting with the subsequent National Assembly or Legislative Yuan.

What this provision sets out is more than the principle that all political representatives shall avoid conflict of interest in carrying out their powers. It *a fortiori* (*a minore ad maius*) stipulates: In light of the provision that the increase

of remuneration or pay shall not apply until the subsequent National Assembly, the disputed self-extension of the term of office is evidently incompatible with the principle of conflict of interest as set out in the Constitution. In sum, the petitioners' claim that the disputed extension of the term of the Third National Assembly contravenes the constitutional order of liberal democracy and results in a normative conflict with Article 8 of the Additional Articles is sustained.

[12] It is hereby held: The amendment process of Articles 1, 4, 9, and 10 of the Additional Articles, which were adopted by the Third National Assembly by secret ballot in its Fourth Session, Eighteenth Meeting on September 4, 1999, is in contravention of the principle of openness and transparency and Article 38, Paragraph 2 of the Rules of the National Assembly. To such an extent, it commits manifest and gross flaws and thereby violates the basic norm that underpins the validity of constitutional amendments. Among the disputed Additional Articles, Article 1, Paragraphs 1 to 3 and Article 4, Paragraph 3 are in normative conflict with the provisions of the Constitution that are integral to its essential nature and underpin the constitutional normative order and thus impermissible under the constitutional order of liberal democracy. As regards Articles 9 and 10, their contents are not questioned. Nevertheless, they violate the said procedural requirements arising under the principle of due process and are thus annulled together with the other disputed Additional Articles. Hence, the disputed Articles 1, 4, 9, and 10 of the Additional Articles shall be null and void from the date of announcement of this Interpretation. The Additional Articles promulgated on July 21, 1997, continue to apply.

Background Note by the Translators

Having doubts as to the interpretation of the Constitution in exercising their powers, some Legislators filed separate petitions with the Constitutional

Court in October and November 1999 as to the constitutionality of the Additional Articles of the Constitution (hereinafter "Additional Articles") promulgated on September 15, 1999. As a whole, the petitioners submitted five claims, as stated in the first paragraph of the Reasoning above. On March 24, 2000, the Constitutional Court made this Interpretation and annulled the disputed constitutional amendments. It was the first, and remains the only, time that the Constitutional Court declared a constitutional amendment unconstitutional. In April 2000, the National Assembly re-convened and adopted another set of Additional Articles to replace the annulled ones. In this amendment, the Delegates of the National Assembly were to be elected by party-list proportional representation at an *ad hoc* election, which was to be held only at specific occurrences (*i.e.* to vote on constitutional amendment bills, territorial change bills, or an impeachment bill against the president, as proposed by the Legislative Yuan). In this sense, the National Assembly would function like the "electoral college" of the United States. Finally, the National Assembly was abolished in 2005, after another constitutional amendment proposed by the Legislative Yuan was passed.

J.Y. Interpretation No. 3 (May 21, 1952)*

The Control Yuan's Power to Introduce Statutory Bills Case

Issue

Does the Control Yuan have the power to introduce statutory bills to the Legislative Yuan on matters within its authority?

Holding

[1] The Constitution does not provide explicitly whether the Control Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority. Yet Article 87 of the Constitution authorizes the Examination Yuan to introduce statutory bills to the Legislative Yuan on matters within its authority. Some argue that the Control Yuan may not introduce bills to the Legislative Yuan, based upon such Latin maxims as "*casus omissus pro omisso habendus est*" ("a case omitted is to be held as intentionally omitted") and "*expressio unius est exclusio alterius*" ("the expression of one thing is the exclusion of another"). However, these maxims do not apply to all circumstances. They are not applicable if there are apparent omissions or there is room for alternative interpretations of related statutory provisions. Such omissions can be found in our Constitution. For example, concerning those constitutional organs instituted through elections, such as the Delegates of the National Assembly and the Members of the Legislative Yuan, Article 34 and Article 64, Paragraph 2 of the Constitution expressly decree that the elections "shall be prescribed by statute." Yet the Constitution does not contain similar provisions with regard to the election of the Members of the Control Yuan. It is apparent that such an

* Translation and Note by Jimmy Chia-Hsin HSU

omission shall not be construed to mean that the election of the Members of the Control Yuan is not to be prescribed by statute. Nor may it be considered to be omitted or excluded deliberately.

[2] Article 71 of the Constitution, as Article 73 in the Draft Constitution, initially provided, "At the meetings of the Legislative Yuan, the Premier of the Executive Yuan and the heads of all ministries and commissions may be present to give their views." At the Constitutional Convention, the Delegates of the Constitutional Convention proposed replacing "the Premier of the Executive Yuan" with "the heads of various Yuans concerned." The reason for such change was that "[on] statutory bills within the competences of the Examination Yuan, the Judicial Yuan and the Control Yuan, the heads of various Yuans concerned may be present at the Legislative Yuan meetings to give their views." This proposed change was adopted by the Constitutional Convention and then became the current text. It is hence evident that "the heads of various Yuans concerned" include the heads of all the Yuans except the Legislative Yuan. Also, the Delegates of the Constitutional Convention proposed deletion of a provision from Article 87 of the Constitution, originally Article 92 in the Draft Constitution. The deleted provision provided, "Regarding statutory bills introduced by the Examination Yuan on matters within its authority, the Secretary-General of the Examination Yuan shall attend the Legislative Yuan to provide explanations of the bills." The reason for deletion was:

> [O]n matters within its authority, the Examination Yuan has the power to introduce statutory bills to the Legislative Yuan, and so do other Yuans. If it is necessary for someone to attend the Legislative Yuan to explain the bills, the head of the Yuan in charge for such bills or his/her authorized representative may attend the Legislative Yuan. It is not necessary to provide that the Secretary-General shall be present

in the Constitution.

It was apparently agreed among the Delegates of the Constitutional Convention that all the Yuans have the power to introduce bills. After examining the Records of the Constitutional Convention and all the propositions introduced by the Delegates of the Constitutional Convention, we found no objection or conflict of opinion on this issue. Nor was there any other particular reason suggesting that the Examination Yuan alone, to the exclusion of the Judicial Yuan and the Control Yuan, wield the power to introduce bills.

[3] The Preamble of the Constitution states that this Constitution is created based upon the teachings bequeathed by Dr. Sun Yat-sen, who founded the Republic of China. The Five Yuans were instituted according to Article 53 (Executive), Article 62 (Legislative), Article 77 (Judicial), Article 83 (Examination), and Article 98 (Control) of the Constitution. Each Yuan is the highest governmental branch of State discharging its duties independently. Each is equal to the other Yuans within the scope of its respective powers, as originally bestowed by the Constitution. On matters within their respective authorities, the Control Yuan and the Judicial Yuan may introduce bills to the Legislative Yuan, out of similar business necessity to that of the Examination Yuan. If the Examination Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority, there is no reason to claim that the Judicial Yuan and Control Yuan's powers to introduce statutory bills to the Legislative Yuan on matters within their respective authorities were purposefully omitted or intentionally precluded in the Constitution. It is the Legislative Yuan alone that wields the power to deliberate on and approve the statutory bills. Yet it is neither unreasonable nor violative of any law for other Yuans, being more familiar with matters within their respective authorities, to introduce statutory bills to the Legislative Yuan and to provide their opinions on respective legislation.

[4] In conclusion, in accordance with Article 87 of the Constitution, the Examination Yuan may introduce statutory bills to the Legislative Yuan. In light of the principle of the Five Powers being separate and equal and of the constitution-making history of Article 87 and Article 71, it is hereby declared that it is consistent with the spirit of the Constitution that the Control Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority.

Background Note by the Translator

The petitioner, the Control Yuan, drafted the Control Act and the Organization Act of the Control Yuan Committees. The Control Yuan then submitted the statutory bills at various times to the Legislative Yuan and requested both bills be deliberated and decided on by the latter Yuan. However, the Legislative Yuan returned the bills on the grounds that there was no textual basis in the Constitution for the Control Yuan to introduce statutory bills to the Legislative Yuan. Then the petitioner, according to Article 44 of the Constitution, requested the President of the Republic to summon the heads of the three Yuans concerned, namely the Legislative Yuan, the Judicial Yuan, and the Control Yuan. After negotiations, an agreement was reached that this case would be best resolved by the Constitutional Court. Based on this agreement, the Control Yuan filed a petition to the Constitutional Court in July 1948 for constitutional interpretation. In May 1952, the Constitutional Court issued this Interpretation.

There is no reasoning in this Interpretation, as J.Y. Interpretations Nos. 1 to 79 did not include any further reasoning other than holdings.

J.Y. Interpretation No. 175 (May 25, 1982)*

The Judicial Yuan's Power to Introduce Statutory Bills Case

Issue

Does the Judicial Yuan have the power to introduce statutory bills to the Legislative Yuan on matters within its authority?

Holding

The Judicial Yuan is the supreme judicial institution. Based on the constitutional principle of the Five Powers being separate and equal, the Judicial Yuan shall have the power to introduce statutory bills to the Legislative Yuan on matters within its authority concerning the organization of judicial institutions and exercise of judicial powers.

Reasoning (abridged translation)

[1] On the issue of whether the Judicial Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority, J.Y. Interpretation No. 3 has clearly indicated, in Paragraph 3 of its Holding:

> The Preamble of the Constitution states that this Constitution is created based upon the teachings bequeathed by Dr. Sun Yat-sen, who founded the Republic of China. The Five Yuans were instituted according to Article 53 (Executive), Article 62 (Legislative), Article 77 (Judicial), Article 83 (Examination), and Article 98 (Control) of the Constitution. Each Yuan is the highest governmental branch of

* Translation and Note by Jimmy Chia-Hsin HSU

> State discharging its duties independently. Each is equal to the other Yuans within the scope of its respective powers, as originally bestowed by the Constitution. On matters within their respective authorities, the Control Yuan and the Judicial Yuan may introduce bills to the Legislative Yuan, out of similar business necessity to that of the Examination Yuan. If the Examination Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority, there is no reason to argue that the Judicial Yuan and Control Yuan's power to introduce statutory bills to the Legislative Yuan on matters within their respective authorities were purposefully omitted or intentionally precluded in the Constitution. It is the Legislative Yuan alone that wields the power to deliberate on and approve the statutory bills. Yet it is neither unreasonable nor violative of any law for other Yuans, being more familiar with matters within their respective authorities, to introduce statutory bills to the Legislative Yuan and to provide their opinions on respective legislation.

It is clear that the Judicial Yuan may introduce statutory bills to the Legislative Yuan with regard to matters within its authority, despite the fact that J.Y. Interpretation No. 3 addressed the different yet related issue of whether the Control Yuan has the power to introduce statutory bills. The Judicial Yuan is the supreme judicial institution. Based on the constitutional structure of the Five Powers being separate and equal, the Judicial Yuan shall have the power and duty to introduce statutory bills to the Legislative Yuan on matters within its authority, for the purpose of enhancing the quality of legislation. Introduction of statutory bills merely initiates the legislative process and does not determine its final outcome. Exercise of both legislative and judicial powers will certainly benefit from such introduction by the Judicial Yuan based upon its practical

experiences and needs.

[2] Further, it is the common goal of modern rule-of-law states to protect the rights of people by respecting the judiciary and strengthening the powers and duties of judicial institutions. In order for the statutes and regulations governing the judiciary to meet actual needs and to function properly, quite a number of the supreme judicial bodies in common law countries are granted the power to make such regulations. Similar institutional arrangements can also be found in many civil law countries. Of more recent examples are Constitutions in many countries of Central and South America. These Constitutions explicitly empower the judiciary to introduce statutory bills to the legislature. The position taken in J.Y. Interpretation No. 3 is not only consistent with the spirit of the Constitution, but also in line with the trend of constitutional politics in the world. Moreover, ever since the judicial and the prosecutorial institutions were separated, the workloads of the Judicial Yuan have increased heavily. In order to reform the judiciary and to materialize its constitutional functions, the Judicial Yuan should have the power to introduce bills to the Legislative Yuan on matters within its authority such as organization of judicial institutions and exercise of judicial powers. Such bill-introduction power is necessary for enhancing constitutionalism in light of Articles 77, 78, and 82 of the Constitution, which establish the Judicial Yuan and the inferior courts to adjudicate civil, criminal, and administrative cases, as well as cases on the discipline of public functionaries, and mandate that the Judicial Yuan exercise the powers to interpret the Constitution and to unify interpretations of statutes and regulations.

Background Note by the Translator

The petitioner, the Control Yuan, claimed that the Judicial Yuan may introduce statutory bills to the Legislative Yuan on matters within its authority, in order to push the Judicial Yuan into proposing bills on judicial reform.

However, the Judicial Yuan cast doubts on the positive answer to that question. In response, the Control Yuan claimed that the two Yuans had disagreement, which resulted in a dispute in the application of the Constitution while exercising their respective constitutional powers. To resolve the disagreement, the Control Yuan filed a petition for constitutional interpretation in March 1982.

J.Y. Interpretation No. 86 (August 15, 1960)*

Separation of the Judicial and the Prosecutorial Institutions Case

Issue

Should the high courts and their subordinate courts be organizationally placed under the Judicial Yuan?

Holding

Article 77 of the Constitution provides that the Judicial Yuan is the highest judicial institution of the State and vested with the judicial power over civil and criminal cases. The judicial power over civil and criminal cases provided for in this Article shall refer to the power to adjudicate civil and criminal cases vested in courts of all levels. It follows that the high courts and their subordinate courts, being vested with the power to adjudicate civil and criminal cases, should be organizationally placed under the Judicial Yuan.

Reasoning

Article 77 of the Constitution provides that the Judicial Yuan is the highest judicial institution of the State and vested with the judicial power over civil and criminal cases. The judicial power over civil and criminal cases provided for in this Article shall refer to the power to adjudicate civil and criminal cases vested in courts of all levels. This is evidenced by the fact that Article 82 of the Constitution requires the organization of the Judicial Yuan and courts of all levels to be prescribed by statute, and that this Article is included as part of the Judiciary Chapter in the Constitution with the hope that the judicial

* Translation and Note by Nigel N. T. LI

system be integrated. It follows that the high courts and their subordinate courts, being vested with the power to adjudicate civil and criminal cases, should be organizationally placed under the Judicial Yuan. All relevant statutes and regulations shall be revised accordingly so as to be in compliance with the essence of Article 77 of the Constitution.

Background Note by the Translator

Pursuant to the Court Organization Act, the high courts and their subordinate courts all exercised judicial power over civil and criminal cases. However, the high courts and their subordinate courts were organizationally placed under the Ministry of Judicial Administration under the Executive Yuan. The petitioner, the Control Yuan, asserted that this was potentially in violation of Article 77 of the Constitution. Hence, it filed a petition with the Constitutional Court for constitutional interpretation.

J.Y. Interpretation No. 2 (January 6, 1949)*

Government-Petitioned Uniform Interpretation Case

Issue

In what circumstances may a government authority file a petition for uniform interpretation of statutes and regulations?

Holding

Article 78 of the Constitution provides that the Judicial Yuan shall have the power to interpret the Constitution and to unify the interpretations of statutes and regulations. For the Constitution, Article 78 uses the term "interpret," whereas for statutes and regulations, it uses the term "unify the interpretations." These two terms carry different meanings. Article 173 of the Constitution stipulates that the Judicial Yuan has the authority to interpret the Constitution. Therefore, in the event that an authority of the central or local governments has doubts regarding the application of the Constitution in exercising its powers, it may petition the Judicial Yuan for constitutional interpretation. This also applies in dealing with questions concerning whether a given statute or regulation is in violation of the Constitution. Regarding any interpretative indeterminacy found by an authority of the central or local governments in the course of application of statutes and regulations, the authority should first conduct its own inquiry and delineate the scope of meaning. In such cases, the authority has no grounds to petition for uniform interpretation to the Judicial Yuan. However, when the statutory interpretation of a government authority differs from the existing interpretation rendered by the same or another government authority in its

* Translation and Note by Cheng-Yi HUANG

application of the said statute or regulation, there exists a necessity to unify the interpretations to avoid a conflict, unless the authority's interpretation shall be controlled by its own existing opinion or by the opinions of other government authorities, or it may change such opinions. A petition for uniform interpretation may be granted only in this circumstance. This petition, submitted by the Executive Yuan, did not present different constructions of the same statute between the said authority and other authorities. Therefore, the petition is denied.

Background Note by the Translator

In September 1948, the Executive Yuan petitioned the Judicial Yuan for interpretation to dispel doubts as to which law(s) should be applied by the Ministry of Judicial Administration in the charging of offenses against standing soldiers who desert from the reserve service.

J.Y. Interpretation No. 371 (January 20, 1995)*

Judges' Petition for Constitutional Review of Statutes Case

Issue

Do judges of lower courts have the authority to petition the Constitutional Court for constitutional review of statutes?

Holding

The Constitution is the final authority in this country. Any statute in violation of the Constitution shall be null and void. Whether a given statute contradicts the Constitution and therefore requires constitutional interpretation shall be decided by the Justices of the Judicial Yuan (the Constitutional Court). Articles 171, 173, and 78 and Article 79, Paragraph 2 of the Constitution have clearly manifested the authority of the Justices of the Judicial Yuan (the Constitutional Court). On the other hand, Article 80 of the Constitution provides that judges shall apply statutes to cases independently. Therefore, duly enacted statutes shall be the only basis of the judgments rendered by judges. Judges shall not refuse to apply a statute simply because they consider it unconstitutional. Nonetheless, the Constitution is superior to statutes in terms of validity. Judges are obliged to apply the Constitution in the first place. Therefore, judges of each instance shall be allowed to petition this Court for constitutional interpretation, if they have reasonable grounds to regard an applicable statute as unconstitutional. In this case, the court may issue a preliminary decision to halt the proceedings, since the constitutionality of the statute is at issue. Meanwhile, the court shall submit substantive reasons in an objective manner, elaborating why it holds the

* Translation and Note by Cheng-Yi HUANG

view that the statute is unconstitutional. Article 5, Paragraphs 2 and 3 of the Constitutional Court Procedure Act, to the extent that they are inconsistent with this Interpretation, shall no longer be applicable.

Reasoning

[1] Modern constitutional states with a written constitution often adopt the system of judicial review based on the principle of separation of powers. Those that do not establish a special court for constitutional review bestow the power of judicial review to ordinary courts by way of *stare decisis* or explicit provisions in their constitutions. The United States follows the former model, whereas post-war Japan adopts the latter (as provided in Article 81 of its 1946 Constitution). In those countries that have special courts for constitutional review, the constitutionality of statutes is reviewed by the special courts. Examples include the Constitutional Court of Germany (as provided in Articles 93 and 100 of its 1949 Basic Law), Austria (as provided in Articles 140 and 141-1 of its 1929 Constitution), Italy (as provided in Articles 134 and 136 of its 1947 Constitution), and Spain (as provided in Articles 161 and 163 of its 1978 Constitution). Although each country has its own context and therefore the design and function of judicial review varies, the ultimate purposes are to enshrine the constitution as the supreme law in the legal system and to uphold the independence of judges so that judges follow nothing but the rule of law and the constitution without any external interference. The legal system of our country is modelled on the continental system. Hence, our judicial review system, dating back to the birth of the Constitution, has been established as very similar to the European countries mentioned above.

[2] Article 171 of the Constitution provides, “Statutes that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a statute is in conflict with the Constitution, it is subject to interpretation by the

Judicial Yuan." Article 173 of the Constitution provides, "The Constitution shall be interpreted by the Judicial Yuan." Article 78 of the Constitution provides, "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretations of statutes and regulations." Article 79, Paragraph 2 of the Constitution and Article 4, Paragraph 2 of the 1994 Additional Articles of the Constitution jointly establish the authority of the Justices of the Judicial Yuan (the Constitutional Court) to be in charge of the matters specified in Article 78 of the Constitution. Accordingly, the power to interpret a statute's constitutionality and to invalidate it rests exclusively with the Justices of the Judicial Yuan (the Constitutional Court). Pursuant to Article 80 of the Constitution, judges of each instance shall apply statutes to cases independently. Therefore, statutes enacted through the due process of legislation shall be the only basis of the judgments rendered by judges. Judges shall not refuse to apply a statute simply because they regard it as unconstitutional. Nonetheless, the Constitution is the final authority in this country, so judges are obliged to apply the Constitution in the first place. Regardless of appellate jurisdiction, judges of each instance shall be allowed to petition this Court for constitutional interpretation, if they have reasonable grounds to regard an applicable statute as unconstitutional. Allowing this petition may not only alleviate the dilemma judges face in applying the statute or obeying the constitution but also avoid unnecessary costs of judicial process. Therefore, while judges confront this problem, they may issue preliminary decisions to halt the proceedings, since the constitutionality of the statute is at issue. Meanwhile, the court shall submit substantive reasons in an objective manner, elaborating why it holds the view that the statute is unconstitutional. Article 5, Paragraphs 2 and 3 of the Constitutional Court Procedure Act, to the extent that they are inconsistent with this Interpretation, shall no longer be applicable. Petitions for constitutional review of statutes by judges shall be governed by this Interpretation. The format of petition shall follow the provisions of Article 8, Paragraph 1 of the said Act.

Background Note by the Translator

Legislator Tzu WU and ten other Members of the Legislative Yuan questioned the Judicial Yuan's decision approving the legal opinion reached by the Taiwan High Court and the Taiwan Tainan District Court during a recently convened discussion stating, "While trying a case, courts have the authority to review whether statutes pertaining to the case being heard are unconstitutional; courts may then refuse to apply any such statutes to their judgment, if they regard the statutes as unconstitutional." Legislator WU and the ten other Legislators argued that the aforementioned decision had granted judges the power of constitutional review outside the Constitutional Court and risked breaching Articles 80 and 170 of the Constitution. On such grounds, the petitioner, the Legislative Yuan, petitioned the Constitutional Court for constitutional interpretation on the matter in July 1992.

J.Y. Interpretation No. 365 (September 23, 1994)*

Father's Preferred Parental Rights Case

Issue

Article 1089 of the Civil Code grants the father preferred parental rights over minors. Does it violate the principle of gender equality of the Constitution?

Holding

Article 1089 of the Civil Code grants fathers the right of final decision in situations of parental disagreement over the exercise of parental rights toward their child. Such part of this Article is inconsistent with both Article 7 of the Constitution, which guarantees equality between men and women, and Article 9, Paragraph 5 of the Additional Articles of the Constitution, which purports to eliminate gender discrimination. The said provision shall be revised. Otherwise, it shall become null and void no later than two years from the date of announcement of this Interpretation.

Reasoning

[1] Article 7 of the Constitution provides, "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 9, Paragraph 5 of the Additional Articles of the Constitution provides, "The State shall protect the dignity of women, safeguard their personal safety, eliminate gender discrimination, and further substantive gender equality." The matrimonial union between a man and a woman as well as the family composed of a married couple and their children living together are both subject

* Translation and Note by Hsiao-Wei KUAN

to the above constitutional provisions. Different treatment in law based on sex is only allowed by the Constitution in exceptional situations where it is grounded on biological differences between sexes or differences in the social function of gender roles resulting therefrom.

[2] Article 1089 of the Civil Code stipulates:

> Parental rights and duties in respect of the child, unless otherwise specified by statutes, shall be exercised and performed jointly by parents. Should there be any disagreement in the exercise of parental rights, the right to exercise shall be accorded to the father. In cases where one of the parents becomes incapable of exercising these rights, it shall be accorded to the other parent. Should it be the case that both parents are incapable of performing duties jointly, the capable one shall assume those duties.

This Article, which was enacted in 1928, before the Constitution was promulgated, was a product of the cultural traditions and social structure at that time. However, with widespread education and more equal access to education between men and women as well as more equal opportunities for women in employment, such provision granting final decision-making authority to fathers would render different results today. In cases where parents are able to compromise and settle their disagreements, the said provision may not impede equality of parental rights between fathers and mothers. In cases of unsettled disagreements, the said provision nevertheless grants the final decision-making authority to fathers, without taking into account the positions of mothers. Such result will violate the principle of equal protection between men and women and be incompatible with the actual status of women in current family life.

[3] To sum up, Article 1089 of the Civil Code grants fathers the right of final

decision in situations of parental disagreement over the exercise of parental rights toward their child. Such part of this Article is inconsistent with both Article 7 of the Constitution, which guarantees equality between men and women, and Article 9, Paragraph 5 of the Additional Articles of the Constitution, which purports to eliminate gender discrimination. The said provision shall be revised. Otherwise, it shall become null and void no later than two years from the date of announcement of this Interpretation. The solutions to this problem shall be provided for based on the principle of gender equality and the best interests of the child. For instance, if an agreement cannot be reached between parents, the law may grant the final decision-making authority to the nearest elder lineal relatives or a family council, or to the family court for decision. In the event of emergency, the law should consider arrangements different from those under ordinary circumstances. As to the Legislative Yuan's submission of the petition by its Letter Tai-Yuan-Yi-2162 of July 26, 1994, which sought to consult this Court, in advance, on whether its members should introduce bills to revise the disputed Article 1089 of the Civil Code, such petition is incompatible with Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act. Considering that the provision petitioned by the Legislative Yuan is the same as the disputed provision in this Interpretation, it is unnecessary for this Court to proceed further or otherwise. It is noted here as well.

Background Note by the Translator

The petitioners, Ms. LIANG and Ms. CHANG, filed petitions with the Constitutional Court in July and August 1994, respectively, after exhausting ordinary judicial remedies of their cases regarding the enforcement of child custody. They alleged that Article 1089 of the Civil Code violated Article 7 of the Constitution. The Constitutional Court decided to consolidate both petitions for review.

J.Y. Interpretation No. 728 (March 20, 2015)*

Qualifications for Successors of Ancestor Worship Guilds Case

Issue

The Act Regarding Ancestor Worship Guilds provides that the qualifications of successors of ancestor worship guilds established before the promulgation of the Act shall abide by their guild charters. Are such provisions of the Act constitutional?

Holding

Article 4, Paragraph 1, First Sentence of the Act Regarding Ancestor Worship Guilds provides, "For the guilds established before the promulgation of this Act, the qualifications of successors are subject to their guild charters." This Sentence does not use gender as a classification to determine the qualifications of successors. In reality, most of the guild charters follow the traditional clan concept of succession, which limits succession to male offspring (including adopted sons) only, while excluding female offspring in most cases. However, the adoptions of these charters are actions of the guild founders and their descendants, authorized by private laws, in order to establish associations and dispose of their inherited property. In principle, these actions shall be respected based on the principle of private autonomy for maintaining the stability of the legal order. Therefore, the said Sentence, which provides that the qualifications of guild successors shall be subject to the guild charters, does not infringe upon women's property rights and therefore does not violate gender equality under Article 7 of the Constitution.

Reasoning

* Translation and Note by Hsiao-Wei KUAN

[1] The petitioners asked this Court to review the constitutionality of Article 4 of the Management Charter of the LU Wan-Chun Ancestor Worship Guild (hereinafter "Charter"), adopted on July 31, 1986, which was ruled upon by the Supreme Court in its 99-Tai-Shan-963 Civil Judgment (2010) (hereinafter "the final judgment"). The Charter is neither a "statute" nor "regulation" as provided for in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, and therefore is not eligible subject matter for interpretation. Yet the content of the Charter was cited by the final judgment when it referred to Article 4, Paragraph 1, First Sentence of the Act Regarding Ancestor Worship Guilds (hereinafter "the disputed provision"), as the basis of the main ruling. The disputed provision reads, "For the guilds established before the promulgation of this Act, the qualifications of successors are subject to their guild charters." Since the petitioners filed their petitions in accordance with the said provision of the Constitutional Court Procedure Act (which was mistakenly listed in the petition as Article 4, Paragraph 1, Subparagraph 2 of the Council of Grand Justices Procedure Act), the disputed provision may be considered the petitioned subject matter to be reviewed as well. This Court may therefore review the constitutionality of the disputed provision. It is so explained here.

[2] An ancestor worship guild is an association with properties donated by the founders for the purpose of worshiping their ancestors or other persons (*see* Article 3, Subparagraph 1 of the Act Regarding Ancestor Worship Guilds). Its formation and existence involve the freedom of association, right to property, and freedom of contract of the founders and of their descendants. The disputed provision may, in reality, result in different treatment between men and women in cases where the relevant charters follow the traditional clan concept of succession, which limits the succession to male offspring (including adopted sons) only and excludes female offspring in most cases. However, the disputed provision, on its face, does not use gender as a classification to determine the qualifications of

successors. Its purposes are to maintain the stability of the legal order and to prohibit *ex post facto* laws. Moreover, adoptions of these charters were actions of the guild founders and their descendants to establish associations and dispose of their inherited property via private laws. In principle, these actions are to be respected based on the freedom of association under Article 14, property rights under Article 15, and the freedom of contract and principle of private autonomy under Article 22 of the Constitution. The disputed provision may have resulted in different treatment in reality. Such difference, however, is not arbitrary. It does not violate the spirit of gender equality under Article 7 of the Constitution. Nor does it infringe upon women's right to property.

[3] Nevertheless, Article 4, Paragraph 1, Second Sentence of the Act Regarding Ancestor Worship Guilds provides, "For those guilds without any charter or without any applicable rule in the charter, successors shall be limited to male offspring (including adopted sons)." This Sentence uses gender as a classification to determine the qualifications of successors and thus constitutes different treatment. However, Paragraph 2 of the same Article provides, "For those members without male offspring, their unmarried daughters are qualified to serve as successors." Paragraph 3 of the same Article provides,

> Daughters, adopted daughters, and sons-in-law of uxorilocal marriages may also serve as successors, if meeting one of the following criteria: (1) when two-thirds of the current successors agree in writing; (2) when two-thirds of the attending members agree in a meeting with a majority of the current successors of the Assembly present.

These two Paragraphs aim to alleviate the different treatment of Paragraph 1. In addition, Article 5 of the Act Regarding Ancestor Worship Guilds provides, "After this Act takes effect, the successors shall include all such persons who

jointly take responsibility to worship their ancestors, upon inheritance of any successor of guilds with or without corporate personhood." This Article also adheres to the principle of gender equality. Nevertheless, different treatments still exist within the overall institution of successors. Under Article 7 of the Constitution, "All citizens of the Republic of China, irrespective of sex ... shall be equal before the law." Article 10, Paragraph 6 of the Additional Articles of the Constitution reads, "The State shall protect the dignity of women, safeguard their personal safety, eliminate gender discrimination, and further promote substantive gender equality." The said Additional Article of the Constitution imposes on the State an obligation to promote substantive gender equality. Furthermore, in light of Articles 2 and 5 of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations on December 18, 1979, the State shall bear a positive obligation to protect women in order to implement substantive gender equality. In determining the qualifications of successors for the ancestor worship guilds established before the promulgation of the Act Regarding Ancestor Worship Guilds, authorities concerned shall review and revise the related provisions, in due time, to ensure that the laws keep pace with time and become more compatible with the principle of gender equality and the people's freedom of association, property rights, and freedom of contract under the Constitution, by taking into account the State's positive obligation to protect women under the said Additional Article of the Constitutional *vis-à-vis* the principle of the stability of the law, as well as social changes and the changing functions of ancestor worship guilds.

Background Note by the Translator

The petitioner, Ms. Pi-Lien LU (in an uxorilocal marriage), is the eldest daughter of Mr. Chin-Jung LU, who is a successor of the LU Wan-Chun Ancestor Worship Guild. The other petitioner, Mr. Chia-Sheng LU, is Pi-Lien LU's son

(with the same surname as his mother). Chin-Jung LU's living maintenance was provided for by the petitioners. He had three more sons, none of whom had a male child. When Chin-Jung LU and two of his sons passed away, only the youngest son, Mr. Hsueh-Chuan LU, remained. Article 4, First Sentence of the Management Charter of the LU Wan-Chun Ancestor Worship Guild (hereinafter "Charter"), adopted on July 31, 1986, provides, "In a case where a registered successor dies, his lineal heirs have the right to appoint a representative to serve as the successor. However, pursuant to the relevant government regulations, daughters have no right to claim inheritance from ancestor worship." Consequently, succession to Chin-Jung LU's membership in the LU Wan-Chun Ancestor Worship Guild was inherited by Hsueh-Chuan LU only. The petitioners thus initiated a civil litigation, claiming they were entitled to inherit the status of successor. The case was dismissed by the Taiwan Panchiao District Court (now renamed as the Taiwan New Taipei District Court). On appeal, their claim was rejected by the Taiwan High Court in its 97-Shan-617 Civil Judgment (2009) and by the Supreme Court in its 99-Tai-Shan-963 Civil Judgment (2010). Both decisions applied Article 4, Paragraph 1 of the Act Regarding Ancestor Worship Guilds, which provides, "For the guilds established before the promulgation of this Act, the qualifications of successors are subject to their guild charters." Accordingly, both decisions dismissed the petitioners' claim based on the Charter's provision that only allowed male descendants of the lineal heirs to serve as successors. Consequently, the petitioners petitioned for interpretation on the grounds that the said Charter provision as applied in the said Supreme Court Judgment was unconstitutional under Article 7 of the Constitution.

J.Y. Interpretation No. 445 (January 23, 1998)*

Prior Restraint on the Freedom of Assembly Case

Issue

Are the disputed provisions of the Assembly and Parade Act constitutional?

Holding

[1] Article 14 of the Constitution stipulates that the people shall have freedom of assembly. This freedom and the freedoms of speech, teaching, writing, and publication as enumerated by Article 11 of the Constitution can be categorized as the freedom of expression, and they are the most important basic rights for the implementation of democratic politics. In order to guarantee the people's freedom of assembly, the State shall provide appropriate places for assembly and maintain security for the proper-functioning of assemblies and parades. Laws that regulate the rights to assembly and parade must not be vague or run afoul of the constitutional requirements as set forth by Article 23 of the Constitution. Article 8, Paragraph 1 of the Assembly and Parade Act (hereinafter "Act") provides that, except for the circumstances as specified by the proviso of the same article, a permit from the competent authorities is required to hold an outdoor assembly/parade. Article 11 of the Act provides that, except for those circumstances specified in the same article, a permit shall be granted for an outdoor assembly/parade. Parts of the said provisions can be considered as content-neutral restrictions on time, place, and manner of assembly/parade, and as such, they are necessary for maintaining social order and promoting the public interest. This part of the law is a matter of policy and legislation. It does

* Translation and Note by Yen-Tu SU

not impinge on the freedom of expression, nor is it inconsistent with the constitutional guarantee of freedom of assembly.

[2] Article 11, Subparagraph 1 of the Act provides that a permit shall not be granted if there is a violation of Article 4 of the Act, which prohibits speech advocating communism or secession. This provision violates the constitutional guarantee of freedom of expression, as it authorizes the competent authorities to censor political speech prior to the issuance of a permit for assembly/parade. Article 11, Subparagraph 2 states [relevant required conditions for censorship, including] "[if] there is sufficient evidence for the finding that national security, social order, or the public interest would be jeopardized." Article 11, Subparagraph 3 states [relevant required conditions for censorship, including] "[if] there is a concern that life, health, or liberty would be in danger, or that property would be seriously damaged." Both of these provisions are unconstitutionally vague, and to the extent that they authorize the competent authorities to reject a permit application solely on the basis of prediction of future harm as opposed to the showing of clear and present danger on the eve of the assembly/parade, these provisions also violate the constitutional guarantee of freedom of assembly. Both of them are null and void from the date of announcement of this Interpretation.

[3] Article 6 of the Act, which designates restricted areas for assembly and parade, is aimed either at protecting the security of important government buildings and military facilities or at keeping international transportation from being disrupted. Article 10 of the Act specifies the qualifications for serving as principals, deputies, or picketers for an assembly/parade that requires a permit. Article 11, Subparagraph 4 of the Act authorizes denial of a permit application when another application has been approved for the same time, venue, and route. Article 11, Subparagraph 5 of the Act authorizes denial of a permit application when the named applicant is a group that is not legally formed, has had its

license revoked, or has been ordered to dissolve. Article 11, Subparagraph 6 of the Act provides that the permit application may be denied if it does not satisfy the requirements of Article 9, which specifies the information to be provided in the application form. All of the aforementioned provisions are for the sake of securing peace during the assembly/parade, and they are also designed to minimize disturbance to general public. They are necessary for preventing infringement of other people's freedoms, for maintaining social order, or for advancing the public interest. Therefore, they are not in violation of Article 23 of the Constitution. However, under the proviso of Article 9, Paragraph 1 of the Act, which provides, "An application may be submitted two days before [the date of assembly/parade] if doing so is justified by natural disaster or other major incidents that are not foreseeable," an unplanned assembly/parade would not be permitted if its application could not be filed two days before its realization. This state of affairs is in conflict with the constitutional guarantee of freedom of assembly and is in dire need of improvement.

[4] Article 29 of the Act, which makes it a crime for a person to instigate actions to disobey the order to disperse and the subsequent order to stop, is within the discretion of the legislature and does not run counter to Article 23 of the Constitution.

Reasoning

[1] This case was brought to the Constitutional Court by Cheng-Yen KAO, Mao-Nan CHEN, and Cheng-Hsiu CHANG, who challenged the constitutionality of the Assembly and Parade Act (hereinafter "Act") that the Taiwan High Court invoked in its Judgment 83-Shan-Yi-5278 (1995). This Court decided to hear the petition and, pursuant to Article 13, Paragraph 1 of the Constitutional Court Procedure Act, held oral arguments on December 5, 1997. This Court heard arguments from the petitioners and from the representatives of

the authorities concerned, including the Executive Yuan, the Ministry of the Interior, the Ministry of Justice, the Ministry of Transportation and Communications, and the National Police Agency of the Ministry of the Interior. It is first explained here.

[2] The arguments of the petitioners are summarized as follows. Article 14 of the Constitution reads, "The people shall have freedom of assembly and of association." Article 11 of the Constitution also provides, "The people shall have freedom of speech, teaching, writing, and publication." Both of them signify that the Constitution guarantees the people's freedom of expression. Given that the people have the right to participate in political decision-making, freedom of expression is the most important basic right for the implementation of democratic politics, as it enables the people to fully express themselves in the formation of the public opinion. Whereas the freedoms of teaching, writing, and publication are exercised mainly by intellectuals, the freedom of assembly functions as an action-based freedom of expression and serves as a direct way to express opinions in public for those ordinary people who do not have convenient access to the media. The freedom of assembly is also a positive right in nature, as the participants in collective opinion-making can transform the exercise of assembly/parade into a positive right to participate in the formation of the national will. However, Article 8, Paragraph 1 of the Act provides that, except for the circumstances as specified by the proviso of the same section, a permit from the competent authorities is required to hold an outdoor assembly/parade. This is a categorical restriction on the people's right to assembly and parade, and it authorizes the competent authorities to impose prior restraints and prohibition on assembly and parade. Article 11 of the Act provides that a permit shall be granted for an outdoor assembly/parade except for the following circumstances: when Articles 4, 6, or 10 would be violated (Subparagraph 1); if there is sufficient evidence for the finding that national

security, social order, or the public interest would be jeopardized (Subparagraph 2); if there is a concern that life, health, or liberty would be in danger, or that property would be seriously damaged (Subparagraph 3); when another application has been approved for the same time, venue, and route (Subparagraph 4); when the named applicant is a group that is not legally formed, has had its license revoked, or has been ordered to dissolve (Subparagraph 5); if the application does not satisfy the requirements of Article 9 (Subparagraph 6). Article 11, Subparagraph 1 refers to Article 4, which, in turn, stipulates, "No assembly/parade shall advocate for communism or secession." This provision implicates issues that are highly political, and its concepts are rather ambiguous. To the extent that other people's rights or freedoms are not affected or impinged upon, advocating communism or secession by way of assembly/parade should be protected by the freedom of expression. If someone advocates for communism of the Marxist-Leninist variety, attempts to overthrow the government by force, and seeks to realize such goals of communism by endeavoring to build organizations, he or she has clearly overstepped the inherent bounds of the right to assembly and parade, and the State is justified to regulate such conduct under a law enacted specifically for this purpose. However, the ambiguous prohibition of the Act at issue gives wide discretion to the police and thereby forces the police to enter political turmoil while having to forsake its commitment to political neutrality. In addition, the police decision under this provision is no different from a prior censorship of expression of opinion. Given that the decision is not made by a court of law under a meticulous trial proceeding, the police decision at issue falls far short of providing the necessary and adequate protections of the freedom of speech. The Ministry of the Interior and the Ministry of National Defense are authorized to specify the exact boundaries of the restricted areas listed in Article 6 of the Act. Under a filing system, a police permit is not required for holding an assembly, and only when an assembly/parade is taking place in a restricted area does the

consent from the caretaker of the restricted area need to be obtained in advance. The restricted areas as listed in Article 6, however, are not narrowly tailored. Besides, the exceptional permit as provided by the proviso of Article 6, Paragraph 1 is redundant, since an assembly permit from the same competent authority is invariably required [under the permit system]. The disqualifications for principals, deputies, or picketers as listed in Article 10 are of formal significance only. Moreover, Article 11, Paragraph 1, Subparagraphs 2 and 3[1] are replete with indeterminate legal concepts. Since an outdoor assembly/parade would inevitably affect other people's freedoms, social order, or the public interest, the freedom of assembly would be interfered with easily in the absence of clear and definite guidelines for applying standards of this sort. Article 11, Subparagraph 4 provides that a permit may be denied if another application has been approved for the same time, venue, and route. The permit application for an outdoor assembly or a counter-protest [, the petitioner argues,] may be denied only under the exceptional circumstance that constitutes a "police emergency." Otherwise, the latter permit application is categorically denied, Article 11, Subparagraph 4 would infringe on the freedom of assembly as guaranteed by Article 14 of the Constitution, and it would also be inconsistent with the proportionality principle. Article 11, Subparagraph 5 concerns the bearers of the right to freedom of assembly. This provision is meaningless, however, given that individual members of a group that is not legally formed, has had its license revoked, or has been ordered to dissolve can nonetheless file the permit application in their own names or in the name of another group that is legally formed. Article 11, Subparagraph 6 provides that the permit application may be denied if it does not satisfy the requirements of Article 9. Article 9 is especially problematic, however, because the application requirements and the application

[1] Editor's note: The provisions here shall be cited as "Article 11, Subparagraphs 2 and 3" instead of "Article 11, Paragraph 1, Subparagraphs 2 and 3" as they were originally identified in the Chinese version, because Article 11 includes only six Subparagraphs and no second Paragraph.

period set forth by this provision are inconsistent with the proportionality principle and leave little legal room for organizing a spontaneous assembly. In sum, the provisions for permit denial as listed in Article 11 of the Act are either too abstract to have any meaning in substance or are in violation of both the freedom of assembly as guaranteed by Article 14 of the Constitution and the requirement set forth by Article 23 of the Constitution. According to the Act, a permit for assembly/parade should be applied for from the police agency, which is also responsible for keeping the assembly/parade in order and for referring offenders under the Act to criminal prosecution. Under the existing regime, the police is susceptible to the manipulation of the elected ruling party to interfere with the people's freedom of assembly. From the viewpoint of the people, though the applicant may move for reconsideration upon receiving a denial of permit for assembly, the reconsideration is made solely by the police agency and therefore falls short of an effective remedy under due process of law. To provide citizens with equal opportunities to participate in public affairs, the State must take affirmative steps to establish relevant institutions in protecting the people's freedom of expression. Only then can the ideal of government by public opinion be realized. By adopting the permit system, the Act imposes prior restraints on the people's basic rights and contravenes the people's constitutional right to freedom of assembly. Furthermore, Article 29 of the Act stipulates, "If an assembly/parade is not dispersed after the competent authorities have ordered it to disperse, and continues to proceed in defiance of another official order to stop, the chief instigator shall be sentenced to imprisonment of up to two years or to short-term imprisonment." Compared to the offense of disobeying an order to disperse a public assembly as provided by Article 149 of the Criminal Code, this provision does not strike a proper balance with respect to the breadth of the offense. In view of the irreplaceable role that freedom of assembly plays in a democracy, peaceful assembly should be fully protected by law, and a higher amount of administrative fine should suffice for punishing the offense as

provided by Article 29 of the Act, which needs not resort to criminal sanctions. Pursuant to Article 25 of the Act, the competent authorities may issue warnings, injunctions, or the order to disperse when an assembly/parade is held without the required permit or after its permit has been revoked, or when it is found to have violated the terms or conditions of the permit. Basically speaking, this regulatory scheme is premised on a permit system, and only with a permit from the competent authorities can [participants of an assembly/parade] be immune from criminal prosecution. This is obviously a regulation that constitutes a major constraint on the freedom of expression. In order to reconcile an assembly/parade with the resulting inconvenience for the general public, the State may adopt a filing system, which enables the police agency to make proper preparations to prevent any unnecessary conflict between the interests of the assembly participants and third parties' security interests, and which also enables the police agency to seek win-win solutions by taking measures for maintaining order as it sees fit. Assemblies and parades are critical ways for people to express themselves, and as such, they are guaranteed by the Constitution. Based on the reasons stated above, the Act's very adoption of a permit system should be deemed unconstitutional for infringing on the people's basic rights.

[3] As the authority concerned, the Executive Yuan has the following arguments. In a democratic society, it is quite usual for people to express themselves and form public opinions on public governance through assemblies and parades. But it should also be noted that assemblies and parades are characterized as being easy to spread and difficult to contain, and they are likely to be a potential threat to public order. In order to ensure the rightful exercise of the freedom of assembly and parade while securing public order and social peace, it is necessary to keep assemblies and parades within the boundaries of peaceful expression as set by statutory laws. As a response to the social changes

upon the lifting of martial law, the Act was promulgated on January 20, 1988. As a result of the termination of the Period of National Mobilization for Suppression of the Communist Rebellion, the revised Act was promulgated on July 27, 1992. Evidently, the Act evolved as society changed, and it can be considered as a product of democratization. With respect to the regulatory approaches to assemblies and parades in comparative law, some countries adopt a filing system, and some opt for a permit system. Though the Act uses a permit system, the system it uses is not a privilege scheme but comes closer to a rule-based system. It therefore does not violate Article 23 of the Constitution, which requires that any restriction on rights must be necessary for preventing infringement on other people's freedoms, for averting imminent danger, for maintaining social order, or for advancing the public interest. This is clearly evidenced by the statistics that, of the 31,725 permit applications filed with the police agencies over the past five years, only 108 applications were denied, and the rate of denial was a tiny 0.34 percent. Article 4 of the Act stipulates that assemblies and parades shall not advocate communism or secession. This provision is grounded on the finding that communism is by nature antithetical to the Three Principles of the People, and that, for the time being, Mainland China is still a hostile regime that poses a military threat to our country. An assembly/parade that advocates communism not only runs afoul of the founding spirit of this country, but also raises concerns that the very existence of the Republic of China or the constitutional order of liberal democracy as referred to in Article 5, Paragraph 5 of the Additional Articles of the Constitution would be jeopardized. Therefore, an assembly/parade shall not advocate communism. Moreover, since advocating secession violates Article 4 of the Constitution, there is nothing wrong in Article 4 of the Act prohibiting the advocacy of secession. In addition, Article 2 of the National Security Act also prohibits assemblies and parades from advocating communism or secession, but it does not specify the legal consequences of violations. In the event that the violation

of Article 4 of the Act results in the denial or revocation of the permit application for assembly/parade, such result serves simultaneously the legislative purpose of carrying out the two aforementioned principles in the National Security Act. As to Article 29 of the Act, its criminal sanctions against the chief instigator are justified by the clear manifestation of the chief instigator's maliciousness in the four-stage course of his or her incessant disobedience upon being warned, ordered to stop, and ordered to disperse by the police. Such behavior cannot be deterred by administrative penalty. Compared to Article 26, Subparagraph 1 of the Assembly Act in Germany, which specifies a similar offense in two stages, this provision is more deliberate. Its constitutionality is therefore beyond question.

[4] The Ministry of Justice, which appeared before this Court on its own behalf and also on behalf of the Executive Yuan, presents the following arguments. The law governing assemblies and parades in our country was enacted after the lifting of martial law for the purpose of protecting lawful assemblies and parades and adapting to the needs of the time. Promulgated by the President on January 20, 1988, originally the law had the title Assembly and Parade Act during the Period of National Mobilization for Suppression of the Communist Rebellion. Later, in order to keep pace with the new developments of the society after the termination of the Period of National Mobilization for Suppression of the Communist Rebellion, the law was revised and renamed as the Assembly and Parade Act on July 27, 1992. The Act, therefore, is not a product of the martial law regime. Its enactment is motivated by the concern that assemblies and parades may cause harm to public order, and that for the sake of striking a proper balance between the public interest and human rights, reasonable restrictions need to be made on such issues as the time, place, and manner of assemblies/parades. Its purpose is definitely not to let government suppress or deny the freedom of expression, and it is consistent with the basic

values of Article 11 of the Constitution, which guarantees the freedom of expression for such goals as truth-seeking, democratic governance, and self-realization. In order to prevent Activities of an assembly/parade from harming the public interest and thereby affecting or intruding on other people's lives in terms of public peace and security, traffic conditions, living quality, or sanitation, necessary restrictions imposed by law are permissible under Article 23 of the Constitution. The use of a rule-based permit system is consistent with the proportionality principle as well. As to Article 29 of the Act, there is nothing wrong from the standpoint of legislative policy for the legislators to impose criminal sanctions based on the evaluation of the offenders' antisocial propensity and culpability. With the lifting of martial law on July 15, 1987, and the termination of the Period of National Mobilization for Suppression of the Communist Rebellion on May 1, 1991, the peacetime constitutional order has been restored in our country. Still, in view of Cross-Strait relations, Communist China has not relinquished its hostility toward us and has continued to endanger us with its military threats and missile intimidation. In order to ensure national security and social order, it is therefore necessary to restrict assemblies and parades that make national-security-related speeches and are likely to result in domestic disquiet. Assemblies or parades that advocate communism or secession would jeopardize the very existence of the Republic of China or the constitutional order of liberal democracy. In light of Article 5, Paragraph 5 of the Additional Articles of the Constitution, they should not be regarded as constitutionally protected speech.

[5] In addition to making the same arguments as the aforementioned arguments of the Executive Yuan, the Ministry of the Interior and its National Police Agency argues as follows. The Act uses a permit application system in regulating assemblies and parades because, although it is a constitutional right to hold an assembly/parade, the enjoyment and exercise of this right should take

due consideration of the public interest of the society as well as the rights and interests of other people. In order to ensure the rightful exercise of the freedom of assembly and parade while securing public order and social peace, the Act requires that permits be applied for and obtained ahead of time, and this requirement is not incompatible with Article 23 of the Constitution. Besides, the permit system in this Act adopts is a rule-based one. The police agency must approve or deny a permit application solely according to law and cannot illegally deny a permit. The use of the permit system not only leaves ample time for the applicants to make preparations, but also enables the competent authorities to make a timely assessment of the state of affairs and make proper responses accordingly. Some sociologists' empirical studies on crowd psychology also consider it necessary to reinforce the use of a permit system. According to the rule of thumb, it should be necessary to regulate [an assembly/parade] by permit, which has majority support according to public opinion polls. With respect to the factual background of this case, it should be noted that the petitioners once filed their permit application with the police agency five days before the parade, but the application was denied for failing to comply with Article 9, Paragraph 1 of the Act. The petitioners were convicted and punished because during their assembly and parade, they refused to obey the warnings, injunctions, and the order to disperse the police agency issued in pursuant to Article 25, Paragraph 1 of the Act. Only Article 9, Paragraph 1, Article 25, Paragraph 1, Subparagraph 1, and Article 29 of the Act may be considered relevant to this case. As to Article 4 of the Act, it has nothing to do with the factual background of this petition. Considering that the Act does not impose any administrative or criminal liability on those who violate this provision by advocating communism or secession, enforcing this provision is certainly not the primary objective of the permit regulation. Hence, the Judicial Yuan (the Constitutional Court) should not breach the principle of *non ultra petita* and review the constitutionality of laws that are not relevant to the final

judgment. Assemblies and parades have much to do with the expression and communication of collective opinions; they may exert influence on the making of public policies, and they ultimately contribute to the exercise of voting rights and the right to petition. As such, they are critical channels for minority groups to express what they wish. However, since crowd Activities are prone to inciting impulsive behaviors that deviate from the norm and may further affect peace, traffic, sanitation, and so forth, it is necessary to impose, by law, certain reasonable restrictions on them. There are ways of restrictions that are more lenient (or more stringent) than others. Articles 8 and 11 of the Act should be construed as adopting a rule-based permit system, which differs from a filing system, not in kind, but in administrative procedure only. Prior restraints on the content of speech of an assembly/parade that implicates the formation of public opinion are constitutionally impermissible unless there exists a very compelling public interest that may justify such restraints. Article 9 of the Act requires that the purpose of the assembly/parade be specified in the application form. While this provision may be considered as instituting some kind of censorship, this requirement is aimed merely at assessing the likelihood for the assembly/parade to pose danger to the public, and certainly not at passing abstract value judgment on its speech. Nonetheless, the inquiry into the purpose [of an assembly/parade] may involve the application of Article 11, Subparagraph 1 of the Act, which, in turn, lists Article 4 of the Act and the violation thereof as a content-based criterion for the denial of permit. Article 4 of the Act, however, resonates with Article 5, Paragraph 5 of the Additional Articles of the Constitution, which provides, "A political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the constitutional order of liberal democracy." Even then, the police agency is authorized to approve or deny the permit application under Article 26 of the Act. In view of the impacts an assembly/parade could have on public order, it is in accordance with the proportionality principle that the Act regulates

outdoor assemblies and parades with permits. To be more specific, Article 11 of the Act provides that, except for the specified circumstances, the competent authorities shall issue the permit and have no discretion whatsoever. And even if any of the specified exceptions is met, the competent authorities should exercise their discretion pursuant to the proportionality principle. In the event that the permit is denied, within three days the applicants should be notified in writing of the reasons for denial and the instructions for remedy. For an application filed under the proviso of Article 9, Paragraph 1, the notice of denial should be given within twenty-four hours. The application for an assembly/parade permit should be filed six days in advance. The application may be submitted two days in advance, however, if doing so is justified by natural disaster or other major incidents that are not foreseeable. Compared to similar regulations in other democracies, this application period requirement is not particularly stringent. As to unplanned rallies, while there would be no application for the competent authorities to consider because there is no initiator, the authorities could still handle the situations by taking into consideration the proportionality principle as required by Article 26 of the Act. In this regard, no excessive restrictions can be said to have been imposed on assemblies and parades. In addition, under the Act, only the principals, deputies, the chief instigators, and not a single participant would be held legally liable. Article 14 authorizes the competent authorities to condition the permit for assembly/parade with six types of restrictions that are deemed necessary. Article 15 specifies the conditions for revoking or modifying a permit. All these provisions are meant to prevent excessive regulation with due considerations of who, what, when, where, and how. Under an after-the-fact filing system, damages to the public interest can only be punished, but not prevented. This regulatory scheme could cause immeasurable harms in Taiwan, a small and densely populated country with an increasingly pluralistic society that breeds conflicts of interests and ideas and has yet to develop a political culture of tolerance. Furthermore, Article 11, Subparagraph 2 cannot be said to

be too ambiguous, for it requires that the factual finding that national security, social order, or the public interest would be jeopardized be justified by sufficient evidence. In any event, the ambiguity of this provision has not led to any abuses by the competent authorities. With respect to the issue concerning the use of criminal sanctions against unauthorized assemblies and parades, there is no excessive restriction in the punishment the Act sets for the chief instigators' violation of the administrative orders the authorities made before and during the two-stage course of action. To the extent that the punishment raises a constitutional concern, the concern is over whether there exist effective institutional safeguards against administrative abuses of power. The only way to minimize the risks of administrative abuses of power, though, is to let the courts in charge of the criminal case review the legality of the order to disperse as well as the subsequent actions undertaken by the police to stop the offenses. Insofar as Article 29 of the Act is concerned, the use of criminal sanctions against the offenders does not constitute legislative overreach, because the harms an outdoor assembly/parade may cause to other legitimate interests are not limited to matters of administrative inconvenience. This provision and Article 28 of the Act differ notably in their subjective as well as objective elements of offenses. If Article 29 of the Act were deleted, no person would be subject to criminal liability for disobeying the order to disperse and the order to stop an assembly/parade, except for the situation in which Article 149 of the Criminal Code is applicable. It makes sense only when the maliciousness of repeated legal offenses as stipulated by Article 29 of the Act is punishable by criminal sanctions. According to the presumption of constitutionality principle, a statute enacted by the Congress should be presumed constitutional unless there exist clear and definite grounds that are sufficient for the Constitutional Court to hold it unconstitutional. Having considered such factors as the crowds' propensity for danger, the traffic impacts, the deployment of the police, the clashes between opposing crowds, and the proportionality principle as required by Article 26, the

Act does not exceed the necessity as required by Article 23 of the Constitution in adopting a permit system. As to the situation in which an urgent assembly/parade is excusable for not being able to apply for the permit in time as required by the existing Act, the problem can be solved with legislative craftsmanship and has nothing to do with the constitutionality of the provision at issue.

[6] In its brief, the Ministry of Transportation and Communications has the following arguments. Assemblies and parades are prone to affect traffic safety and operations, as they are likely to change dramatically when they become larger and larger. The use of a rule-based permit system enables the competent authorities to plan for contingencies and traffic control in time so as to prevent traffic congestion or traffic chaos, which lead to excessive interference with other road users' rights. That assemblies and parades may come at huge social costs and cause significant and direct harms to social order and public interests is further evidenced by our past experiences with the occupation of highways, overnight protests at station plazas, and the blocking of rail traffic by lying on tracks. Therefore, the existing provisions of the Act are in accordance with the freedom of assembly as guaranteed by Article 14 of the Constitution and with the *Gesetzesvorbehalt* principle as embedded in Article 23 of the Constitution. Having considered the totality of the arguments, this Court rendered this Interpretation on the basis of the following reasons:

[7] Pursuant to Article 78 of the Constitution, the Judicial Yuan is vested with the power to interpret the Constitution and to unify the interpretations of statutes and regulations. A Judicial Yuan Interpretation shall be binding upon each and every governmental agency and the people of the whole country. As such, a Judicial Yuan Interpretation is distinct from the decisions made by ordinary courts, administrative courts, or the Public Functionary Discipline Sanction Commission, as the binding force of those judicial decisions is limited to the

specific cases at issue, be they concerning civil, criminal, or administrative law matters, or concerning discipline of public functionaries. Under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, an individual, legal entity, or political party, whose constitutional rights are unlawfully violated may, after exhaustion of ordinary judicial remedies, petition this Court to review the constitutionality of the statutes or regulations applied by a final decision of a court of last resort. In making a Judicial Yuan Interpretation under this provision, this Court certainly would look into whether the petitioner's constitutional rights are infringed upon by the statute or regulation upon which the final decision of the court of last resort was grounded. But since the petition for constitutional review filed by a person not only serves to protect the petitioner's constitutional rights, but is also aimed at elaborating constitutional truth for the sake of safeguarding the constitutional order, this Court certainly could review the constitutionality of the laws that are related to and necessary for the disposition of the specific case undergirding the petition. In J.Y. Interpretation No. 216, for instance, the petitioner took issue with two letters that the former Ministry of Judicial Administration issued on matters of enforcement proceedings by arguing that they contravened the Customs Act. This Court nonetheless made it clear in that Interpretation that trial Court judges are not bound by regulations of the judicial administration when it comes to matters of adjudication. In J.Y. Interpretation No. 289, the petitioner merely challenged the constitutionality of Article 6 of the Measures Governing the Handling of Pecuniary Penalties Cases, but this Court held that the Measures as a whole were at best a tentative substitute for adequate legislation and should be abolished within the period of time as prescribed by the Interpretation. The petition that led to J.Y. Interpretation No. 324 challenged the constitutionality of Article 26 of the Measures Governing the Customs' Supervision of Containers, yet this Court in that Interpretation went on to hold that "the Measures implicate issues of administrative contract, the basic norms of which shall be duly

promulgated by the competent authorities as soon as possible." In J.Y. Interpretation No. 339, the petitioner contended that the Ministry of Finance Letter Tai-Tsai-Shuei-38572 of December 20, 1977, was in violation of Article 19 of the Constitution, Article 18 of the Commodity Tax Act, and the principle of *lex mitior*. This Court took an additional step and invalidated Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act as revised and promulgated on January 9, 1971. The petitioner of J.Y. Interpretation No. 396 argued that the Public Functionary Disciplinary Sanction Act violated the right to judicial remedy as guaranteed by Article 16 of the Constitution on the grounds that it failed to provide appellate relief. Building on the core concern of the petition, this Court prescribed in that Interpretation a set of constitutional guidelines for the institutional reform of the public functionary disciplinary sanction, including, among others, that the disciplinary authority shall be restructured into a court of law, and that sufficient procedural safeguards shall be afforded to the disciplinary defendants in accordance with the principle of due process of law. In addition, in J.Y. Interpretation No. 436, which was referred to this Court by the Members of the Legislative Yuan pursuant to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act, this Court also considered the legislative referral as implicating the court-martial system as a whole and held:

> [I]n order to implement the principle of adjudicatory independence, such institutional arrangements as the separation of judicial and prosecutorial functions in the court-martial, the criteria for selecting military officers to serve on the trial panel, and the career security of the military judges shall be subject to reform as well.

These are but a few examples of the Interpretations made by this Court, but they suffice to demonstrate that, when exercising the power of constitutional review,

the consideration of this Court is not necessarily limited to the issues being raised in the petition. In the present case, the petitioners were convicted of violating Article 29 of the Act by the Taiwan High Court in its Judgment 83-Shang-Yi-5278 (1995). They petitioned to this Court to review the constitutionality of the Act as applied by the final judgment mentioned above, and they contended that, by enabling the police to impose prior restraints and prohibition on assembly and parade under indeterminate legal concepts, the Act should be held to be unconstitutional for infringing on the petitioners' freedom of assembly as guaranteed by Article 14 of the Constitution. The petitioners were convicted because they disobeyed the order to disperse and the subsequent warning when leading a parade of cars and people without obtaining a permit six days before the outdoor event as required by Article 9, Paragraph 1 of the Act. However, it would be ill-advised for this Court to limit our consideration to the issue of whether or not the application deadline as set by Article 9, Paragraph 1 of the Act is constitutional, because the real issue presented in this case is the very constitutionality of the permit requirement for outdoor assemblies and parades as found in Article 8, Paragraph 1, First Sentence and the relevant provisions of the Act. Therefore, in this Interpretation we review the constitutionality of the permit scheme employed by the Act in regulating outdoor assemblies and parades. Article 14 of the Constitution stipulates that the people shall have freedom of assembly. Along with the freedoms of speech, teaching, writing, and publication as enumerated by Article 11 of the Constitution, this freedom is part of the freedom of expression. In light of the idea that sovereignty rests in the people, the people shall have the right to discuss freely and to fully express themselves, and only so can they seek for facts, search for the truth, form the public opinion through democratic process, and thereby make policy or law. Therefore, the freedom of expression is the most important basic right for the implementation of democratic politics. The State must guarantee the enjoyment of this right out of respect for the dignity

and autonomy of an individual as an independent and free person. Whereas the freedoms of speech, teaching, writing, and publication involve expressions of ideas via speech or written words, the freedom of assembly is mainly about exercise of free speech through action. For those ordinary people who do not have convenient access to the media, exercising free assembly is an important way to express opinions in public. According to the definition of Article 2 of the Act, an assembly is a meeting, lecture, or any other mass activity held in a public place or place accessible to the general public. A parade, in turn, refers to an organized collective procession on streets, roads, alleys, or any other public place or place accessible to the general public. As an expression of ideas through collective action, the exercise of free assembly is a way for the people to communicate with the government. In this way, the people may offer their opinions to the government, participate in the formation of the will of the State, or influence policymaking. In this regard, the State not only should refrain from interfering with the exercise of such freedom, but should also provide appropriate places for assembly and maintain security for the proper-functioning of assemblies and parades. Furthermore, the freedom of assembly is not just an external freedom to be protected in form, but also an internal freedom to be protected in substance, so that those who participate in an assembly/parade may do so without fear. Therefore, in addition to adhering to the necessity principle as required by Article 23 of the Constitution, the statutory restrictions on the right to assembly and parade must also comply with the void-for-vagueness doctrine. Only laws with clear rules can serve as the legal basis for a decision made by the competent authorities to restrict the exercise of such rights. And the people should be able to rely on clear and definite laws in asserting and defending their constitutional rights under due process of law.

[8] A distinction can be made between indoor and outdoor assemblies/parades, as outdoor assemblies/parades inevitably affect other people's lives in terms of

public peace and security, traffic conditions, living quality, and/or sanitation. In order to protect the freedoms of others or maintain social order or public interests, the State surely has the authority to regulate [outdoor assemblies/parades] by statute. That being said, the regulation should strike a proper balance between freedom of expression and the societal interests affected, and the regulation should be done by the least restrictive means. Generally speaking, there exist three types of regulatory regimes when it comes to the regulation of [outdoor] assemblies and parades: the *ex post* sanction, the filing system, and the permit system. Article 8, Paragraph 2 of the Act provides that no permit is required for any indoor assembly. According to Article 8, Paragraph 1 of the Act, a permit from the competent authorities is required for any outdoor assembly/parade except for (1) those held in accordance with statutes and regulations, (2) academic, artistic, tourist, or sport Activities or other Activities of similar nature, and (3) religious and folk Activities, weddings, and funerals. So, they opt for the permit system. This Court takes a clause-by-clause approach to review and determine whether the statutory provisions that are related to and necessary for the workings of this administrative prior restraint can withstand scrutiny under the proportionality principle as required by Article 23 of the Constitution. The petitioners argue that *ex post* sanction and a filing system are the only two regulatory regimes that are constitutionally permissible, and that the very use of prior restraint is an infringement of the basic right to free assembly. We reject this argument as groundless. To the extent that a prior restraint of the permit requirement has to do with content-neutral time, place, and manner restrictions clearly prescribed by a statutory law, it would not be considered an infringement on the freedom of expression. By the same token, the competent authorities may take precautionary measures that are necessary for protecting such important public interests as transportation security and social peace before the assembly/parade takes place.

[9] Article 11 of the Act provides that, except for the circumstances listed in the same Article, a permit should be granted for an outdoor assembly/parade upon application. In other words, the competent authorities cannot refuse to issue a permit for an assembly/parade if the application does not fall into any of the exceptions listed in the same Article. This is a rule-based permit system. The constitutionality of each provision of permit denial as listed in Article 11 of the Act is separately reviewed and discussed as follows.

[10] [According to] Subparagraph 1, "when Articles 4, 6, or 10 would be violated," [the competent authorities may deny a permit application]. Article 4 thereof stipulates, "Assembly and parade shall not advocate communism or secession." "Advocating communism or secession" is political speech. By listing it as a condition for denial of permit, the Act allows the competent authorities to review the content of speech. This amounts to a direct restriction on the freedom of expression. To be sure, Article 5, Paragraph 5 of the Additional Articles of the Constitution reads, "A political party shall be considered unconstitutional if its goals or Activities endanger the existence of the Republic of China or the constitutional order of liberal democracy." The right to form a political party, however, is part of the right to freedom of association. No permit is required for forming a political party, and no existing law bans the creation of new political parties. A political party can be prohibited if and only if it is dissolved by a judgment of the Constitutional Tribunal based on the finding that, since its establishment, its goals or Activities have endangered the existence of the Republic of China or the constitutional order of liberal democracy. The Ministry of the Interior argues that Article 4 of the Act resonates with the aforementioned Article 5 of the Additional Articles of the Constitution. We disagree. By listing the violation of Article 4 of the Act as a condition for denial of permit, the Act authorizes the competent authorities to engage in content-based prior restraint of assembly/parade. The competent

authorities would not be able to enforce this content-based restriction, however, if the permit application fails to specify the purpose of the assembly/parade in accordance with Article 9, Paragraph 1, Subparagraph 2 of the Act. If the outdoor assembly/parade is found to have such cause after the permit is granted, the competent authorities could revoke the permit pursuant to Article 15, Paragraph 1 of the Act and thereby achieve the objective of prohibition provided that doing so is urgently necessary, as dictated by circumstances of the moment, for maintaining social order, the public interests, or the safety of the assembly/parade. On the other hand, if such advocacy is made clear at the outset of the permit application, but the proposed assembly/parade does not pose any clear and present danger to social order or public interests, then the decision made by the competent authorities to deny or revoke the permit would be one that is made solely on the grounds that the assembly/parade advocates communism or secession of territory. This not only impinges on the participants' freedom to express their political opinions, but also runs afoul of the requirement of necessity made by Article 23 of the Constitution. Article 6 of the Act designates the following areas as restricted areas for assemblies and parades: (1) the Office of the President, the Executive Yuan, the Judicial Yuan, the Examination Yuan, and courts at all levels; (2) international airports and seaports; (3) important military facilities or areas. The restriction extends to the respective surroundings of the restricted areas. Article 6, Paragraph 2 of the Act tasks the Ministry of the Interior as well as the Ministry of National Defense with specifying the exact boundaries of the restricted areas. An assembly/parade may nonetheless be held in a restricted area if approval is obtained from the competent authorities. The creation of the restricted areas is aimed partly at ensuring the functions of Head of State, constitutional organs, and courts, partly at keeping international transportation from being disrupted, and partly at protection and security of important military facilities. In this regard, this provision, which prohibits assemblies and parades—except for those approved

by the competent authorities—from taking place in the restricted areas, is necessary for maintaining social order and promoting the public interest. Insofar as the regulation over the restricted areas and their surroundings is concerned, this provision is clearly written and is in line with the void-for-vagueness doctrines. We therefore uphold the constitutionality of this provision. Article 10 of the Act disqualifies the following persons from serving as principals, deputies, or picketers for permit-required outdoor assemblies or parades: (1) any person under the age of twenty; (2) any person who is not an R.O.C. citizen; (3) any person who has been sentenced to imprisonment but has yet to serve and complete the prison term, with the exception of those who have received suspended sentences; (4) any person who has yet to serve and complete rehabilitative or reformative treatment as ordered by a court; (5) any person who is interdicted. By requiring that those who serve as principals, deputies, or picketers for permit-required outdoor assemblies or parades be R.O.C. citizens with full legal capacity and without having to serve any pending sentence of imprisonment that is not suspended, or any pending rehabilitative or reformative treatment as ordered by a court, this foregoing provision is designed to ensure that those who may lead the formation of public opinion be qualified as such. This is within the scope of legislative authority and does not violate Article 23 of the Constitution.

[11] Subparagraph 2 provides that "[if] there is sufficient evidence for the finding that national security, social order, or the public interest would be jeopardized," [a permit application may be denied]. An assembly or a parade is a collective action of a multitude of people that aims at a specific common purpose. It is also a means by which people express their views and form the public opinion about governance in a democratic society. For the sake of ensuring social order and public safety, assemblies and parades as guaranteed by the Constitution must be held in peace, and statutory restrictions [on assemblies

or parades] are constitutionally permissible only if they have crossed the line of peacefulness. The content of the statutory restrictions, however, shall be clear, definitive, and specific. The phrase "national security, social order, or the public interest would be jeopardized" as found in this Subparagraph at issue is composed of general clauses that are not as specific and definite as the law should be. As such, this provision grants discretion to the police, which would have to determine, within a rather short period of time, whether there is sufficient evidence for the finding that the aforementioned governmental interests would be jeopardized. An outdoor assembly/parade would inevitably affect other people's freedoms, social order, or the public interest. Nevertheless, when a permit application presents no clear and present danger, if the competent authorities may base their decision solely on a prediction of future harm, then the application of this provision in practice is prone to impinge on the freedom of assembly. Such a state of affairs is not compatible with Article 11 of the Act, the legislative purpose of which is to confine the competent authorities' discretion. In this regard, the very use of this provision as a standard for reviewing the permit application is in and of itself an infringement on the right to freedom of assembly. In the event that a permit-required assembly/parade proceeds without a permit, or that a clear and present danger presents itself after the permit is issued, the competent authorities may still take suitable actions as authorized by Article 25, Paragraph 1, Subparagraph 1 and by Article 15, Paragraph 1 of the Act respectively when doing so is urgently necessary for the safety of an assembly/parade. It is also beyond dispute that the competent authorities may deny a permit application when there already exists a clear and present danger and the proposed assembly/parade would make the danger and harm even worse.

[12] Subparagraph 3 [allows the competent authorities to deny a permit application if they find] "there is a concern that life, health, or liberty would be

in danger, or that property would be seriously damaged." We hold this provision unconstitutional on grounds similar to what has been laid out in the preceding paragraph. In addition, it is unclear whether a permit for an assembly/parade may be denied when only a fraction of the participants raise the concern "that life, health, or liberty would be in danger, or that property would be seriously damaged." Besides, if there is merely a concern that life, health, or liberty would be in danger, or that property would be seriously damaged, then there is still no action that is punishable under criminal law. If there is a disturbance or disorder, the disorderly conduct is still punishable under the Maintenance of Social Order Act. In this regard, to deny a permit based solely on such a concern is in violation of the principle of proportionality. Since the standard for determining the presence of this "concern" is far from clear and specific, allowing the competent authorities to make this kind of substantive decision prior to the proposed assembly/parade contravenes the constitutional guarantee [of freedom of assembly]. In the event that a major incident occurs after the permit is issued, the competent authorities could still apply Article 15, Paragraph 1, First Sentence of the Act as dictated by the urgent necessity for ensuring the safety of the assembly/parade. This is similar to what we have said about Subparagraph 2.

[13] [The competent authorities, pursuant to] Subparagraph 4, [may reject a permit application] "when another application has been approved for the same time, venue, and route." When another application for an assembly/parade permit has been approved for the same time, venue, and route, the further approval of the present application would lead to confusion about the purposes of the assemblies/parades. If the two assemblies/parades are held in different manners, there is an increasing likelihood that there would be disruptions of social order. The likelihood of crowd conflict also increases with the presence of those who oppose and counteract the assemblies/parades. To be sure, when the competent authorities invoke this provision to deny a permit application, they

should comply with Article 26 of the Act by giving due consideration to the proper balance between the right to assembly/parade and the other governmental interests, and by choosing an appropriate means to achieving the intended purpose within the range of necessity. We uphold the constitutionality of this provision.

[14] Subparagraph 5 provides that "when the named applicant is a group that is not legally formed, has had its license revoked, or has been ordered to dissolve," [the competent authorities may deny the application.] This provision has the effect of saying that only natural persons, legal entities, or other groups legally formed are eligible for being the applicants of assemblies or parades. This requirement, in turn, is derived from Article 7 of the Act, which provides, "There shall be a person responsible for each assembly/parade" in Paragraph 1 and "The person responsible for the assembly/parade held by a legally formed group shall be the representative of the group or another person designated by him or her" in Paragraph 2. The identity of the person who represents a legally formed group is objectively ascertainable through a thorough background check. And as such, this provision is within the discretion of the legislature and is constitutional.

[15] [According to] Subparagraph 6, [the competent authorities may deny a permit application] "if the application does not satisfy the requirements of Article 9." Article 9, Paragraph 1 of the Act provides that the person responsible for an outdoor assembly/parade shall complete an application form specifying (1) such identification information as the names and residences of the principals, deputies, or picketers; (2) the purpose, procedure, and schedule of the assembly/parade; (3) the venue of the assembly or the route along with the rallying and breakup points of the parade; (4) the expected number of participants; (5) the models and number of vehicles and devices. The application shall be filed to the competent authorities for approval six days before the

assembly/parade takes place, but the application may be submitted two days before [the date of assembly/parade] if doing so is justified by natural disaster or other major incidents that are not foreseeable. Paragraph 2 of the same Article further requires that deputies present letters of proxy, that consent forms from the owner or manager of the venue for the assembly be enclosed, and that a detailed map of the parade route be enclosed for a parade application. An outdoor assembly/parade inevitably affects other people's freedoms, social order, or the public interest. In order to prevent activities of an assembly/parade from harming the public interest and thereby affecting or intruding on other people's lives in terms of public peace and security, traffic conditions, living quality, and/or sanitation, the Act requires that the person responsible for the assembly/parade file the permit application with the competent authorities six days in advance, and that detailed information, such as the identities of the principals, the purpose, procedure, and schedule of the assembly/parade, the venue of the assembly, the route along with the rallying and breakup points of the parade, the expected number of participants, the number of the vehicles and devices, *etc*., be specified in the application. This requirement not only leaves ample time for the applicants to make preparations, but also enables the competent authorities to make an informed assessment of the state of affairs and take such precautionary measures as making a good plan of traffic control to prevent traffic congestion or traffic chaos, which would lead to excessive interference with other road users' rights. Therefore, insofar as this part is concerned, this line item provision does not exceed the necessity as required by Article 23 of the Constitution. On the other hand, the proviso of Article 9, Paragraph 1 of the reads, "[A]n application may be submitted two days before [the date of assembly/parade] if doing so is justified by natural disaster or other major incidents that are not foreseeable." How can an assembly/parade submit its permit application two days in advance when it is held in response to a natural disaster or an unforeseeable major incident of another sort? Given that

an unplanned assembly/parade is by definition an immediate response that a crowd makes to a major incident that is unforeseeable, it is impossible to expect that its principals can file the permit application two days in advance, nor is it possible to expect that upon the occurrence of a major incident that a responding assembly/parade could nonetheless be postponed for two days. In this regard, the permit system is simply not applicable to unplanned assemblies or parades. The freedom of assembly as guaranteed by Article 14 of the Constitution does not preclude assemblies and parades that are unplanned. Under Article 9, Paragraph 1 of the Act, any permit application that cannot be filed within the period prescribed by law due to hastiness would be denied for violating Article 9. The resulting restraint on assembly/parade under this provision is inconsistent with the constitutional guarantee of freedom of assembly and is in dire need of improvement.

[16] Article 29 of the Act stipulates, "If an assembly/parade is not dispersed after the competent authorities have ordered it to disperse and continues to proceed in defiance of another official order to stop, the chief instigator shall be sentenced to imprisonment of up to two years or to short-term imprisonment." Under the circumstances as prescribed in Article 25 of the same Act, the competent authorities may issue warnings, injunctions, or the order to disperse to an assembly/parade. The prescribed circumstances include (1) when the assembly/parade is held without the required permit or after its permit has been revoked; (2) when the approved assembly/parade is found to have violated the terms or conditions of the permit; (3) when law is breached in the course of a permit-exempted assembly/parade held under Article 8, Paragraph 1 of the Act; (4) when there is any other behavior that is illegal. Article 11 of the Act provides that, except for those circumstances specified in the same article, a permit shall be granted for an outdoor assembly/parade. Part of the said provisions can be considered as content-neutral restrictions on

time, place, and manner of assembly/parade, and they are constitutionally permissible. Similarly, it does not violate Article 23 of the Constitution when the authorities issue warnings, injunctions, or the order to disperse to an assembly/parade under the circumstances as prescribed in Article 25 of the Act. Pursuant to Article 28 of the Act, if an assembly/parade is not dispersed after the authorities have ordered it to disperse, the principals, delegates, or the hosts of the assembly/parade shall be subject to an administrative fine ranging from TWD 30,000 to 150,000. This is an administrative penalty against the principals, delegates, or the hosts for their disobeying the dispersal order issued by the competent authorities. By contrast, it is only under the circumstances in which "an assembly/parade is not dispersed after the competent authorities have ordered it to disperse and continues to proceed in defiance of another official order to stop" that Article 29 imposes criminal sanctions on the instigators. Accordingly, the latter behavior [as described in Article 29] is subsequent to the former behavior [as described in Article 28], and the persons subject to punishment under these two provisions are not necessarily the same. The latter provision, under which a convicted chief instigator shall be sentenced to imprisonment for no more than two years or to short-term imprisonment, is aimed at punishing the instigator's unrelenting defiance against the order to disperse and the order to stop. If such behavior is left undeterred, the competent authorities would not be able to take necessary measures provided by the Code of Criminal Procedure when the instigation puts others or the public order in unpredictable danger. The breach of peace and order as punishable by Article 64, Subparagraph 1 of the Social Order Maintenance Act is applicable when and only when the offender "intends to cause trouble by assembling a crowd haphazardly at parks, stations, wharfs, airports, or other public places and refuses to disperse the crowd as ordered by the competent officer for the concern that public order would be in jeopardy." As to the offense of disobeying an order to disperse a public assembly as

provided by Article 149 of the Criminal Code, the criminal sanctions are imposed on any person "who assembles a crowd in public with the intent to engage in violence or coercion and who refuses to disperse after having been ordered to disperse three times or more by the competent official." These two provisions differ from Article 29 of the Act in terms of both the subjective and objective elements of offense. Therefore, their existence does not lead to the conclusion that [Article 29 of the Act] violates the necessity principle as required by Article 23 of the Constitution. Moreover, the issues concerning the propriety of the order to disperse—such as how the order to disperse assemblies or parades is made by the authorities and the means the authorities use to stop the assembly/parade from continuing—are matters of fact-finding. It should go without saying that in making a decision on conviction and sentencing, a criminal Court should make a precise determination as to whether all elements of a criminal offense—especially the necessary element of *mens rea*—are present in the case.

Background Note by the Translator

The petitioners in this case were Chen-Yen KAO, Mao-Nan CHEN, and Cheng-Hsiu CHANG, who were convicted in the Taiwan High Court Judgment 83-Shang-Yi-5278 (1995) of violating the Assembly and Parade Act (hereinafter "Act") and were each sentenced to a thirty-day short-term imprisonment convertible to fine. After exhausting ordinary judicial remedies, they filed their petition for constitutional review with the Constitutional Court in June 1995. In their petition, they challenged the constitutionality of Article 8, Paragraph 1, and Articles 6, 10, 11, 25, and 29 of the Act. The Constitutional Court decided to hear the petition and held oral arguments on December 5, 1997.

Prompted in part by this J.Y. Interpretation No. 445, which was issued on January 23, 1998, the Act was partially revised on June 26, 2002. With respect

to the issue concerning unplanned assemblies and parades, the proviso of Article 9, Paragraph 1 of the revised Act provides that, if an assembly/parade must be held immediately due to an unexpected major emergency, its application needs not comply with the requirement that applications be filed six days in advance. Article 12, Paragraph 2 of the revised Act further stipulates, "When the application is submitted pursuant to the proviso of Article 9, Paragraph 1, the competent authorities should notify the applicant in writing [of its approval or denial of permit] within twenty-four hours upon receiving the application."

In November 2008, hundreds of protestors held a two-day sit-in at the entrance of the Executive Yuan to protest police abuse during the visit of Yun-Lin CHEN, a high-ranking official of the Chinese government. The protest did not apply for a permit and was ultimately dispersed by police with force. One of the protestors was Ming-Tsung LEE, an assistant professor of sociology at National Taiwan University, and he was prosecuted for violating Article 29 of the Act in 2009. LEE's case was tried by Taiwan Taipei District Court Judge Szu-Fan CHEN. In September 2010, Judge CHEN decided to suspend the pending procedure and petitioned the Constitutional Court to review the constitutionality of several provisions of the Act. In 2011, a criminal chamber of the Taiwan Taoyuan District Court suspended the trial proceedings of a similar case concerning violation of the Act and petitioned the Constitutional Court for constitutional review. Por-Yee LIN, a graduate student who was convicted of violating Article 29 of the Act in 2006 for his involvement in a protest against high tuition, also filed a petition with the Constitutional Court in 2012, challenging the constitutionality of the Act on a number of grounds.

The Constitutional Court consolidated the three aforementioned petitions and rendered J.Y. Interpretation No. 718 on March 21, 2014. In J.Y. Interpretation No. 718, the Constitutional Court held that, to the extent that urgent and spontaneous (unplanned) assemblies/parades were not exempted

from the permit regulation, Article 8, Paragraph 1, the proviso of Article 9, Paragraph 1, and Article 12, Paragraph 2 of the Act violated both the proportionality principle as required by Article 23 and the freedom of assembly as guaranteed by Article 14 of the Constitution. The Constitutional Court also held that the aforementioned provisions were to cease to be effective from January 1, 2015.

J.Y. Interpretation No. 744 (January 6, 2017)*

Prior Restraint on Commercial Speech Case

Issue

Are Article 24, Paragraph 2 of the Statute for Control of Hygiene and Safety of Cosmetics and its punishment as provided in Article 30, Paragraph 1 of the same Statute unconstitutional?

Holding

Article 24, Paragraph 2 of the Statute for Control of Hygiene and Safety of Cosmetics reads, "Before publishing or broadcasting any advertisement, the cosmetic firm shall first submit [the content of the advertisement] to the health authority of the central government or that of a special municipality for approval ...." Article 30, Paragraph 1 of the same Statute reads, "Any person who violates ... Article 24, Paragraph 2 is punishable by a fine of up to TWD 50,000." These two provisions constitute a prior censorship of cosmetic advertisements and go beyond what is necessary in restricting the cosmetic firms' freedom of speech. As such, they are not in accordance with the proportionality principle as required by Article 23 of the Constitution and violate the people's freedom of speech under Article 11 of the Constitution. These two provisions shall be null and void immediately from the date of announcement of this Interpretation.

Reasoning

[1] This case was petitioned for by DHC Taiwan, Inc., whose representative is Yoshiaki Yoshida. The petitioner advertised its sunscreen lotion products on an

* Translation and Note by Yen-Tu SU

online shopping website without first applying for and obtaining approval from the competent authority. Pursuant to Article 30, Paragraph 1 of the Statute for Control of Hygiene and Safety of Cosmetics (hereinafter "Statute"), the Department of Health of the Taipei City Government fined the petitioner TWD 30,000 for violating Article 24, Paragraph 2 of the Statute. To contest the fine, the petitioner filed an administrative suit after its administrative appeal was denied. The Taipei High Administrative Court ruled against the petitioner in its Judgment 99-Chien-850 (2010). In its Judgment 100-Tsai-2198 (2011), the Supreme Administrative Court dismissed the petitioner's appeal on the grounds that the appeal was legally impermissible for lack of importance in terms of legal principles. Therefore, for the purpose of this petition, the judgment of The Taipei High Administrative Court is deemed the final judgment. In this petition, the petitioner challenges the constitutionality of the laws applied in the final judgment. The laws being challenged include three provisions of the Statute: Article 24, Paragraphs 1 and 2 and Article 30, Paragraph 1 regarding the punishment for violation of Article 24, Paragraph 2. The petitioner also challenges the constitutionality of Article 20 of the Enforcement Rules for the Statute. On two provisions of the Statute, Article 24, Paragraph 2 and Article 30, Paragraph 1 regarding the punishment for violation of Article 24, Paragraph 2, we granted review of the said petition, which was duly filed under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. This Court made this Interpretation on the basis of the following grounds:

[2] The purpose of freedom of speech is to ensure the free flow of information to provide people with opportunities to obtain ample information and to pursue self-realization. Cosmetic advertisements promote the use of cosmetic products through media communications for marketing purposes. They are a form of commercial speech. To the extent that commercial speech is producing information for lawful business, which is neither false nor misleading and can

help consumers make economically rational choices, it is protected by Article 11 of the Constitution as a form of free speech (*see* J.Y. Interpretations Nos. 577 and 623).

[3] Article 24, Paragraph 2 of the Statute stipulates, "Before publishing or broadcasting any advertisement, the cosmetic firm shall first submit all the texts, pictures, and/or oral statements of the advertisement to the health authority of the central government or that of a special municipality for approval; for the record, the cosmetic firm shall also present the approval letter or certificate to the press or media." Article 30, Paragraph 1 of the Statute stipulates, "Any person who violates ... Article 24 Paragraph 2 is punishable by a fine of up to TWD 50,000; if the violation is a serious or a recurring one, the violator's business license or factory permit may be annulled by the issuing authority." Taken together, these two provisions (hereinafter "provisions at issue") constitute a prior censorship of cosmetic advertisements that restricts cosmetic firms' freedom of speech and the opportunities for the people to obtain ample information. Being a severe interference with the freedom of speech, such prior censorship of cosmetic advertisements shall be presumed unconstitutional. The provisions at issue can be otherwise regarded as permissible under the constitutional principle of proportionality and the constitutional guarantee to the freedom of speech if and only if their legislative records are sufficient enough to support the findings that the prior censorship of cosmetic advertisements is directly connected to and absolutely necessary for the achievement of compelling public interests in preventing direct, immediate, and irreparable harms to people's lives, bodily integrity, and/or health, and the people are afforded with the opportunity to seek prompt judicial remedy.

[4] Cosmetics are defined as substances to be applied externally on the human body for the purpose of freshening hair or skin, stimulating the sense of smell, covering body odor, promoting attractiveness, or altering the appearance. The

national health authority is further authorized to make public the scope and categories of cosmetics (*see* Article 3 of the Statute). In other words, cosmetics are not for oral digestion. In addition, all of the cosmetics listed in the Table on the Scope and Categories of Cosmetics as announced by the national health authority are ordinary products for daily use. The most likely legislative purpose of the provisions at issue, therefore, is to prevent obscene, immoral, false, or exaggerated advertisements from being published or broadcasted (*see* Article 24, Paragraph 1 of the Statute) so as to maintain *boni mores* and to protect consumers' health as well as other lawful interests that are deemed relevant. These have to do with the protection of public interests, to be sure. But since cosmetic advertisements are aimed at attracting consumers to purchase the advertised products and do not pose direct or immediate threats to people's lives, bodily integrity, and/or health, it is difficult to argue that the purpose of censoring such advertisements in advance is to prevent direct, immediate, and irreparable harms to people's lives, bodily integrity, and/or health. And since the provisions at issue cannot be said to be aimed at protecting any compelling public interest, there exist no direct and absolutely necessary connections between the restrictions imposed by the prior censorship of the provisions at issue on cosmetic firms' freedom of speech and consumers' access to full information on the one hand and any compelling public interest on the other hand.

[5] According to the existing law, cosmetics are divided into two major categories: ordinary cosmetics and cosmetics containing drug ingredients (*see* Article 7, Paragraphs 1 and 2 as well as Article 16, Paragraphs 1 and 2 of the Statute). Cosmetics containing drug ingredients are for such uses as sun screening, hair dyeing, hair perming, minimizing sweating and odor, skin whitening, acne prevention, skin moisturizing, preventing bacterial infections, teeth whitening, *etc.* (*see* the Criteria for Cosmetics Containing Medical, Poisonous, or Potent Drugs). Although they could produce greater impacts than ordinary cosmetics on people's

lives, bodily integrity, and/or health, it is inconceivable that their advertisements would pose direct threats to people's lives, bodily integrity, and/or health. Besides, regardless of whether it is imported or produced domestically, a cosmetic containing drug ingredients could be imported or produced only if it has first applied for and then obtained approval from the authorities, after examination and testing (*see* Article 7, Paragraph 1 and Article 16, Paragraph 1 of the Statute). Any cosmetic containing drug ingredients must list the ingredients, usage, dose, and other information as required by the national health authority on its label leaflet and/or package, in the same manner as what is required for any ordinary cosmetic. Also, it is required to disclose the name and content of the drug ingredients contained, the precautions for use, and the serial number of its license (*see* Article 6 of the Statute). As far as the prevention of health hazards is concerned, Chapter IV (beginning with Article 23) of the Statute authorizes the health authorities to conduct such inspection measures as spot checks and sampling and to enforce the law by revoking the licenses and/or prohibiting the importation, manufacture, and/or sale [of any given harmful cosmetic]. Chapter V, in turn, provides for the penalties for violations. Furthermore, Article 24, Paragraph 1 of the Statute bans false advertisements and the like, and the authorities may also invoke Article 30, Paragraph 1 of the Statute to punish those false cosmetic advertisements that are likely to be harmful to human health. Given the above regulations and subsequent punishments, the provisions at issue, even when applied to the advertisements for cosmetics containing drug ingredients, can neither be justified as pursuing any compelling public interest nor be directly connected to and considered absolutely necessary for protecting any such interest.

[6] In sum, the provisions at issue violate the proportionality principle under Article 23 of the Constitution and freedom of speech as guaranteed by Article 11 of the Constitution. Both provisions shall be null and void immediately from the date of announcement of this Interpretation.

[7] The petitioner also contends that Article 24, Paragraph 1 of the Statute and Article 20 of the Enforcement Rules for the Statute were unconstitutional as well by virtue of violating Articles 11, 15, and 23 of the Constitution. Judging from the petitioner's arguments in this regard, however, it is difficult to sustain that the petitioner has made sufficiently-grounded challenges to the constitutionality of these aforementioned provisions. According to Article 5, Paragraph 3 of the Constitutional Court Procedure Act, this part of the petition shall be dismissed for failing to meet the requirements set forth in Article 5, Paragraph 1, Subparagraph 2 of the same Act. It is noted here.

Background Note by the Translator

In 2010, the petitioner DHC Taiwan, Inc. posted an advertisement for its "DHC White Sunscreen" on an online shopping website. The advertisement stated among its claims that "[the product] ... can form a membrane on the surface of the skin to prevent skin from being harmed by the sun's glare. [It] ... can lighten skin color, moisturize skin, and prevent skin dryness. It is non-greasy and works well as a base under makeup. It doesn't leave white residue on the skin and is suitable for body use as well." Pursuant to Article 30, Paragraph 1 of the Statute for Control of Hygiene and Safety of Cosmetics, the Department of Health of the Taipei City Government fined the petitioner TWD 30,000 for posting the advertisement without first applying for and obtaining approval from the competent authority and thereby violating Article 24, Paragraph 2 of the same Statute. To contest the fine, the petitioner filed an administrative lawsuit after its administrative appeal was denied. Both The Taipei High Administrative Court and the Supreme Administrative Court ruled against the petitioner. In September 2011, the petitioner brought its case before the Constitutional Court, challenging the constitutionality of the prior censorship of cosmetic advertisements.

J.Y. Interpretation No. 744 is widely considered a significant departure

from the Constitutional Court's prior jurisprudence. In J.Y. Interpretation No. 414, issued on November 8, 1996, the Constitutional Court upheld the constitutionality of the prior censorship of drug advertisements as provided for in Article 66, Paragraph 1 of the Pharmaceutical Affairs Act. While acknowledging that drug advertisements are a form of commercial speech protected by Articles 15 and 11 of the Constitution, the Constitutional Court in J.Y. Interpretation No. 414 held that drug advertisements should be subject to stricter regulation for the sake of protecting public interests. Applying the standard of intermediate scrutiny, the Constitutional Court held that the prior censorship of drug advertisements at issue was justified as necessary for advancing the public interests in ensuring the truthfulness of drug advertisements and protecting public health. In J.Y. Interpretation No. 744, the Constitutional Court apparently adopted the most stringent standard of "strict scrutiny" and held unconstitutional the prior censorship of cosmetic advertisements. However, the Constitutional Court did not make it clear that all and other forms of commercial speech would also be subject to strict scrutiny after J.Y. Interpretation No. 744. It remains to be closely watched whether the Constitutional Court will apply the same stringent standard of strict scrutiny to other forms of commercial speech in the future.

J.Y. Interpretation No. 631 (July 20, 2007)*

Issuance of Communications Surveillance Warrants Case

Issue

Is Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications, promulgated and implemented on July 14, 1999, unconstitutional?

Holding

Article 12 of the Constitution provides, "The people shall have freedom of secrecy of correspondence." The purpose of this Article is to protect the people's rights to choose whether or not, with whom, during which period of time, and in which way to communicate, and to protect the contents of their communications from arbitrary invasion by the State or from having their above rights violated by others. In addition to statutory authorization, when the State decides to adopt measures restricting the above rights, the conditions must be specific, definite, and necessary. Also, the procedures must be reasonable and legitimate. Hence the protection of freedom of secrecy of correspondence guaranteed by the Constitution will not be compromised. Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications (hereinafter "Act"), promulgated and implemented on July 14, 1999, provides, "During criminal investigations, the communications surveillance warrant mentioned in the preceding paragraph shall be issued by prosecutors upon applications from judicial police authorities or by virtue of the prosecutors' own authority." It does not require that the communications surveillance warrant shall in principle be issued by an impartial judge who exercises the judicial power independently. To the contrary, it

* Translation and Note by Ching-Yi LIU

delegates, concurrently, the duty of applying for and the power of granting the communications surveillance warrant to prosecutors and judicial police officers, who are responsible for criminal investigations. Such a provision cannot be considered reasonable, nor can it be considered legitimate, and it thus constitutes a violation of Article 12 of the Constitution that guarantees the freedom of secrecy of correspondence. After announcement of this Interpretation, this provision shall become null and void no later than when the new Article 5 of the Act, revised on July 11, 2007, becomes effective.

Reasoning

[1] Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act clearly stipulates that an individual whose constitutional rights are unlawfully violated may, after exhaustion of ordinary judicial remedies, petition this Court to review the constitutionality of the statutes or regulations applied by a final decision of a court of last resort. One of the evidentiary grounds that the final judgment rendered against the petitioner in this case was obtained through wiretapping, and whether the wiretapping was legal or not was determined according to Article 5 of the Act on Protection and Surveillance of Communications (hereinafter "Act"), promulgated and implemented on July 14, 1999, the statute applied by the court of last resort in making the final judgment. Therefore, this Court is certainly authorized to review the case pursuant to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act.

[2] Article 12 of the Constitution provides, "The people shall have freedom of secrecy of correspondence." The purpose of this Article is to protect the people's rights to choose whether or not, with whom, during which period of time, and in which way to communicate, and to protect the contents of their communications from arbitrary invasion by the State or from having their above rights violated by others. The freedom of secrecy of correspondence is one among concrete

categories of the right to privacy guaranteed to the people in the Constitution. It is not only an basic right necessary for the protection of human dignity, individuality and integrity of personality, but also for the protection of the private sphere of personal life from intrusion and self-determination of personal information (*see* J.Y. Interpretation No. 603). Such freedom is explicitly guaranteed by Article 12 of the Constitution. In addition to statutory authorization, when the State decides to adopt measures restricting the above rights, the conditions must be specific, definite, and necessary. Also, the procedures must be reasonable and legitimate. Hence the protection of freedom of secrecy of correspondence guaranteed by the Constitution will not be compromised.

[3] The Act is a statute enacted by the State with the purpose of balancing the interest in the "protection of the people's freedom of secrecy of correspondence from illegal invasion" and the interest in the "guarantee of national security and maintenance of social order" (*see* Article 1 of the Act). According to the Act, a communications surveillance warrant putting an individual's private correspondence under surveillance may be issued only when it is necessary to safeguard national security or to maintain social order, provided that both substantive and procedural legal requirements are met (*see* Articles 2, 5, and 7 of the Act). Article 5, Paragraph 1 of the Act provides, "A communications surveillance warrant may be issued when there is an adequate showing of facts to support the suspicion that a defendant or criminal suspect has committed one of the following offenses and that national security or social order has been seriously endangered, while there is probable cause to believe that the content of communications of the defendant or criminal suspect is relevant to the offense, and it would be impossible or difficult to collect or investigate the evidence by means other than communications surveillance." This is the legislative authorization that is concrete and clear enough for the State to restrict its people's freedom of secrecy of correspondence. When the State conducts its surveillance

on the communications of a defendant or suspect for the purpose of carrying out a criminal investigation, it means that the State is taking a measure of collecting relevant communications records of the person under surveillance by monitoring and screening the details of his or her communications and may seize such records. It is one of the types of coercive measures in criminal procedure through which the records seized may be admitted as evidence for the determination as to whether the person is guilty. However, it is worthwhile to note that in the case of adopting the measure of communications surveillance, the freedom of secrecy of correspondence is restrained in such a way that the person under surveillance is not notified, nor has he or she ever given his or her consent to such surveillance or been offered any opportunity to of defend himself or herself. Furthermore, as the surveillance usually continues without any interruption for a specific period of time and is conducted without tangible space barriers, the person's basic rights are violated for a relatively longer time. Since those who are put under surveillance usually do not know that their basic rights are being violated, they have no way to exercise their rights to defend themselves (such as the right to remain silent, the right to counsel, and the right against self-incrimination) that are protected under the Code of Criminal Procedure. In addition, because the enforcement of communications surveillance may simultaneously result in the violation of rights to secrecy of communications of innocent third parties other than those named in a communications surveillance warrant, it could do much worse damage to the people's basic rights than search and seizure in criminal procedure.

[4] Communications surveillance is essentially a measure that violates the people's basic rights with extreme force and in a broad way. In order to achieve the purpose of the coercive measure, when conducting communications surveillance, the State usually deprives those who are put under surveillance of their rights to avoid such coercive measure before the measure is adopted. In order

to prevent unnecessary violations of privacy rights that occur due to the coercive measure adopted by investigation authorities and at the same time not compromise the purpose of the coercive measure, it is essential to place an independent and impartial judicial institution in charge of reviewing government applications for communications surveillance warrants so that the people's freedom of secrecy of correspondence can be protected. Therefore, when prosecutors or judicial police authorities believe it is necessary for the purpose of criminal investigation to put certain private communications under surveillance, they shall in principle apply to a court for a communications surveillance warrant so as to ensure the due process guarantee provided by the Constitution. The disputed Article 5, Paragraph 2 of the Act lacks such requirement, and this in turn leads to the result that the prosecutorial and judicial police authorities, who are responsible for criminal investigations, are in fact charged with, concurrently, the duty of applying for and the power of granting the communications surveillance warrant, without any proper inter-authority check and balance mechanism on governmental powers to prevent undue violations of the people's freedom of secrecy of correspondence that is guaranteed by the Constitution. Consequently, such a provision cannot be considered reasonable, nor can it be considered legitimate, and it thus constitutes a violation of Article 12 of the Constitution that guarantees the freedom of secrecy of correspondence. After announcement of this Interpretation, this provision shall become null and void no later than when the new Article 5 of the Act, revised on July 11, 2007, becomes effective. Moreover, since communications surveillance is a severe intrusion into the people's freedom of secrecy of correspondence, those who have the power to grant communications surveillance warrants should make their every effort to review applications for warrants strictly to ensure that the requirements set forth in Article 5 of the Act are satisfied. Even when it is indeed necessary for them to grant a communications surveillance warrant, they should adhere to the principle of minimum violation, and specify, without any vagueness, the period for such

surveillance, the person under such surveillance, and the method of surveillance. Furthermore, it would be superfluous to dwell on the principle any more than to note that they should supervise the implementation of the surveillance at all times.

Background Note by the Translator

The petitioner is a police officer working for the information technology office in a police station. The petitioner received a cell phone call from an unidentified female Ms. X via the petitioner's own cell phone. Ms. X asked for the police officer's assistance in retrieving personal information about another female, Ms. KAO. The petitioner thus used a computer, accessing the database of the National Police Agency, and acquired the information about Ms. KAO, which the petitioner then disclosed to Ms. X.

Before the petitioner revealed the private information, a prosecutor had approved a request to monitor the petitioner's cell phone communications. The prosecutor became aware of the petitioner's leak of the information through the surveillance and then retrieved the logs of the petitioner's review records from the National Police Agency. In the Taiwan High Court Criminal Judgement 92-Shang-Su-882 (2003), the judge used the transcribed text from the surveillance as evidence and decided that the petitioner's act had constituted the offense of disclosing secrets of Article 132, Paragraph 1 of the Criminal Code.

The petitioner had two claims. First, communications surveillance warrants should be approved and issued by a court. For this reason, Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications, which provides that communications surveillance warrants are to be issued by a prosecutor during criminal investigations, is unconstitutional. Second, the communications surveillance warrant in this case was issued for the reason of monitoring suspected crimes relating to guns and ammunition. However, the transcribed text

obtained from monitoring the suspected crimes beyond the scope set forth in Article 5, Paragraph 1 of the Act was used by the judge of the case as evidence. The petitioner claimed the decision in the case contradicted the Constitution and thus petitioned for constitutional interpretation.

Both J.Y. Interpretations Nos. 654 and 631 pertained to the freedom of "secrecy of correspondence." While the subject being wiretapped in J.Y. Interpretation No. 631 was a suspect under criminal investigation, the subject who was under surveillance in J.Y. Interpretation No. 654 was a detainee in custody for his alleged criminal offenses. In J.Y. Interpretation No. 654, the Constitutional Court indicated that a detainee, even though his personal liberty and security and several other constitutional rights may be limited because of the detention, shall, outside of the scope of such limitations, still enjoy all other constitutional rights as an ordinary person under the presumption of innocence doctrine. It can be implied from the Constitutional Court's words that the Constitutional Court affirmed that detainees still enjoy the freedom of "secrecy of correspondence" so that the detainee is ensured to have the right to a fair trial.

The facts of J.Y. Interpretation No. 654 are summarized as follows. The petitioner was not allowed to see anyone or communicate with anyone by letter after he was taken into custody for criminal offenses he allegedly committed. In addition, the prosecutor issued an order to audio-record all the conversations between the petitioner and his lawyer during his counsel's visitation. As a result, all the conversations between the petitioner and his counsel were placed under the surveillance of and audio-recorded by the officers of the detention center.

Article 23, Paragraph 3 of the Detention Act provided that when counsel visits an accused in custody, the visitation shall be placed under surveillance according to Paragraph 2 of the same Article. Furthermore, Article 28 of the Detention Act provided that the information obtained through the surveillance and audio-recording during the visitation in accordance with Article 23,

Paragraph 3 may be admitted into evidence both in the investigative process and the criminal trial against the accused. The petitioner asserted that the above surveillance and audio-recording impinged upon his right to litigate protected by Article 16 of the Constitution. He submitted an objection to the Taiwan Panchiao District Public Prosecutors Office that was overruled by the Taiwan Panchiao District Court. As a consequence, the petitioner decided to challenge, by proceeding to lodge a petition for interpretation to the Constitutional Court, the constitutionality of Article 23, Paragraph 3 and Article 28 of the Detention Act, and Article 1, Paragraph 2 of the Organization Act of Detention Centers providing that matters regarding the detention of the accused shall be supervised by the district court and the prosecutors office in the same jurisdiction of the detention center. The Constitutional Court issued J.Y. Interpretation No. 654 in which it decided that Article 23, Paragraph 3 and Article 28 of the Detention Act were unconstitutional and became ineffective as of May 1, 2009. Below is the summary of J.Y. Interpretation No. 654:

> While the physical freedom or other certain constitutional rights of a detainee are limited by law because of the detention, under the doctrine of presumption of innocence, the detainee nevertheless enjoys, in principle, all other constitutional rights outside of the scope [of such limitations] as an ordinary person.
>
> Article 23, Paragraph 3 of the Detention Act provides, "under surveillance" referred in Paragraph 2 shall apply when counsel visits a detainee. Taking into consideration the meaning and purpose of the Detention Act and its Enforcement Rules as well as the totality of the legal system, the term "surveillance" entails not only on-site monitoring by the detention center personnel, but also eavesdropping, recording, and audio-recording, among other acts. Under current

practices, counsel visitation is routinely monitored and recorded pursuant to the aforementioned statutory provisions. These provisions, which allow a detention center to conduct surveillance and audio-recording without considering whether they achieve the purpose of detention or are necessary in maintaining the order of the detention center, have hindered the exercise of the right to defense and exceeded the scope of necessity, thus violating the principle of proportionality under Article 23 of the Constitution, and they thus are inconsistent with the meaning and purpose of the Constitution to protect the right to judicial remedy.

J.Y. Interpretation No. 400 (April 12, 1996)*

Public Easements on and Taking of Privately-Owned Existing Roads Case

Issue

Do the Executive Yuan Letters, which allow public easements on privately-owned existing roads without taking such lands, constitute an infringement upon said owners' property rights as protected by Article 15 of the Constitution?

Holding

The purpose of Article 15 of the Constitution, which provides that the people's right to property shall be guaranteed, is to protect each individual's freedom to exercise his/her rights to use, profit, and disposal for the duration of property ownership and to prevent infringements by the public authority and other parties in order to allow the individual to realize his/her freedoms, to develop his/her personality, and to maintain his/her dignity. To be consistent with this constitutional protection of the right to property, state authorities, for the necessity of public use or other public interests, may take an individual's property according to law, but shall make just compensation in return. In cases of privately-owned existing roads on which public easements have been established due to some specific criteria, the owners of those roads have been deprived of their freedom to use and make profits from the lands in question, and their interests on the property have been specifically sacrificed for public interests. The State shall take such lands and make compensation according to law. If the central or local governments, due to financial difficulties, are unable to take all such lands and

* Translation and Note by Tze-Shiou CHIEN

make compensation accordingly, the authorities concerned shall set a deadline for making compensation to be paid by annual installments or other means. It is obviously against the principle of equality if the State is not required to conduct expropriation and make compensation for those lands on which public easements have already been established and maintained by regulations when this situation is compared with that of other privately-owned lands within the same road project that have been expropriated and for which compensation has been provided. Those parts of the Executive Yuan Letters Tai-67-Nei-6310 of July 14, 1978, and Tai-69-Nei-2072 of February 23, 1980, to the extent they are inconsistent with the principles described above, shall no longer apply.

Reasoning

[1] The final judgment in this petition was made on the premise that the Executive Yuan Letters Tai-67-Ne-6310 of July 14, 1978, and Tai-69-Ne-2072 of February 23, 1980, were not in conflict with Article 14 of the Land Act. The petitioner specifically argued the two Letters were in violation of the Constitution. Hence, the petition challenging the two Letters has satisfied the requirements provided in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and was accordingly granted review. It is so explained here.

[2] The purpose of Article 15 of the Constitution, which provides that the people's right to property shall be guaranteed, is to protect each individual's freedom to exercise his/her rights to use, profit, and disposal for the duration of property ownership and to prevent infringements by the public authority and other parties in order to allow the individual to realize his/her freedoms, to develop his/her personality, and to maintain his/her dignity. However, individuals' freedom to exercise their property rights is bounded by their social responsibilities and responsibilities toward the environment and ecology according to law. Those individuals whose property rights have been restricted due to the above-

mentioned responsibilities and who have particularly sacrificed for public interests shall have the right to be adequately compensated. Although the State may take privately-owned lands according to law for the purposes of establishing public enterprises or implementing national economic policies (*see* Articles 208 and 209 of the Land Act), adequate compensation must be made so as to satisfy the requirements of the constitutional protection of property rights described above.

[3] A public easement, distinguished from an easement of the Civil Code, is a legal relationship in which privately-owned lands are used for a public nature. The idea of a public easement has long been established in our legal system (s*ee* J.Y. Interpretation No. 255; Administrative Court Precedent[1] 45-Pan-8 and Precedent 61-Pan-435). To determine whether the owner of a privately-owned existing road has to assume the burden of a public easement, the following requirements should be met. First, it must be a necessary crossing for the unspecified general public, not merely a crossing for the sake of convenience or to save time. Second, the owner must have failed to prevent the general public from crossing from the initial outset of the crossing practice. Third, this situation must have continued uninterrupted for a long period of time. There is no specified length for the long period of time. However, it must be long enough so that most

[1] Editor' Note: Taiwan, a civil law country, does not adopt the doctrine of *stare decisis*. In a formal sense, judges in Taiwan are not bound to the court precedents as are common law judges. In order to unify different opinions of the lower courts and promote the consistency of statutory constructions, Taiwan has established a unique "Precedent" system. The Supreme Court or the Supreme Administrative Court may select any of its own decisions on an important legal issue and designate its legal reasoning in that decision, after modifications if necessary, as Precedent. Such Precedents are detached from the facts of their original cases and written in the form of abstract legal doctrines. Technically speaking, Precedents are only *de facto*, but not *de jure*, binding on the lower courts. If a Precedent is applied in a court decision, the losing party of that decision, once final, may petition the Constitutional Court to review the constitutionality of the Precedent at issue pursuant to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act.

people do not have a specific recollection regarding the exact time when the situation began and merely have some vague and general understanding of the situation (*e.g.*, beginning in the Japanese Occupation Era or around the time of the flood of August 7, 1959). Concerning those lands provided as roads for public transportation based either on any construction law or the Civil Code, they are different from those privately-owned existing roads arising from being used by the general public as a crossing for an extended length of time. Apparently, the burden of such latter type of lands is not the public easement mentioned in this Interpretation. In the circumstances where the owners of private lands are burdened by public easement due to the above-mentioned criteria, the authorities concerned shall, according to law, conduct expropriation to acquire the lands and, based on the government's financial resources, make just compensation. If the central or local governments, due to financial difficulties, are unable to expropriate all such lands and make compensation accordingly, they shall take into account the principles mentioned in the Executive Yuan Letter Tai-84-Nei-38493 of October 28, 1995, and the Ministry of the Interior Letter Tai-84-Nei-Ing-8480481 of October 11, 1995, and set forth a feasible plan to gather financial resources so as to make compensation by annual installments or other means, such as issuing bonds maturing at various dates, setting up user-pay systems, providing tax reductions, or giving publicly-owned lands in lieu of monetary compensation. It is obviously against the principle of equality if the State is not required to conduct expropriation and make compensation for those lands on which public easements have already been established and maintained by regulations when this situation is compared with that of other privately-owned lands within the same road project that have been expropriated and for which compensation has been provided. Furthermore, once geographic or social environments have changed to such an extent that the necessity for a privately-owned existing road to serve as a crossing no longer exists, the public easement should be immediately reviewed and repealed. The Executive Yuan Letter Tai-

67-Ne-6310 of July 14, 1978, states:

> After governments take actions to broaden or lengthen roads and change the types of roads according to urban planning, those privately-owned lands within the scope of the road project, except for those existing roads from the Japanese Occupation Era which are still used and were registered in the "road" category in the land registration book remaining burdened by public easement as mentioned before, shall be expropriated and granted compensation.

The Executive Yuan Letter Tai-69-Ne-2072 of February 23, 1980, further clarifies:

> The Executive Yuan Letter Tai-67-Ne-6310 of July 14, 1978, stated that privately-owned existing roads from the Japanese Occupation Era could still be used based on public easement. Such statement was made taking into account governments' financial difficulties in providing large sums of compensation. This does not mean to indefinitely refuse to conduct expropriation to acquire those lands. Accordingly, considering that Article 14 of the Land Act provides that "public roads for transportation should not be privately owned ... those roads which are privately owned lands may be expropriated according to law," the Letter should be modified as follows. "Local governments, once relieved of financial difficulties, subsidized by higher level governments for the specific road project, or having levied a benefit tax or user's fee, shall compensate those owners of private lands used as existing roads within the road project according to law."

Those parts of these two Letters, to the extent inconsistent with the principles described in this Interpretation, shall no longer apply.

Background Note by the Translator

Five petitioners indicated that their lands had become an existing road for public passage. Hence, they asked the Chiayi City Government to complete the process of expropriation and to make corresponding compensation. However, their requests were rejected. They filed a petition with the Constitutional Court in June 1994 after exhausting ordinary judicial remedies. They alleged that both of the Executive Yuan Letters Tai-67-Nei-6310 of July 14, 1978, and Tai-69-Nei-2072 of February 23, 1980, were in breach of Articles 15, 23, 143, and 172 of the Constitution.

J.Y. Interpretation No. 440 (November 14, 1997)*

Taking Without Compensation of the Underground Strata of Private Lands Case

Issue

Does Article 15 of the Ordinance on the Management of Taipei City Roads, which authorizes the government to use the underground strata of private lands without having to purchase the lands or giving compensation, infringe upon the people's property rights as guaranteed by Article 15 of the Constitution?

Holding

Article 15 of the Constitution provides that the people's right to property shall be guaranteed. When government authorities exercise their powers according to law and cause harms to the property of the people, such harms are considered special sacrifices of individuals if they exceed the bearable extent of the property's social responsibility. In such cases, the State shall make reasonable compensation to those affected people. If the competent authorities install underground utilities within privately-owned existing roads or private lands designated by urban plans to be used as future roads without taking or purchasing these private lands, such installations will constitute special sacrifices of individuals for infringement of the exercise of rights by the land-right owners and harm caused thereto. Those affected individuals shall have the right to adequate compensation. Article 15 of the Ordinance on the Management of Taipei City Roads, issued by the Taipei City Government on August 22, 1975, provides:

* Translation and Note by Tze-Shiou CHIEN

> When not interfering with the original uses of and not creating safety concerns to privately-owned existing roads or private lands designated by urban plans to be used as future roads, the competent authorities may install underground utilities without taking or purchasing such lands, except that compensation must be paid for any harm to the surface facilities.

To the extent that it provides for neither purchase of nor compensation for the use of underground strata, the said provision is incompatible with the above requirements and shall cease to apply immediately. Additionally, it is noted that any taking or purchase of privately-owned existing roads or private lands designated by urban plans to be used as future roads shall be made in accordance with J.Y. Interpretation No. 400 and Article 48 of the Urban Planning Act.

Reasoning

Article 15 of the Constitution provides that the people's right to property shall be guaranteed. When government authorities exercise their powers according to law and cause harms to the property of the people, such harms are considered special sacrifices of individuals if they exceed the bearable extent of the property's social responsibility. In this case, the State shall pay reasonable compensation to those affected people. When public easements, after meeting certain requirements, are established on privately-owned existing roads, the land owners would thus be deprived of their freedoms to use and make profits from their lands. Since they suffer special sacrifices on their property interests for the sake of public interests, the State shall take the lands and pay compensation according to law. If the central or local governments, due to financial difficulties, are unable to take all such lands and make compensation accordingly, the authorities concerned shall set a deadline for making compensation to be paid by

annual installments or other means. The above are already stated in J.Y. Interpretation No. 400. With regard to the expropriation or purchase of lands designated by urban plans to be used as future roads, Article 48 of the Urban Planning Act provides that privately-owned lands designated to be used for public facilities in the future pursuant to the Act shall be taken or purchased by the public facilities concerned. Other privately-owned lands similarly designated shall be taken or purchased by the competent authorities or town-level government authorities through the following approaches: (1) expropriation, (2) zone expropriation, or (3) urban land readjustment. To protect land-right holders' rights to use and profit from their lands as much as possible, Article 30 of the Urban Planning Act and Article 4 and Article 11, Appendix A of the Multi-Purpose Plans for Lands Designated for Public Facilities under Urban Plans, as modified by the Executive Yuan Letter Tai-86-Nei-38181 of October 6, 1997, have allowed the land-right holders to apply for construction of parking lots or markets under their lands before the competent authorities expropriate or purchase the lands. Therefore, it is obvious that there exist relevant laws conferring on the competent authorities the power to expropriate or purchase those designated lands within the scope of urban plans. Indeed, if necessary for advancing public interests, the competent authorities may take lands designated for road use within the scope of urban plans according to law. However, such decisions to expropriate or purchase must be made after taking into account the severity of the harm caused thereby, such as whether it has interfered with the property's original uses or created safety concerns. Accordingly, prior to exercising their powers to expropriate or purchase, the competent authorities may legally use those privately-owned existing roads or designated lands within the scope of urban planning to install underground facilities for electricity distribution, water supply, or sewage systems. However, under the principle of proportionality, this can only be done in the least harmful places and by the least harmful means. Furthermore, the land-right holders in question must be appropriately compensated so as to preserve their benefits from

property ownership. Article 15 of the Ordinance on the Management of Taipei City Roads, issued by the Taipei City Government on August 22, 1975, provides:

> When not interfering with the original uses of and not creating safety concerns to privately-owned existing roads or private lands designated by urban plans to be used as future roads, the competent authorities may install underground utilities without taking or purchasing such lands, except that compensation must be paid for any harm to the surface facilities.

To the extent that it provides for neither purchase of nor compensation for the use of underground strata, the said provision is incompatible with the above requirements and shall cease to apply immediately. Additionally, it is noted that any taking or purchase of privately-owned existing roads or private lands designated by urban plans to be used as future roads shall be made in accordance with J.Y. Interpretation No. 400 and Article 48 of the Urban Planning Act.

Background Note by the Translator

The petitioners alleged that their jointly-owned lands were classified as "private lands to be used as public roads" under an urban plan of the government. The Maintenance Office of the Public Works Department under the Taipei City Government installed an underground concrete pipeline paved by asphalt road for public passage on their lands without taking and compensation. Their request to the above-mentioned office for taking and compensation was rejected. After exhausting ordinary judicial remedies, they filed a petition to the Constitutional Court, alleging that Article 15 of Ordinance on the Management of Taipei City Roads was in breach of Articles 15 and 143 of the Constitution.

J.Y. Interpretation No. 584 (September 17, 2004)*

Permanent Disqualification of Taxi Drivers Case

Issue

Is Article 37, Paragraph 1 of the Statute for Road Traffic Management and Punishment constitutional in disqualifying for life a person with certain felony records from holding a taxi driver registration?

Holding

Article 15 of the Constitution guarantees the people's right to work, which includes the people's freedom to choose an occupation. As people's occupations are closely related to the public interest, the State may set forth the qualifications or other requirements for engaging in certain occupations by statutes or regulations specifically authorized by a statute, provided that the limitations are in compliance with Article 23 of the Constitution. Article 37, Paragraph 1 of the Statute for Road Traffic Management and Punishment (hereinafter "Statute") as amended on April 21, 1999, provides:

> A person who has been convicted of an offense of murder, taking by force, abrupt taking, robbery, extortion, or kidnapping for ransom or any of the sexual offenses under Articles 221 to 229 of the Criminal Code and whose conviction is final is prohibited from applying for taxi driver registration.

Given the characteristics of the taxi business and taxi drivers' work, the provision

* Translation and Note by Szu-Chen KUO

sets forth the subjective qualifications for the occupation of taxi driver, which constitutes a restriction on the people's freedom to choose an occupation. The restriction is aimed at safeguarding passengers' lives, personal security, and property as well as the social order and increasing people's trust in the taxi business. Therefore, Article 37, Paragraph 1 of the Statute is consistent with the spirit of the Constitution as described in the very beginning [of the holding of this Interpretation] and not in conflict with Article 23 of the Constitution. In addition, the management of the taxi business varies across countries, depending on the national conditions and social order in each country. Because of the higher recidivism rate of the persons who have been convicted of the listed offenses, they are considered as potentially posing a greater threat to the personal safety of taxi passengers. Taking into account the necessity of safeguarding major public interests such as the safety of life and personal security of passengers and [the impact] of restricting the subjective qualifications necessary for choosing an occupation, the authorities impose different restrictions on the choice of occupation. The different treatment is made on a rational basis and not in violation of the equality principle under Article 7 of the Constitution. Nonetheless, it is noted that setting forth disqualifications for taxi drivers, a measure taken without better alternatives for safeguarding passengers' security under the current system of taxi administration, is in its nature a limitation on the people's freedom to choose an occupation. The authorities concerned, with betterment of taxi administration, development of crime prevention systems, or other systems, ought to keep reviewing the availability of alternative measures which are less restrictive and thereby make revisions accordingly. Furthermore, if the authorities concerned are able to prove that an offender who has been convicted of the disqualifying crimes poses no special danger to passengers, the lifetime ban on his/her choice of occupation as taxi driver should be lifted at that proper time. This is in order that in maintaining the public interest, protection of the people's right to work and the equality principle as guaranteed in the Constitution may be

better fulfilled.

Reasoning

[1] Article 15 of the Constitution guarantees the people's right to work, which includes the people's freedom to choose an occupation. As people's occupations are closely related to the public interest, the State may set forth the qualifications or other requirements for engaging in certain occupations by statutes or regulations specifically authorized by a statute, provided that the limitations are in compliance with Article 23 of the Constitution (*see* J.Y. Interpretations Nos. 404 and 510). In considering the constitutionality of a limitation on the freedom of occupation, the standard of review varies with the content of the limitation. The legislature is allowed to set forth proper restrictions on the practice of an occupation such as its manner, time, place, target customers, or content if such restrictions are necessary for the public interest. Where the legislature intends to regulate the subjective qualifications necessary for choosing an occupation, such as knowledge and competency, age, physical condition, or moral standards, there must be a more important public interest than what is required for restrictions on the practice of an occupation, and the restrictions must be necessary for the achievement of such public interest. Furthermore, the State, in exercising its power over the people, must treat all people equally as required under Article 7 of the Constitution. Different treatment without a rational basis cannot be justified. The equality principle under Article 7 of the Constitution, nevertheless, does not mean formal equality, namely absolute and mechanical equality. Rather, it is a guarantee of substantive equality before the law. The legislative branch, in light of the value system in the Constitution and the purpose of the law, may treat things differently based on the nature of the things being regulated (*see* J.Y. Interpretation No. 485).

[2] Taxis are an important public transportation means for people in urban areas.

As the taxi business differs from that of other motor vehicles, taxi drivers' work is characterized as being closely connected with the safety of passengers and the social order. The authorities concerned set forth certain restrictions on the subjective qualifications for taxi drivers so that the persons with particularly dangerous inclinations are unable to utilize taxis to commit crimes. Such restrictions are aimed at safeguarding passengers' lives, personal security, and property as well as the social order, creating a healthy and safe business environment for taxis, and increasing people's trust in the taxi business. Therefore, such restrictions are truly necessary for preventing infringement on other people's freedoms, for maintaining social order, or for advancing the public interest. Article 37, Paragraph 1 of the Statute for Road Traffic Management and Punishment (hereinafter "Statute") as amended on April 21, 1999, provides:

> A person who has been convicted of an offense of murder, taking by force, abrupt taking, robbery, extortion, or kidnapping for ransom or any of the sexual offenses under Articles 221 to 229 of the Criminal Code and whose conviction is final is prohibited from applying for taxi driver registration.

Given the characteristics of the taxi business and taxi drivers' work as well as the importance of safeguarding the safety of person and property, it prohibits persons who have been convicted of the offenses listed in the provision (hereinafter "listed offenses") from applying for taxi driver registration. It is a restriction on the subjective qualifications for the occupation of taxi driver. We believe that such restriction is an effective means to achieving the legitimate purpose stated above. [The relevant statistics on the recidivism rate before and after the 1997 amendment of Article 37, Paragraph 1 of the Statute support the effectiveness and necessity of such restriction.] Article 37, Paragraph 1 of the Statute was amended in January 1997 for the first time to prohibit the persons who have been convicted

of the listed offenses from driving a taxi for life. According to the statistics of the National Police Agency, the Ministry of the Interior, the recidivism rate of the registered taxi drivers who had been convicted of the listed offenses in 1997 was 4.24 percent for the same offense and 22.22 percent with other offenses being included, with the latter being quite high. (According to the statistics of the Ministry of Justice, the recidivism rate of those convicted on the enforcement lists of all prosecutors offices at the district court level in 1997 was 22.3 percent for the same offense and forty-three percent with other offenses being included.) After the amendment, the number of taxi drivers who have been convicted of the listed offenses has been decreasing. Furthermore, it is within the professional discretion of the authorities concerned to decide what the least restrictive means on the people's freedom of occupation, in order to achieve the purposes stated above, should be. The authorities concerned shall take all the following factors into consideration: the present social conditions, the importance of safeguarding passengers' security, whether the means is effective to the purpose, whether we can distinguish the criminal recidivism rate in general from the odds of criminal recidivism of a former inmate, the social costs of various regulatory measures, whether it will impact former inmates to the extent that their way of making a living with the skills they had before imprisonment will be fundamentally changed, or whether the means impedes former inmates from being resocialized. (The Ministry of Justice already conducts an assessment on the risk of reoffending in the parole-granting procedure; however, the ratio of the number of former inmates who had their parole revoked to the number of former inmates released on parole in that year was 27.2 percent in 1993 and thirty percent in 1997. The figures are still rather high. Moreover, the reoffending prediction is made based on quantitative methods in criminology, but the prediction method and the reliability of such prediction are still in doubt. *See* the report submitted by the Ministry of Justice to the investigation meeting held by this Court on February 10, 2004.) In the investigation meeting, the authorities concerned and the business

operators reported that, objectively speaking, other effective but less restrictive measures to ensure the security of the taxi [passengers], such as monitoring the route of taxis with a satellite positioning system, only permitting pre-booking taxis via calling [a dispatch center] and strengthening the tracking and administration system, or modifying the cars to make a separation between the driver and passenger seats and reinforcing drivers' pre-job training, are impractical. A lifetime ban from driving a taxi for the persons who have been convicted of the listed offenses is indeed a rather severe restriction on their freedom to choose an occupation. Nevertheless, taking into consideration the importance and imminence of the public interest of protecting the lives, personal security, and property of an unspecified number of people who ride in taxis and the opinions provided by the authorities and business operators concerned, we believe that, at the present, the measure of lifetime prohibition that the authorities concerned adopted to protect passengers' safety of person and property is reasonable and a relatively moderate restriction on the people's freedom to choose an occupation. In sum, Article 37, Paragraph 1 of the Statute is consistent with the spirit of the Constitution as described in the very beginning [of the reasoning of this Interpretation] and not in conflict with Article 23 of the Constitution. In addition, the management of the taxi business varies across countries, depending on the national conditions and social order in each country. Because of the higher recidivism rate of the persons who have been convicted of the listed offenses, they are considered as potentially posing a greater threat to the personal safety of taxi passengers than those who have never committed any offense or have been convicted of other offenses. Taking into account the necessity of safeguarding major public interests such as the safety of life and personal security of passengers and the social order, as well as [the impact] of restricting the subjective qualifications necessary for choosing an occupation, the authorities impose different restrictions on the choice of occupation [of the two groups of people, those who have been convicted of the listed offenses and those who have never

committed any offense or have been convicted of other offenses]. The different treatment is made on a rational basis and not in violation of the equality principle under Article 7 of the Constitution. Nonetheless, it is noted that the said lifetime disqualifications for taxi drivers, a measure taken without better alternatives for safeguarding passengers' security under the current system of taxi administration, is in its nature a limitation on the people's freedom to choose an occupation. With betterment of the social order, development of crime prevention systems, improvement in the quality of drivers, and betterment of taxi administration or other business systems, the authorities concerned ought to keep reviewing: whether the listed offenses are directly connected to the safeguarding of passenger safety, the extent of the limitations on qualifications, and the availability of alternative measures which are less restrictive on the freedom of occupation, and thereby make revisions accordingly. Furthermore, if the authorities concerned, via individual-based assessment or other mechanisms, are able to ascertain that an offender who has been convicted of the listed crimes after a certain period of years poses no special danger to passengers, the lifetime ban on his/her choice of occupation as taxi driver should be lifted at that proper time. (According to the Ministry of Justice report on the recidivism rate of all former inmates in the period from 1992 through 2002, the average rate was reduced to 1.5 percent in the seventh year after release and less than 1 percent in the tenth year after release.) This is in order that in maintaining the public interest, protection of the people's right to work and the equality principle as guaranteed in the Constitution may be better fulfilled.

Background Note by the Translator

In Taiwan, holding the occupation of taxi driver requires a professional driver's license and taxi driver registration. The petitioner in this case was convicted of attempted murder in 1971 and completed his prison sentence after

the conviction. He filed his application for taxi driver registration in 1982. According to the then-effective Article 37, Paragraph 1 of the Statute for Road Traffic Management and Punishment (hereinafter "the Statute"), a person with certain felony records could still apply for taxi driver registration after two years had passed since he/she finished serving the prison sentence. His application was approved, as it had been more than two years since he completed serving his prison sentence. In 1997, the petitioner's registration was cancelled because he failed to have the required inspection according to the law.

The petitioner re-applied for taxi driver registration in 2000. His application was rejected at that time because Article 37, Paragraph 1 of the Statute had been amended, banning the persons who had been convicted of certain offenses, including the offense of which the petitioner had been convicted, from applying for taxi driver registration for life. The petitioner, after exhaustion of ordinary judicial remedies, brought the case to the Constitutional Court, challenging the constitutionality of the lifetime ban as provided in Article 37, Paragraph 1 of the Statute.

J.Y. Interpretation No. 749 (June 2, 2017)*

Temporary Disqualification of Taxi Drivers Case

Issue

Are Article 37, Paragraph 3 and other provisions of the Statute for Road Traffic Management and Punishment constitutional in revoking, for three years, the taxi driver registrations and driver's licenses of registered taxi drivers with certain criminal records?

Holding

[1] Article 37, Paragraph 3 of the Statute for Road Traffic Management and Punishment (hereinafter "Statute") provides:

> If a registered taxi driver commits an offense of larceny, fraud, possession of stolen property, or coercion, or any of the offenses under Articles 230 to 236 of the Criminal Code and is then convicted and sentenced to imprisonment for no less than sixty days by a court of the first instance, he/she shall have his/her taxi driver registration suspended. If the conviction with imprisonment for no less than sixty days is affirmed and final, he/she shall have his/her taxi driver registration and driver's license revoked.

The provision has gone beyond what is necessary in restricting the taxi drivers' right to work to the extent that it suspends and revokes a taxi driver's registration simply because he/she commits a disqualifying offense and is sentenced to

* Translation and Note by Ren-Chuan KAO

imprisonment for no less than sixty days, regardless of whether the committed crime poses any substantial risk to passengers' safety. The authorities concerned shall amend the provision as appropriate in accordance with the ruling of this Interpretation within two years from the date of announcement of this Interpretation. If the authorities concerned fail to complete the amendment within the said two years, the clauses of suspension and revocation of taxi driver registrations of this provision shall become null and void. In the light of the purpose of temporary disqualification, those taxi drivers whose taxi registrations were already revoked are not allowed to re-apply for registration within three years [from the date of revocation] before the competent authorities amend the laws as appropriate.

[2] Revocation of driver's licenses as provided in Article 37, Paragraph 3 of the Statute obviously goes beyond what is necessary to achieve the purpose of temporary disqualification. As such, it is not compatible with the proportionality principle as required by Article 23 of the Constitution and violates the people's right to work as guaranteed by Article 15 and the people's general freedom of action as guaranteed by Article 22 of the Constitution. It shall be null and void from the date of announcement of this Interpretation. It follows that the authorities concerned shall no longer apply Article 68, Paragraph 1 (originally Article 68 before the amendment on May 5, 2000) of the Statue to revoke all the other driver's licenses of a taxi driver on the grounds that he/she breached Article 37, Paragraph 3 of the Statute.

[3] Article 67, Paragraph 2 of the Statute, which provides, "A person ... whose driver's license has been revoked under ... Article 37, Paragraph 3 ... shall be prohibited from re-applying for a new driver's license within three years after revocation," shall become null and void accordingly, since we have declared the driver's license revocation clause of Article 37, Paragraph 3 of the Statute to be null and void.

Reasoning

[1] The petitioners, Wan-Chin WANG, Yao-Hua LI, Jung-Yao LI, Chih-Chieh CHEN (whose original name was Te-Hao CHEN), Ching-Yu YEH, and Hua-Tsung HSU, are all taxi drivers. The competent authorities revoked both their taxi driver registrations and driver's licenses because they had each been convicted of the offenses listed in Article 37, Paragraph 3 of the Statute for Road Traffic Management and Punishment (hereinafter "Statute") and sentenced to imprisonment for no less than sixty days by final court decisions. The petitioners filed suits against the revocations respectively. After exhaustion of ordinary judicial remedies, the petitioners petitioned this Court for interpretation, claiming that Article 37, Paragraph 3, Article 67, Paragraph 2, and Article 68 of the Statute applied in their respective final judgments were in violation of Article 7, Article 15, Article 22, and Article 23 of the Constitution. (*See* Appendix for the final judgment and the challenged provisions of each petitioner.) We considered their petitions as having validly satisfied the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and accordingly granted review.

[2] The petitioners, Judge of the Ching-Unit of the Administrative Division of the Taiwan Taipei District Court, in adjudicating the Taiwan Taipei District Court Cases 102-Chiao-202 and 103-Chiao-11 on traffic disputes, and Judge of Jou-Unit of the Administrative Division of the Taiwan Taoyuan District Court, in adjudicating the Taoyuan District Court Case 104-Chiao-349 on a traffic dispute, regarded as unconstitutional the applicable Article 37, Paragraph 3 of the Statute. Therefore, they halted the proceedings and petitioned this Court for constitutional interpretation. We considered the petitions as having validly satisfied the requirements elaborated in J.Y. Interpretations Nos. 371, 572, and 590 and accordingly granted review as well.

[3] As all the above petitions were concerned with the constitutionality of

Article 37, Paragraph 3, Article 67, Paragraph 2, and Article 68 of Statute, we decided to consolidate the petitions and made this Interpretation on the basis of the following grounds:

[4] I. The constitutionality of the suspension and revocation of taxi driver registrations as provided for in Article 37, Paragraph 3 of the Statute

[5] Article 37, Paragraph 3 of the Statute [as amended and promulgated on December 28, 2005] (hereinafter "Disputed Provision A") provides:

> If a registered taxi driver commits an offense of larceny, fraud, possession of stolen property, or coercion, or any of the offenses under Articles 230 to 236 of the Criminal Code and is then convicted and sentenced to imprisonment for no less than sixty days by a court of the first instance, he/she shall have his/her taxi driver registration suspended. If the conviction with imprisonment for no less than sixty days is affirmed and final, he/she shall have his/her taxi driver registration and driver's license revoked.

Suspension or revocation of the taxi driver registration is a restriction on taxi drivers' freedom to choose an occupation.

[6] Article 15 of the Constitution guarantees the people's right to work, which includes the people's freedom to choose an occupation. Where people's occupations are closely related to the public interest, the State may set forth the qualifications or other requirements for engaging in certain occupations by statutes or regulations specifically authorized by a statute, provided that the limitations are in compliance with Article 23 of the Constitution (*see* J.Y. Interpretations Nos. 404, 510, and 584). In considering the constitutionality of a limitation on the freedom of occupation, the standard of review varies with the content of the limitation. Where the legislature intends to regulate the subjective

qualifications necessary for choosing an occupation, such as knowledge and competency, physical condition, or criminal record, the regulation must further an important public interest by means that are substantially related to that interest, in order to be in compliance with the proportionality principle.

[7] Taxis are an important form of public transportation. The work of taxi drivers is characterized as being closely connected with passengers' safety and the social order. Crimes involving taxis recur with great frequency. Surveys show that the among taxi drivers with criminal records, a majority have committed offenses involving larceny, fraud, possession of stolen property, or coercion, with some of the cases turning into the focus of public criticism. Taxi drivers with criminal records thus constitute a significant threat to passengers' safety and the social order. In addition, as taxis travel around to pick up and drop off passengers, taxi drivers have numerous chances to ferry female passengers who travel alone or passengers carrying property and have the clear ability to control the movements of passengers. For the purposes of preventing one with malicious intent from utilizing a taxi to commit crimes and safeguarding passengers' safety, Disputed Provision A was amended on July 29, 1981, for the first time to provide that if a registered taxi driver commits any of the listed offenses, he/she shall have his/her taxi driver registration and driver's license revoked (later amended as having his/her taxi driver registration suspended upon conviction and having his/her registration and driver's license revoked when the conviction is final). (*See* The Legislative Yuan Gazette, 70 (55): 43 & 44.)

[8] Taxis in our country predominantly run as "street-hailed" taxis. Passengers hail taxis randomly, usually unable to select the driver or know the service quality before getting into a taxi. Moreover, as passengers sit in a narrow and small space with the driver, they are subjected to the driver. The protection of passengers' safety and maintenance of the social order are certainly important public interests.

[9] Disqualifying the taxi drivers who have committed certain offenses and

received certain sentences from holding taxi driver registrations serves to assist in achieving the end stated above. Nevertheless, the restrictive means is considered as substantially related to the end stated above if and only if it disqualifies those who pose substantial risks to the safety of passengers.

[10] Considering that among taxi drivers with criminal records, a majority have committed offenses involving larceny, fraud, receiving of stolen property, or coercion, the authorities concerned added Article 37-1, Paragraph 3 to the Statute as amended and promulgated on July 29, 1981, listing the offenses of larceny, fraud, receiving of stolen property, or coercion as temporary disqualifying offenses. (*See* The Legislative Yuan Gazette, 70 (55): 43 & 44. This provision was later listed as Article 37 [, Paragraph 3] of the Statute as amended and promulgated on May 21, 1986.) In addition, in order to strengthen the protection of female passengers' safety, the disqualifying offenses listed in Article 37, Paragraph 3 as amended and promulgated on January 22, 1997, and implemented on March 1 of the same year were expanded to include the offenses against morality under Articles 230 to 236 of the Criminal Code. (*See* The Legislative Yuan Gazette, 86 (2): 142-144. The provision was later amended and promulgated on December 28, 2005, as Disputed Provision A, while the listed offenses remained unchanged). [We noted] that the legislature listed the respective disqualifying offenses in each amendment based on the specific concerns at that time. The disqualifying offenses in Disputed Provision A are listed as categories in accordance with the chapters in the Criminal Code, including offenses against property (larceny, fraud, receiving of stolen property), offenses regarding coercion (Articles 296 to 308 of the Criminal Code), and offenses against morality (Articles 230 to 236 of the Criminal Code). The level of hazard and extent of harm of various offenses, though listed in the same chapter of the Criminal Code, are different. Some offenses even have no direct correlation with the safety of taxi passengers (such as the offense of unlawful occupation of

another's real property under Article 320, Paragraph 2, stealing from a payment machine under Article 339-1, and illegal searching under Article 307 of the Criminal Code). Moreover, the legislative records as well as the statistics and research the authorities concerned have submitted so far are insufficient to infer that all the people with criminal records of the offenses listed in Disputed Provision A, within a specific period of time after committing the offenses, will take advantage of business opportunity to commit said offenses again and therefore constitute substantial risk to passengers' safety.

[11] Furthermore, even if a taxi driver commits any of the said offenses and is sentenced to imprisonment for sixty days or more, the court would possibly declare short-term imprisonment only for a short term or probation after taking into account the offender's intent and post-crime attitude as well as circumstances of the crime. It is questionable whether the taxi drivers sentenced to imprisonment for a short term or granted probation all pose a substantial risk to passengers' safety and should all be disqualified. Disputed Provision A has gone beyond what is necessary in restricting the taxi drivers' right to work to the extent that it suspends and revokes a taxi driver's registration simply because he/she commits a disqualifying offense and is sentenced to imprisonment for no less than sixty days, regardless of whether the committed crime poses any substantial risk to passengers' safety.

[12] In sum, the clauses of suspension and revocation of taxi driver registration of Disputed Provision A are inconsistent with the proportionality principle under Article 23 of the Constitution and incompatible with the spirit of the right to property as guaranteed under Article 15 of the Constitution. The authorities concerned shall amend Disputed Provision A as appropriate in accordance with the ruling of this Interpretation within two years from the date of announcement of this Interpretation. If the authorities concerned fail to complete the amendment within the said two years, the clauses of suspension and revocation of taxi driver

registration of Disputed Provision A shall become null and void.

[13] II. The constitutionality of revoking driver's licenses under Disputed Provision A, applied in conjunction with Article 67, Paragraph 2 and Article 68 of the Statute

[14] According to Article 2 of the Measures Governing Taxi Driver Registration, a person who holds the occupation of taxi driver should apply to the police office of the city or county government where he/she is going to run the business for taxi driver registration. He/she is not allowed to run the business until he/she receives the registration certificate and its copy. Hence, revoking [an offender's] taxi driver registration and prohibiting him/her from holding the occupation of taxi driver is sufficient in achieving the legislative purpose of protecting passengers' safety. The clause of revoking the driver's license in Disputed Provision A not only restricts the right to work, but further deprives the people's freedom of driving cars in general. Such restriction obviously goes beyond what is necessary to achieve the purpose. As such, it is not compatible with the proportionality principle as required by Article 23 of the Constitution and violates the people's right to work as guaranteed by Article 15 and the people's general freedom of action as guaranteed by Article 22 of the Constitution. It shall be null and void from the date of announcement of this Interpretation. It follows that the authorities concerned shall no longer apply Article 68, Paragraph 1 (originally Article 68 before the amendment on May 5, 2000) of the Statue, which provides, "A person's driver licenses shall all be revoked for his/her violation of any provision of the Statute or the Regulations for Road Traffic Management," to revoke all the other driver's licenses of a taxi driver on the grounds that he/she breached Disputed Provision A.

[15] Moreover, Article 67, Paragraph 2 of the Statute, which provides, "A person ... whose driver's license has been revoked under ... Article 37, Paragraph 3 ... shall be prohibited from re-applying for a new driver's license within three

years after revocation," (hereinafter "Disputed Provision B") shall become null and void accordingly, since we have declared the driver's license revocation clause of Disputed Provision A to be null and void.

[16] Those taxi drivers whose registrations were revoked pursuant to Disputed Provision A before the date of announcement of this Interpretation may still keep their professional driver's licenses even before the authorities concerned amend Disputed Provision A in accordance with the ruling of this Interpretation. For those whose driver's licenses were revoked pursuant to Disputed Provision A before the date of announcement of this Interpretation, they are allowed to re-apply for professional driver's licenses immediately. According to Article 3 of the Measures Governing Taxi Driver Registration, which states, "A person with a professional driver's license may apply for taxi driver registration, provided that he/she is not prohibited from doing so according to Article 36, Paragraph 4 or Article 37, Paragraph 1 of the Statute," the above-mentioned two groups of drivers would be allowed to re-apply for taxi driver registration with their original or newly-issued professional driver's licenses. Nevertheless, [allowing them to re-apply immediately] would be in conflict with the three-year disqualification period as provided for in Disputed Provision B. Therefore, in the light of the purpose of the disqualification provision, those taxi drivers whose registrations were already revoked are not allowed to re-apply for registration within three years [from the date of revocation] before the competent authorities amend the laws as appropriate.

[17] III. Denied petitions

[18] As to the petitioner Jung-Yao LI's petition for uniform interpretation, this part of petition does not involve any difference in the application of the same statute or regulation by different judicial bodies (such as the Supreme Court and the Supreme Administrative Court). We find this part of the petition not compatible with Article 7, Paragraph 1, Subparagraph 2 of the Constitutional

Procedure Act and dismiss it in accordance with Paragraph 3 of the same Article.

[19] The petitioner Hua-Tsung HSU also challenges the constitutionality of the Guidelines for Processing Residence or Business Office Addresses of Vehicle Registration and Driver's Licenses on the Computer System of Road Inspection, which were applied by the Taiwan Taipei High Administrative Court Orders 103-Jou-Kang-3 (2014) and 103-Jou-Kang-Tsai-3 (2015). He claims that a person, though punished by an administrative disposition, has no way to know the content of the administrative disposition and argue against it because the related documents were sent to his registered household address rather than his domicile address. [He claims that] this is an infringement on his constitutional right to judicial remedy. This part of the petition fails to elaborate how the said Guidelines contradict the Constitution and is therefore not compatible with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. We also dismiss this part of the petition in accordance with Paragraph 3 of the same Article.

Background Note by the Translator

This is the second case in which the Constitutional Court ruled on the constitutionality of disqualifying taxi drivers with criminal records, the first being J.Y. Interpretation No. 584 made in 2004. This Interpretation is about temporary disqualification while J.Y. Interpretation No. 584 concerns permanent disqualification. Becoming a taxi driver in Taiwan requires one to hold a professional driver's license and taxi driver registration. According to the Statute for Road Traffic Management and Punishment (hereinafter "Statute"), if a taxi driver is convicted of a disqualifying offense with a certain accompanying sentence, his/her taxi driver registration shall be revoked. In addition, his/her professional driver's license will also be revoked. It follows that all of his/her other driver's licenses will be revoked, including the ones to drive a non-commercial passenger car and to drive a scooter. Several petitioners petitioned

the Constitutional Court to review the relevant provisions of the Statute regarding temporary disqualification and revocation of driver's licenses. The Constitutional Court consolidated the petitions and rendered this Interpretation.

The Constitutional Court upheld the constitutionality of the permanent disqualification in J.Y. Interpretation No. 584. Applying the same standard of review (intermediate scrutiny) in this Interpretation, the Constitutional Court confirmed that the temporary disqualification provision served the important public interest of protecting passengers' safety, but held that the restrictive means were not substantially related to the said interest because not all the disqualifying offenses and offenders posed the same substantial risks to passengers' safety. This new Interpretation may invite future petitioners to challenge J.Y. Interpretation No. 584.

J.Y. Interpretation No. 736 (March 18, 2016)*

Public School Teachers' Right to Judicial Remedy Against Infringements by Schools Case

Issue

Is Article 33 of the Teachers Act unconstitutional? Does a teacher have the right to bring an administrative suit against his/her school's specific administrative actions?

Holding

Based on the constitutional principle that where there is a right, there is a remedy, a teacher who finds his/her right or legal interest has been infringed upon by a specific administrative action of his/her school is entitled to file a lawsuit in court either pursuant to the Administrative Court Procedure Act or the Code of Civil Procedure. Article 33 of the Teachers Act reads:

> If a teacher is unwilling to file an administrative complaint, or is not satisfied with the outcome of an administrative complaint and a review of administrative complaint, he/she may, based on the nature of the case, file a lawsuit according to law or seek remedy in accordance with the Administrative Appeal Act, the Administrative Court Procedure Act, or other laws protecting the rights of teachers.

This Article merely prescribes the remedial procedures when a teacher finds his/her right or legal interest has been infringed upon. It does not restrict the

* Translation and Note by Ed Ming-Hui HUANG

right of a public school teacher to initiate an administrative suit and thus does not violate the protection of the people's right to judicial remedy under Article 16 of the Constitution.

Reasoning

[1] Article 16 of the Constitution guaranteeing people the right to judicial remedy means that a person shall have the right to judicial remedy when his/her right or legal interest has been infringed upon. Based on the constitutional principle that where there is a right, there is a remedy, when a person's right or legal interest has been infringed upon, the State shall provide such person an opportunity to institute a court proceeding, to request a fair trial in accordance with the due process of law, and to obtain timely and effective remedies. Restricting the right to remedy simply on the basis of status or occupation is constitutionally impermissible (*see* J.Y. Interpretations Nos. 430 and 653).

[2] Article 33 of the Teachers Act reads:

> If a teacher is unwilling to file an administrative complaint, or is not satisfied with the outcome of an administrative complaint and a review of administrative complaint, he/she may, based on the nature of the case, file a lawsuit according to law or seek remedy in accordance with the Administrative Appeal Act, the Administrative Court Procedure Act, or other laws protecting the rights of teachers.

This Article merely prescribes the remedial procedures when a teacher finds his/her right or legal interest has been infringed upon. It does not restrict the right of a public school teacher to initiate an administrative suit and thus does not violate the protection of the people's right to judicial remedy under Article 16 of the Constitution. A teacher who finds his/her right or legal interest has

been infringed upon by a specific administrative action of his/her school (such as citation of absence without valid reasons, docking of pay, no pay raise after annual performance review, teaching evaluation, etc.) is entitled to file a lawsuit in court either pursuant to the Administrative Court Procedure Act or the Code of Civil Procedure, in the same manner as ordinary people. Thus the constitutional principle of "where there is a right, there is a remedy" will be fulfilled. It goes without saying that the court reviewing such cases should, to an adequate extent, defer to the judgment made by the school based upon its expertise and familiarity with the facts (*see* J.Y. Interpretations Nos. 382 and 684).

[3] One of the petitioners also petitions for overturning or supplementing J.Y. Interpretation No.382, which dealt with the issue of the remedy for students who are subject to restrictive actions taken by a school. The Supreme Administrative Court Judgment 100-Pan-1127 (2011) quoted J.Y. Interpretation No. 382 simply for clarifying the legal status of a public school, an institution established by governments at various levels according to law to carry out educational functions and possessing the status of an administrative agency. It did not apply the said Interpretation to decide whether public school teachers can sue against specific actions by their schools. Thus, J.Y. Interpretation No. 382 may not be challenged in this petition. The petitioner also alleges that Article 2, Paragraph 3, Subparagraphs 3 and 6 of the Guidelines for Evaluating Teachers of National Cheng Kung University are in conflict with J.Y. Interpretation No. 432 because the phrases "outstanding contribution" and "specific and distinguished (achievement)" of the qualifications for exemption from merit evaluation are void for vagueness. In addition, a professional judgment made by the department's faculty evaluation committee may be overturned, as its evaluation must be reviewed by the faculty evaluation committees of each college and the University. Such review procedure is inconsistent with the protection of

academic freedom and the ruling of J.Y. Interpretation No. 462. We find this part of the petition has failed to elaborate how the said Guidelines and procedure contradict the Constitution. Therefore, these two parts of the petition were not duly submitted under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and are dismissed in accordance with Paragraph 3 of the same Article.

Background Note by the Translator

The petitioner Man-Ting TSAI is a teacher at Taoyuan Municipal Tsaota Junior High School. In taking leave, he did not comply with the Regulations for Leave-Taking of Teachers, so the school had him registered as absent without valid reasons, docked his pay, and placed him in the same pay grade at the annual performance review. The petitioner filed an administrative complaint and a review of administrative complaint against the three actions, and both the complaint and the review of complaint were denied in succession. Then, he filed an administrative suit, but the Taipei High Administrative Court, in its Order 99-Su-761 (2010), dismissed the case because it found the petitioner, as a public school teacher, lacked standing in suing against the three actions. He filed a motion to set aside the order made by the Taipei High Administrative Court and was again denied by the Supreme Administrative Court Order 100-Tsai-974 (2011). The petitioner then petitioned the Constitutional Court for constitutional interpretation, claiming that Article 33 of the Teachers Act, which had been applied in the aforementioned Supreme Administrative Court Order, was unconstitutional.

The petitioner Yao-Chuan TSAI is a professor at National Cheng Kung University. When his application for exemption from evaluation was rejected, he filed a complaint to the faculty evaluation committee of the University, but the complaint was deemed groundless. He then filed an administrative

complaint and then a review of administrative complaint pursuant to the Teachers Act, and both were denied in succession. Afterward, the petitioner initiated an administrative suit, but the Kaohsiung High Administrative Court, in its Judgment 98-Su-603 (2009), dismissed his claim because of lack of legal grounds. He filed an appeal to the court of last resort, but again was denied by the Supreme Administrative Court Judgment 100-Pan-1127 (2011). The petitioner then petitioned the Constitutional Court for constitutional interpretation, claiming that Article 2, Paragraph 3, Subparagraphs 3 and 6 of the Guidelines for Evaluating Teachers of National Cheng Kung University, which had been applied in the aforementioned Supreme Administrative Court Judgment, were unconstitutional. The petitioner also petitioned for overturning or supplementing J.Y. Interpretation No. 382.

In the past, students and the State were subject to the "special power relationship," a legal doctrine denying students the right to institute legal proceedings in court against the State. The relationship between public school teachers and the State was the same. J.Y. Interpretation No. 684 struck down the doctrine by stating that there is no need to place special restrictions on students' rights to judicial remedy. Therefore, a student whose right has been infringed upon is allowed to bring an administrative appeal and suit. And J.Y. Interpretation No. 736 kept on consolidating such a breakthrough with respect to the protection of public school teachers' basic rights. Following is an excerpt of the reasoning of J.Y. Interpretation No. 684:

> With regard to the issue of whether a student suffering from a restrictive action taken by his/her school may file an administrative appeal and administrative suit against that action, this Court has laid out in J Y. Interpretation No. 382 that it shall depend on the nature of the action. If the action is made pursuant to guidelines for student

registration or other rules for reward and punishment and is to dismiss a student or is of a similar effect so as to deprive a student of his/her status as a student, thus hindering his/her opportunities to receive education, the action is deemed to have a significant impact on his/her constitutional right to receive education. Hence, such action is an administrative disposition as referred to in the Administrative Appeal Act and the Administrative Court Procedure Act. Therefore, the student shall be entitled to file an administrative appeal and administrative suit against that action. As for actions aiming at maintaining school discipline and essential to achieving the purposes of education without infringing upon students' right to receive education (such as demerit or reprimand), students are not allowed to file any administrative appeal and administrative suit. They are only allowed to seek remedies through the internal complaint processes within the school. Nevertheless, based on the mandate under Article 16 of the Constitution that where there is a right, there is remedy, when an administrative disposition or other actions made by a university as public authority infringes upon a student's right to receive education or other constitutional rights, the impacted student is entitled to file an administrative appeal and administrative suit, even if the disposition or action is not to dismiss a student or of similar kind. We do not see a need to limit the students' right to file an administrative appeal and administrative suit in such cases. To this extent, the holding of J.Y. Interpretation No. 382 is hereby overturned.

[However,] in light of the principle of university autonomy, the competent authorities and courts which have jurisdiction over the administrative cases brought by university students against the actions

of a university should defer to the professional judgment of the university to an adequate extent (*see* J.Y. Interpretation No. 462).

J.Y. Interpretation No. 752 (July 28, 2017)*

A Defendant's Right to Appeal a Higher Court Guilty Decision Reversing a Lower Court Not-Guilty Decision Case

Issue

Are Article 376, Subparagraphs 1 and 2 of the Code of Criminal Procedure unconstitutional in forbidding certain cases from being appealed to a court of third instance?

Holding

[1] Article 376, Subparagraphs 1 and 2 of the Code of Criminal Procedure (hereinafter "CCP") provide:

> Once judged by a court of second instance, cases involving the following offenses are not appealable to a court of third instance: (1) offenses with a maximum punishment of imprisonment for no more than three years, short-term imprisonment for no more than sixty days, or fine only; (2) offenses of larceny under Articles 320 and 321 of the Criminal Code.

In cases where a defendant is found guilty of the non-appealable offenses by a court of first instance, and a court of second instance then rejects his/her appeal or enters a conviction after vacating the conviction [by the lower court], whether to allow the defendant to appeal to a court of third instance is within the discretion of the legislative department. It does not violate the right to judicial remedy under

* Translation and Note by Szu-Chen KUO

Article 16 of the Constitution that Article 376, Subparagraphs 1 and 2 of the CCP do not allow the defendant in such cases to appeal to a court of third instance. However, in cases where a defendant is found not guilty of the non-appealable offenses by a court of first instance, but a court of second instance vacates his/her acquittal and enters a conviction, the provisions fail to provide the defendant at least one opportunity to appeal and are thus in violation of the right to judicial remedy as guaranteed in Article 16 of the Constitution. The part of the provisions prohibiting such cases from being appealed to a court of third instance shall become null and void from the date of announcement of this Interpretation.

[2] As for the cases involving defendants who had their acquittals vacated and were convicted of the non-appealable offenses by a court of second instance, the defendants and persons who may appeal on behalf of the interests of the defendants may appeal according to law provided that these cases are still within the time period to appeal on the day this Interpretation is announced. The courts of second instance in such cases shall notify the defendants by court order that they may appeal to a court of third instance within ten days from the next day of being served the order. In regard to the cases where the defendants have already filed an appeal before the date of announcement of this Interpretation within the prescribed time period to appeal and the relevant courts have not rendered any decisions, the courts shall not reject the appeals on the basis of Article 376, Subparagraphs 1 and 2 of the CCP.

Reasoning

[1] The petitioner, Tsung-Ren CHANG (hereinafter "Petitioner CHANG"), was prosecuted for several offenses of larceny by the Taiwan Yilan District Prosecutors Office. He was found guilty on some charges and not guilty on the others in the Taiwan Yilan District Court Criminal Judgment 104-Yi-125 (2015). Petitioner CHANG and the prosecutor respectively appealed. The Taiwan High

Court, in its Criminal Judgment 104-Shang-Yi-2187 (2015), affirmed the guilty part of the judgment. As to the not-guilty part of the judgment, the Taiwan High Court set aside the acquittals on five counts and convicted on the five counts in accordance with Article 321 of the Criminal Code. Petitioner CHANG appealed the judgment of conviction rendered by the court of second instance. However, the Taiwan High Court, in its Criminal Order 104-Shang-Yi-2187 (2015) (hereinafter "Petitioner CHANG's final decision"), ruled that according to Article 376, Subparagraph 2 of the Code of Criminal Procedure (hereinafter "CCP"), Petitioner CHANG's convictions of larceny under Article 321 of the Criminal Code were not appealable to a court of third instance, and the court therefore rejected his appeal. Petitioner CHANG petitioned this Court for interpretation. He argues that Article 376, Subparagraph 2 of the CCP, as applied to cases where a court of second instance affirms a conviction by a court of first instance or enters a conviction after vacating an acquittal made by a court of first instance, contravenes the equality principle under Article 7 and the proportionality principle under Article 23 of the Constitution. It therefore violates the right to liberty and security of person and the right to judicial remedy protected by the Constitution.

[2] The other petitioner, Yen-Hung CHEN (hereinafter "Petitioner CHEN"), was prosecuted for sexual harassment by the Kaohsiung District Prosecutors Office. The Taiwan Kaohsiung District Court, in its Criminal Judgment 98-Yi-1416 (2010), found him not guilty for insufficient evidence. Then, the prosecutor appealed; the Taiwan High Court Kaohsiung Branch Court, in its Criminal Judgment 99-Shang-Yi-476 (2010) (hereinafter "Petitioner CHEN's final decision"), vacated the acquittal by the court of first instance and convicted Petitioner CHEN of the offense under Article 25, Paragraph 1 of the Act on Prevention of Sexual Harassment. Since the potential punishment of Petitioner CHEN's conviction of the offense under Article 25, Paragraph 1 of the Act on

Prevention of Sexual Harassment was "imprisonment for no more than three years, short-term imprisonment for no more than sixty days, or fine only," his conviction, pursuant to Article 376, Subparagraph 1 of the CCP, was not appealable to a court of third instance and thus was final. Petitioner CHEN petitioned this Court for constitutional interpretation. He claims that Article 376, Subparagraph 1 of the CCP is in violation of the right to equality guaranteed by Article 7 and the right to judicial remedy guaranteed by Article 16 of the Constitution.

[3] Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act stipulates that an individual whose constitutional rights are unlawfully violated may, after exhaustion of ordinary judicial remedies, petition this Court to review the constitutionality of the statutes or regulations applied by a final decision of a court of last resort. Article 376, Subparagraphs 1 and 2 of the CCP provide:

> Once judged by a court of second instance, cases involving the following offenses are not appealable to a court of third instance: (1) offenses with a maximum punishment of imprisonment for no more than three years, short-term imprisonment for no more than sixty days, or fine only; (2) offenses of larceny under Articles 320 and 321 of the Criminal Code.

In Petitioner CHANG's case, the court in Petitioner CHANG's final decision rejected his appeal pursuant to Article 376, Subparagraph 2 of the CCP. Hence, his petition for reviewing the constitutionality of Article 376, Subparagraph 2 of the CCP satisfied the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and was granted review. As for Petitioner CHEN's case, the court of Petitioner CHEN's final decision did not refer to

Article 376, Subparagraph 1 of the CCP in the text of the final decision. Nevertheless, Petitioner CHEN's final decision was subject to Article 376, Subparagraph 1 of the CCP, which prohibited Petitioner CHEN from appealing to a court of third instance. Thus, Article 376, Subparagraph 1 of the CCP shall be deemed to have been applied in Petitioner CHANG's final decision beyond doubt. Therefore, this provision is to be considered a statute applied in a final decision by a court of last resort, as provided for in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. Had Petitioner CHEN appealed to the court of third instance, his appeal would certainly have been rejected pursuant to Article 376, Subparagraph 1 of the CCP. We do not find that Petitioner CHEN, in order to satisfy the requirements of the Constitutional Court Procedure Act, had to file an appeal to obtain a court order which directly applied Article 376, Subparagraph 1 of the CCP. In sum, the court of second instance vacated Petitioner CHEN's acquittal and entered a conviction, but he was prohibited from appealing to the court of third instance because of Article 376, Subparagraph 1 of the CCP. He then petitioned this Court, arguing Article 376, Subparagraph 1 of the CCP violated Article 16 of the Constitution. We considered this a valid petition, satisfying the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and granted review accordingly.

[4] While the petitioners challenged the two different Subparagraphs of Article 376 of the CCP separately, the two Subparagraphs, namely Article 376, Subparagraphs 1 and 2 of the CCP (hereinafter "the disputed provisions") presented the same issue of constitutionality. We thus consolidated the two petitions and made this Interpretation on the basis of the following grounds:

[5] Article 16 of the Constitution guaranteeing people the right to judicial remedy means that a person shall have the right to judicial remedy when his/her right or legal interest has been infringed upon (*see* J.Y. Interpretation No. 418).

Based on the constitutional principle that where there is a right, there is a remedy, when a person's right or legal interest has been infringed upon, the State shall provide such person an opportunity to institute a court proceeding, to request a fair trial in accordance with the due process of law, and to obtain timely and effective remedy. This is the core of the right to judicial remedy as guaranteed by Article 16 of the Constitution (*see* J.Y. Interpretations Nos. 396, 574, and 653). A person who is convicted [on a charge] for the first time may also suffer disadvantages to his/her right to liberty and security of person and right to property. To effectively protect the people's right to judicial remedy and to prevent mistakes or wrongful convictions, a person who is convicted [on a charge] for the first time, based on the spirit of the aforementioned J.Y. Interpretations, shall be provided with at least one opportunity to appeal. [Availability of appellate remedy in such cases] is also the core of the right to judicial remedy as guaranteed by Article 16 of the Constitution. Aside from this, it is within the discretion of the legislature to decide whether and how, by statute and via reasonable means, to restrict the trial instances, proceedings, and other relevant requirements of judicial remedies. [In exercising its discretion,] the legislature shall take into account such factors as the types and the nature of cases, policy purposes and functions of judicial remedy, and effective utilization of judicial resources (*see* J.Y. Interpretations Nos. 396, 442, 512, 574, 639, and 665).

[6] The disputed provisions, which restrict the people from appealing to a court of third instance, are concerned with the people's right to judicial remedy guaranteed by Article 16 of the Constitution. The purpose of the disputed provisions is to reduce the workload on judges, so that judges can focus on those more important and complex cases and the judicial system may function properly (*see* Legislative Yuan Bill-Related Documents Yuan-Tzung-161-Government-4969 of June 22, 1994). Therefore, the legislative body, after taking into account such factors as types and the nature of cases, policy purposes and functions of

judicial remedy, and effective utilization of judicial resources, exercised its discretion and enacted the disputed provisions. In cases where a defendant is found guilty of the non-appealable offenses listed in the disputed provisions (hereinafter "non-appealable offenses") by a court of first instance and a court of second instance then rejects his appeal or enters a conviction after vacating the conviction [by the lower court], it is constitutional that the disputed provisions do not allow the defendant to appeal to a court of third instance. Since the defendant already has had the opportunity to appeal the conviction by a court of first instance, we should defer to the legislative department as regards whether to allow the defendant to appeal to a court of third instance. We conclude that in such cases, the disputed provisions do not violate the spirit of the people's right to judicial remedy as guaranteed in Article 16 of the Constitution.

[7] Nonetheless, according to the disputed provisions, when a defendant is found not guilty of the non-appealable offenses by a court of first instance, but a court of second instance vacates his/her acquittal and enters a conviction, he/she is also prohibited from appealing to a court of third instance. In such cases, the defendant is found guilty [on a charge] by a court for the first time, with the conviction becoming final upon the rendition of the judgment. The defendant cannot request that a higher court review his case through ordinary criminal proceedings. While the defendant in such cases may still seek relief by filing a motion to a court for retrial or by filing a motion for extraordinary appeal to the Prosecutor General, the requirements of retrial as provided from Articles 420 through Article 440 and of extraordinary appeal as provided from Article 441 through Article 448 of the CCP are rather strict. Courts and the Prosecutor General also apply these requirements in a strict manner. That is, for a defendant who is found not guilty by a court of first instance and then guilty by a court of second instance, these special proceedings cannot replace ordinary appellate procedures. In cases where a court of second instance vacates the acquittal by a

court of first instance and enters a conviction, providing the defendant with appropriate opportunity to appeal falls into the core domain safeguarded by the right to judicial remedy. It is not an issue of trial instance which the legislative department may decide how to design or restrict after taking into account the above-mentioned factors. The disputed provisions, which prohibit the defendant who has his/her acquittal vacated and is convicted of the non-appealable offenses by a court of second instance from appealing to a court of third instance, fail to provide the defendant who is convicted [on a charge] by a court for the first time with at least one opportunity to appeal, so as to prevent mistakes or wrongful convictions. The part of the disputed provisions which prohibits such cases from being appealed to a court of third instance contradicts the spirit of Article 16 of the Constitution which guarantees the people's right to judicial remedy and shall become null and void from the date of announcement of this Interpretation.

[8] As for the cases involving defendants who had their acquittals vacated and were convicted of the non-appealable offenses by a court of second instance, the defendants and persons who may appeal on behalf of the interests of the defendants (*see* Article 344, Paragraph 4 as well as Articles 345 and 346 of the CCP) may appeal according to law provided that these cases are still within the time period to appeal (with the time for document delivery prescribed by law properly added) on the day this Interpretation is announced. The courts of second instance in such cases shall notify the defendants by court order that they may appeal to a court of third instance within ten days from the next day of being served the order. In regard to the cases where the defendants have already filed an appeal before the date of announcement of this Interpretation within the prescribed time period to appeal and the relevant courts have not rendered any decisions, the courts shall not reject the appeals on the basis of the disputed provisions.

[9] Petitioner CHANG made an appeal within the appeal period, and the court

of second instance rejected the appeal in Petitioner CHANG's final decision. This procedural decision shall not be considered final on the merits. The court of second instance in Petitioner CHANG's case shall submit the appeal regarding its vacating the acquittal and subsequent conviction to the court of third instance for review. Petitioner CHEN may, within ten days of being served this Interpretation, appeal his conviction to the court of third instance in accordance with the spirit of this Interpretation and relevant provisions of appeal as provided in the CCP.

Background Note by the Translator

Petitioner CHANG was found guilty on some charges and not guilty on others by the district court. Petitioner CHANG and the prosecutor respectively appealed. The appellate court affirmed the guilty part of judgment and vacated five non-guilty counts and entered convictions on the five counts. Petitioner CHANG further appealed, but his appeal was rejected pursuant to Article 376, Subparagraph 2 of the Code of Criminal Procedure (hereinafter "CCP"). He then petitioned the Constitutional Court and challenged the constitutionality of the said provision.

Petitioner CHEN was charged with sexual harassment, and the district court found him not guilty. Then, the prosecutor appealed; the appellate court vacated the acquittal and entered a conviction. His conviction was not appealable to a court of third instance according to Article 376, Subparagraph 1 of the CCP and thus was final. Petitioner CHEN brought his case to the Constitutional Court and challenged the constitutionality of the said provision.

While the petitioners challenged the two different Subparagraphs of Article 376 of the CCP separately, the Constitutional Court consolidated the two petitions on the grounds that these two Subparagraphs presented the same issue of constitutionality.

J.Y. Interpretation No. 603 (September 28, 2005)*

Mandatory Fingerprinting for Identity Cards Case

Issue

Do Article 8, Paragraphs 2 and 3 of the Household Registration Act, which require applicants for new national identity cards to be fingerprinted, violate the Constitution?

Holding

[1] The core values of a free and constitutional democracy are to protect human dignity and respect the free development of personality. Although the right to privacy is not among those rights enumerated in the Constitution, it should nonetheless be protected under Article 22 of the Constitution in order to protect human dignity, individuality, and the integrity of personality, as well as to protect the private sphere of personal life from intrusion and self-determination of personal information (*see* J.Y. Interpretation No. 585). Self-determination of personal information, one aspect of information privacy, guarantees that individuals have a right to determine whether or not, to what extent, at what time, in what manner, and to whom to disclose their personal information. It also affords people a right to know and have control over the use of their personal information, as well as a right to rectify any errors contained therein. The constitutional right to information privacy, however, is not absolute. The State may, while complying with Article 23 of the Constitution, impose appropriate restrictions by clear and unambiguous statutes.

[2] Fingerprints are important personal information; a person's self-

* Translation and Note by Ting-Chi LIU

determination of his or her fingerprint information is, therefore, protected by the right to information privacy. Furthermore, whether to issue national identity cards or not will directly affect the exercise of people's basic rights. Article 8, Paragraph 2 of the Household Registration Act (hereinafter "Act") states that when applying for a national identity card pursuant to the preceding Paragraph, an applicant shall be fingerprinted for record keeping, provided that no applicant shall be fingerprinted until he or she reaches the age of fourteen. Paragraph 3 of the same Article further states that no national identity card will be issued unless the applicant is fingerprinted in accordance with the preceding Paragraph. Anyone who fails to be fingerprinted accordingly will be denied the national identity card; these provisions obviously mandate fingerprinting for record keeping as a condition of the issuance of national identity cards. However, the Act fails to articulate the purpose of such a requirement, which, in itself, is inconsistent with the constitutional protection of the right to information privacy. Even assuming that the mandate may serve the purposes of anti-counterfeiting, preventing false application or fraudulent use of identity cards, and making an identification of unconscious patients on the road, persons with dementia who get lost and unidentified human remains, the benefits are clearly outweighed by the costs, and the means goes beyond what is necessary, which does not conform to the principle of proportionality. Therefore, Article 8, Paragraphs 2 and 3 of the Act, which require the applicants to be fingerprinted for record keeping as a condition of the issuance of national identity cards are repugnant to Articles 22 and 23 of the Constitution. These provisions shall no longer be applicable from the date of announcement of this Interpretation. The replacement of national identity cards can proceed on the basis of the remaining provisions of the Act.

[3] Where there is a specific and important public interest and it is necessary for the State to engage in large-scale collection and storage of individuals' fingerprints in a database, the statute should explicitly specify the purpose of the

collection, and the collection should be substantially related to the important public interest. The use of fingerprint information other than for the specified purpose shall be explicitly prohibited by law. The competent authorities shall, in keeping with developments in contemporary technology, employ measures that ensure the accuracy and safety of fingerprint information, as well as take necessary organizational and procedural safeguards so as to conform with the right to information privacy protected by the Constitution.

Reasoning

[1] The petitioners, Legislator Ching-Te LAI and eighty-four other Members of the Legislative Yuan, in exercising their powers, considered that Article 8 of the Household Registration Act (hereinafter "Act"), promulgated in 1997, violated Articles 22 and 23 of the Constitution. They petitioned this Court for constitutional interpretation pursuant to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and also sought an injunction to enjoin the implementation of the said provisions pending the interpretation of this Court.

[2] In regard to the petition for temporary injunction, this Court rendered J.Y. Interpretation No. 599, which temporarily enjoined the application of Article 8, Paragraphs 2 and 3 of the Act and denied the petition with regard to Paragraph 1 of the same Article. In regard to the petition for constitutional interpretation, this Court, in accordance with Article 13, Paragraph 1 of the Constitutional Court Procedure Act, invited representatives of the petitioners, authority concerned, scholars and civic organizations to present briefs in the Judicial Yuan on June 30 and July 1, 2005. This Court then held oral arguments on July 27 and 28 in the same year. The representatives of, and counsels for, the petitioners as well as the authority concerned, the Executive Yuan, were notified to present their cases. In addition, expert witnesses were invited to give their opinions. It should be noted first that the petitioners narrowed the scope of the constitutional review to Article

8, Paragraphs 2 and 3 of the Act.

[3] The petitioners' arguments are summarized as follows. (1) The petition conforms to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and should be admissible for review. (2) Article 8, Paragraph 2 of the Act, which mandates that applicants for national identity cards who are above the age of fourteen shall be fingerprinted, is repugnant to the Constitution on the grounds that it infringes upon human dignity, liberty and security of person, the right to privacy, the right to personality, and self-determination of personal information; in addition, it does not comport with the proportionality principle, the *Gesetzesvorbehalt* principle, the void-for-vagueness doctrine, and due process of law: (a) Fingerprint information is part of an individual's abstract personality within the scope of the right to personality. Moreover, because this information can be used to verify a person's identity, its disclosure and use should be determined by that person him or herself, and should be protected by the constitutional right to privacy and self-determination of personal information. The compulsory fingerprinting and the creation of a fingerprint database specified in Article 8, Paragraph 2 of the Act not only intrude on the private sphere where an individual autonomously develops his or her personality, but also infringe upon the right to personality by restricting the individual's right to self-determination of personal information and right to privacy. (b) Article 8, Paragraph 2 of the Act requires every national above the age of fourteen to be fingerprinted, but it does not specify the purpose of collection of this information, which is against the principle that a law restricting basic rights should explicitly state its purpose. The purpose claimed *post hoc*, to improve individual identification for household registration, is neither substantial nor important and is overbroad. Further, mandatory collection and storage of fingerprint information cannot effectively achieve the purpose of "individual identification," "prevention of identity theft," or other purposes claimed by the Ministry of the Interior. Even assuming it can

achieve those purposes, it is not the least restrictive means, and the costs are not proportionate to the benefits, which is a violation of the principle of proportionality. (c) Mandatory collection and storage of fingerprint information is a state action which substantially affects individuals' rights, and therefore, it should be specifically prescribed by statute. The purpose of the current Article 8 of the Act mandating collection and storage of fingerprint information is vague. In addition, Paragraph 2 of the Article is only applicable to first-time applicants, who reach fourteen years of age, for national identity cards. If Article 8 of the Act is applied to all applicants for new identification cards above fourteen years of age, it would lack legal authorization. (d) Mandatory collection of fingerprint information is in essence a compulsory measure which should conform to Article 8 of the Constitution as well as relevant criminal procedure statutes. However, the current provision, which allows administration to collect individuals' fingerprints without a court order, violates due process of law. (e) In cases where other countries have examples of integrating fingerprints with certificates, the certificates are for specific and limited purposes, such as identity or qualification verifications. Even those countries that collect and use their nationals' biometric information usually take a position against the creation of a centralized biometric database. Therefore, currently, the use of a biometric database is at most a practice under development, not a universal or inevitable trend in the international community. (3) Article 8, Paragraph 3 of the Act violates the principle of prohibition on inappropriate connection, the proportionality principle, as well as equal protection, and therefore is unconstitutional: (a) Article 8, Paragraph 3 of the Act makes fingerprinting a condition of issuance of national identity cards. However, there is no substantial relationship between national identity cards and fingerprinting. Therefore, denying national identity cards to those who refuse to be fingerprinted is repugnant to the principle of prohibition on inappropriate connection. (b) Other than refusal to issue national identity cards, there are other less restrictive means to achieve mandatory collection of individuals' fingerprints.

The public interests pursued by the current "no fingerprinting, no national identity card" scheme are not proportionate to the costs suffered by affected individuals. (c) This practice of denying the issuance of identification documents to certain citizens for unconstitutional reasons also violates the constitutional principle of equal protection.

[4] The arguments of the authority concerned, the Executive Yuan, are summarized as follows. (1) When the Legislative Yuan, in exercising it powers, has doubts about the meaning of a constitutional provision at issue, or has doubts about the constitutionality of a statute at issue, it may petition the Constitutional Court for interpretation. This petition, however, falls into neither of the above scenarios. The petition fails to meet the requirements for constitutional interpretation and therefore shall be dismissed. The Act was promulgated in 1997. Its implementation is the duty of the executive branch, not that of individual Members of the Legislative Yuan, nor is it a statute that is applied by Members of the Legislative Yuan. The petition is therefore invalid. (2) Article 8, Paragraph 2 of the Act does not run afoul of the principles of proportionality or *Gesetzesvorbehalt* or the void-for-vagueness doctrine: (a) Although fingerprint information is personal information protected by the rights to personality, privacy, and self-determination of personal information, the State may collect and use this information if it is authorized by a statute which serves an important public interest and is consistent with the principle of proportionality. (b) The legislative purpose of Article 8 of the Act is to create fingerprint information for every national, which may be used to "confirm an individual's identity," "make an identification of unconscious patients on the road, elderly persons with dementia who get lost, and unidentified human remains," and "prevent fraudulent use of the national identity card." These are explicit and important public interests. (c) Fingerprints are unique to an individual and remain unchanged during his or her lifetime. Therefore, fingerprint identification is an effective way to identify a

person, which is an appropriate means to ensure the accuracy of national identity cards. Moreover, fingerprint identification is an economical, reliable, and safe method of identification, and in comparison with other biometric identification methods, it is less intrusive. The statute at issue serves the important public interests of protecting vulnerable persons and maintaining social order, which makes its impact proportionate to the damage that it may cause. (d) Article 8 of the Act explicitly mandates fingerprinting as a condition of applying for national identity cards; this requirement is therefore not inconsistent with the *Gesetzesvorbehalt* principle. The meaning of this provision is comprehensible. Mandatory fingerprinting is also foreseeable for those who are subject to the regulation. Such meaning of this provision can also be ascertained, *post hoc,* by the judiciary. The dissemination, use, and management of fingerprint information are also subject to the regulation of the Protection of Computer-Processed Personal Information Act, and thus, it is not vague or ambiguous. (e) Public opinion is in favor of collecting fingerprints. According to public-opinion polls conducted by the Research, Development, and Evaluation Commission of the Executive Yuan, Opinion Poll Center of TVBS, and the Ministry of the Interior in 2001, 2002, and 2003 respectively, about 80 percent of citizens approved of being fingerprinted when applying for national identity cards. Thus, the requirement is supported by the majority of people. In the international community, some countries have mandatory fingerprinting for all persons, and others only for foreign nationals. Regardless of the differences in laws, a common trend is to collect and store individuals' biometric information in order to ascertain their identity and enhance the accuracy of identity verification. By the end of 2006, more than forty member states of the International Civil Aviation Organization will have passports embedded with electronic chips, which can store an individual's biometric information, such as fingerprints, palm prints, facial characteristics, or iris information for identification purposes. More and more countries and their people are willing to accept the collection and storage of

biometric information for identification, which is obviously an international trend. (3) Article 8, Paragraph 3 of the Act is not repugnant to the Constitution: (a) Fingerprinting is a prerequisite for national identification. Fingerprint information in conjunction with other information shown on the identification card form the basis for identifying a person. If an individual meets all the requirements prescribed by law, the State should issue him/her a national identity card. However, if the basis of identification is lacking and the requirement prescribed by law is not met, the State should not issue the national identity card as an appropriate means to enforce the mandatory fingerprinting requirement. It is the consequential effect of not abiding by the procedural requirement, not a form of punishment. The accompanying inconvenience that may be caused to a person's daily life or exercising his/her rights is the result of a person's choice not to fulfill the legal obligation, which should not be regarded as an infringement on individual rights by the competent authorities. Moreover, fingerprint information is one type of personal information governed by the Protection of Computer-Processed Personal Information Act, and its processing and use are regulated by relevant statutes, which do not run afoul of the principle of proportionality. (b) The national identity card is an important proof of personal identity. When issuing the national identity card, the State should confirm that the identity of the applicant is indeed the person identified on that particular card. Because fingerprints cannot be altered, they can assist in identifying a person and ensure the accuracy of identification. Therefore, mandatory fingerprinting is rationally related to the national identity card.

[5] Having considered the arguments and opinions made by the petitioners, the authorities concerned, and expert witnesses, this Court rendered this Interpretation. The reasons are as follows:

[6] Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act states that one-third or more of the incumbent Legislators may

petition this Court for constitutional interpretation, if they, in exercising their powers, have doubts about the meaning of a constitutional provision at issue or have doubts about the constitutionality of a statute at issue. Therefore, a petition filed [by Legislators] under Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act is considered as satisfying the requirement thereof in either of the following conditions: right after exercising their power to enact a new law, one-third or more of the Legislators consider unconstitutional this new statute passed by the majority of their fellow Legislators and promulgated by the President; or one-third or more of the Legislators consider unconstitutional an existing statute which remains unchanged after a failed attempt to amend it.

[7] Paragraphs 2 and 3 were added to Article 8 of Act and promulgated on May 21, 1997. In 2002 and 2005, the Executive Yuan had twice submitted bills to amend this Article to the Legislative Yuan, suggesting deletion of Paragraphs 2 and 3, on the grounds that these Paragraphs might infringe on an individual's basic rights. At the First Session of the Sixth Legislative Yuan, the Procedure Committee proposed to the floor that the bill should be sent to both the Committee on the Interior Affairs and Ethnic Groups as well as the Finance Committee for review. Accepting the proposal from the Procedure Committee, a resolution was passed at the First Session, the Ninth Meeting of the Sixth Legislative Yuan on April 22, 2005, and the bill was sent to the two committees for review. However, at the Tenth Meeting (May 3, 2005), the Legislative Yuan Caucus of the Kuomintang (the Chinese Nationalist Party) contended that the bill to amend Article 8 was already reviewed by the Fifth Legislative Yuan, and at that time, the Legislators unanimously resolved that this provision should not be amended. In addition, no consensus was reached at the caucus negotiations. In order to avoid further dispute and prevent the delay of the implementation of issuing new identity cards on July 1, for the sake of not squandering public funds and

jeopardizing social order, the Legislative Yuan Caucus of the Kuomintang submitted a motion for reconsideration in accordance with the Rules of Procedures for the Legislative Yuan. The floor voted on the motion and passed a resolution that it should be "considered at a later time." At the Fourteenth Meeting [of the same Session] (May 31, 2005), the Legislative Yuan Caucus of the Kuomintang again submitted a motion for reconsideration, and the outcome was the same as on the previous occasion, to consider it later. Ching-Te LAI and eighty-four other Members of the Legislative Yuan, who, in exercising their powers, had doubts about the constitutionality of Article 8, Paragraphs 2 and 3 of the Act thus petitioned for constitutional interpretation. This Court noted that the bill to amend Article 8, Paragraphs 2 and 3 of the Act had been referred to the floor by the Procedure Committee. The floor had once made a resolution to send the bill to the Committee on the Interior Affairs and Ethnic Groups as well as the Finance Committee for review, and regarding the motions for reconsideration, had twice decided to "consider it at a later time." This is a case in which some Legislators, finding the effective statute passed by the Legislative Yuan unconstitutional, exercised their power to amend the statute but failed and then petitioned this Court to review the constitutionality of said statute. We considered this petition compatible with Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Interpretation Procedure Act and granted review.

[8] The core values of a free and constitutional democracy are to protect human dignity and respect the free development of personality. Although the right to privacy is not among those rights enumerated in the Constitution, it should nonetheless be protected under Article 22 of the Constitution in order to protect human dignity, individuality, and the integrity of personality, as well as to protect the private sphere of personal life from intrusion and self-determination of personal information (*see* J.Y. Interpretation No. 585). Self-determination of personal information, one aspect of information privacy, guarantees that

individuals have a right to determine whether or not, to what extent, at what time, in what manner, and to whom to disclose their personal information. It also affords people a right to know and have control over the use of their personal information, as well as a right to rectify any errors contained therein.

[9] Although the right to privacy has evolved to protect human dignity and respect the free development of personality, restrictions on it do not necessarily intrude on human dignity. The constitutional protection of an individual's information privacy is also not absolute. The State may mandatorily collect necessary personal information if it is explicitly authorized by a statute when it serves an important public interest and is consistent with the Article 23 of the Constitution. In considering whether the statute conforms to Article 23 of the Constitution, the public interest in the collection, use, and disclosure of personal information by the State should be balanced against the intrusion on information privacy suffered by an individual. In addition, different levels of scrutiny should be adopted in individual cases depending on whether the collected personal information is related to private and sensitive matters, or, although not related to private and sensitive matters, may be easily combined with other information to form a detailed personal dossier. In order to ensure an individual's subjectivity and integrity of personality as well as to protect an individual's right to information privacy, the State should ensure that the information legitimately obtained is properly used for the purposes of its collection and that informational security is maintained. Therefore, it is imperative for a statute to clearly specify the purpose for collection of information. This is the only way that individuals can know, *ex ante*, the purpose for the collection of their personal information and how the State plans to use it, in order to ascertain whether the competent authorities have indeed properly used their information in a way that is consistent with the purpose specified by law.

[10] Article 7, Paragraph 1, First Sentence of the Act states that in areas where

household registration is implemented, national identity cards and household certificates shall be printed and issued. Article 20, Paragraph 3, First Sentence of the Enforcement Rules of the Household Registration Act further states that an individual must carry his/her national identity card at all times. Based on these provisions, the issuance of the national identity card does not establish an individual's status as a citizen. The national identity card is merely one of several valid identification documents. However, many existing statutes and regulations require that the national identity card or a copy be presented when exercising one's rights or conducting various administrative procedures. Some examples are as follows: a voter must present his/her national identity card to receive a ballot (*see* Article 21 of Act of Election and Recall of Public Officials and Article 14 of the Act of Election and Recall of President and Vice President); a person must submit a copy of his/her national identity card to take part in the initiation of a referendum (*see* Article 10 of the Enforcement Rules of the Referendum Act); an applicant for a passport must present his/her national identity card and a copy (*see* Article 8 of the Enforcement Rules of the Passport Statute); a person who applies for labor retirement pension in accordance with the Labor Pension Act must submit a copy of his/her national identity card (*see* Article 37 of the Enforcement Rules of the Labor Pension Act); examinees for various state-administered examinations must present their national identity cards and admission passes in order to be admitted to the examination sites (*see* Article 3 of the Regulations on Examination Sites); an applicant for taxi driver registration should submit his/her national identity card (*see* Article 5 of the Measures Governing Taxi Driver Registration). In addition, it is also very common for the national identity card to be required as proof of one's identity in ordinary private activities, for example opening a bank account or being hired by a business. Therefore, the national identity card is an important identity document which helps our citizens conduct their personal and group activities. Whether they are issued identity cards directly affects the exercise of their basic rights. Article 8, Paragraph 2 states that when

applying for a national identity card pursuant to the preceding Paragraph, an applicant shall be fingerprinted for record keeping, provided that no applicant shall be fingerprinted until he or she reaches the age of fourteen. Paragraph 3 of the same Article further states that no national identity card will be issued unless the applicant is fingerprinted in accordance with the preceding Paragraph. Anyone who fails to be fingerprinted accordingly will be denied the national identity card; these provisions obviously mandate fingerprinting for record keeping as a condition of the issuance of national identity cards.

[11] Fingerprints are personal biometric data. Because they are unique to each individual and remain unchanged during a lifetime, once they are linked to an individual, they become one type of personal information which can verify a person's identity with a high degree of accuracy. In addition, traces of fingerprints are left when a person touches an object, and if they are compared with files stored in a database, fingerprints could become the key to open an individual's complete dossier. Because fingerprints have these characteristics, if the State, while verifying individuals' identities, collects their fingerprints for record keeping, this turns fingerprints into sensitive information which could be used for individual surveillance. Therefore, when the State engages in large-scale mandatory collection of individuals' fingerprint information, in order to conform to Articles 22 and 23 of the Constitution, this information collection should be explicitly prescribed by statute and use less intrusive means which are substantially related to an important public interest.

[12] The failure of the Act to explicitly specify the purpose of mandatory collection and storage of fingerprint information in itself violates the constitutional protection of an individual's information privacy. It is argued that, based on the legislative motivation and process of the amendment adding Paragraphs 2 and 3 to Article 8 of the Act, the purpose of mandatory collection of the fingerprint information of all citizens and storing it in a database is to help

prevent crime. Nevertheless, after the termination of the Period of National Mobilization for Suppression of the Communist Rebellion as well as the restoration of the separation of household administration and police administration (*see* J.Y. Interpretation No. 575), the purpose of the Act does not include the prevention of crime. Moreover, in oral arguments, the authority concerned, the Executive Yuan, denied that the purpose of obtaining the fingerprints of all citizens was to prevent crime, and therefore it cannot be the legislative purpose behind the statutory provisions at issue. Accepting, *arguendo*, the Executive Yuan's argument in oral arguments that the purposes of mandating the collection and storage of individuals' fingerprint information as provided in Article 8 of the Act are to enhance the anti-counterfeiting functions of the new identity cards, prevent false application or fraudulent use of identity cards, and to make an identification of unconscious patients on the road, persons with dementia who get lost, persons with mental disabilities, as well as unidentified human remains, the conditions for the issuance of the national identity card with respect to the mandatory collection and storage of all citizens' fingerprints still do not comport with the principle of proportionality under Article 23 of the Constitution, even though these are important public interests. Firstly, regarding the purposes of "enhancing the anti-counterfeiting functions of the identity cards" and "preventing fraudulent use of identity cards," in addition to storing fingerprints on the face of the identity cards or embedding them therein, verification equipment must be widely available or other corresponding measures must be employed in order to enable the real-time verification function and to prevent counterfeiting or fraudulent use. However, achieving this function involves substantial financial costs, and if it lacks proper safeguards, this process could generate high informational security risks. Moreover, according to the Executive Yuan, the new identity card does not have a designated space to store fingerprint information, and there is no plan to make the fingerprint database available for daily real-time verification. Most importantly, the competent authorities have

designed several anti-counterfeiting measures for the new identity card. If these measures function as expected, in conjunction with using existing information on the face of the identity card, such as photos, for verification, the purposes listed can be achieved without the need to mandatorily collect and store the fingerprints of all citizens. Secondly, with regard to the purpose of "preventing false applications for identity cards," the competent authorities have not yet offered any statistics regarding false applications; thus, there is no way to evaluate its potential benefits and effects. Furthermore, because this is the first instance collecting individuals' fingerprint information, the household registration authorities need to cross-reference other household registration records and rely on other reliable data in order to ascertain the identity of the person being fingerprinted. For the reason that existing information, other than fingerprints, can accurately verify a person's identity, the collection of fingerprints is not substantially related to the purpose of preventing false applications for identity cards. Finally, regarding the purposes of "making an identification of unconscious patients on the road, persons with dementia who get lost, persons with mental disabilities, as well as unidentified human remains," as the authority concerned, the Executive Yuan, pointed out, 2,796 elderly persons with dementia who have gotten lost are placed in social welfare institutions and about 200 unidentified human remains are found each year. Although these cases regarding special needs for identity verification are rare, the interest of ascertaining these people's identities is still an important public interest. Nevertheless, for those citizens whose identities are already unknown or are hard to ascertain, mandatory collection and storage of their fingerprint information when they apply for a new identity card does not help to verify their identities. Thus, the competent authorities must focus on future identification needs. But even assuming that this need may exist in the future, and this means can help to achieve the purposes listed, mandatory collection and storage of fingerprint information for all citizens above the age of fourteen, *ex ante*, and requiring all citizens to bear the risks of an ambiguous statutory

authorization as well as potential breaches of information go beyond what is necessary. The benefits are clearly outweighed by the costs, which does not conform to the principle of proportionality and infringes on an individual's information privacy protected by Article 22 of the Constitution.

[13] In light of the foregoing, Article 8, Paragraphs 2 and 3 of the Act, which amount to mandating the collection and storage of individuals' fingerprints as a condition of the issuance of national identity cards, infringe upon an individual's right to information privacy protected by the Constitution. In addition, the alleged purposes of enhancing the anti-counterfeiting functions of the new national identity cards, preventing false application or fraudulent use of identity cards, and making an identification of unconscious patients on the road, persons with dementia who get lost, persons with mental disabilities, and unidentified human remains do not comport with the principle of proportionality and are repugnant to Articles 22 and 23 of the Constitution. These provisions shall no longer be applicable from the date of announcement of this Interpretation. The replacement of national identity cards can proceed on the basis of the remaining provisions of the Act.

[14] Where there is a specific and important public interest and it is necessary for the State to engage in large-scale collection and storage of individuals' fingerprints in a database, the statute should explicitly specify the purpose of the collection, and the scope as well as the manner thereof should be substantially related to the important public interest. The use of fingerprint information other than for the specified purpose shall be explicitly prohibited by law. The competent authorities shall, in keeping with developments in contemporary technology, employ measures that ensure the accuracy and safety of fingerprint information, as well as take necessary organizational and procedural safeguards so as to conform with the right to information privacy protected by the Constitution.

[15] Despite the fact that similar legislation in foreign nations as well as

domestic public opinion polls may serve as factual references when interpreting the Constitution, they cannot be the sole basis when determining the meaning of the Constitution. Furthermore, it is not yet settled whether the collection of individuals' fingerprint information and creating digital files for it is a legislative trend in the international community. Without careful comparison between our household registration system and its foreign counterparts as well as detailed considerations regarding why and how foreign countries collect individuals' fingerprints, foreign legislation should not be hastily transplanted. In addition, public opinion polls only reflect individuals' understanding or preferences about a particular issue. Their reliability is affected by many factors, such as the content of the poll, polling method, polling agency, and the purpose of the poll. Although the authority concerned alleged that the majority of our citizens are in favor of being fingerprinted as a condition of the issuance of the national identity cards, it failed to offer any supporting polling materials. As a result, we do not accept this claim in this Interpretation. It is also explained here.

Background Note by the Translator

The petitioners, Legislator Ching-Te LAI and eighty-four other Members of the Legislative Yuan, in exercising their powers, considered that Article 8 of the Household Registration Act (hereinafter "Act"), promulgated in 1997, violated Articles 22 and 23 of the Constitution. They petitioned the Constitutional Court for constitutional interpretation pursuant to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and sought an injunction to enjoin the implementation of this provision pending the interpretation of the Constitutional Court.

With regard to the petition for temporary injunction, the Constitutional Court rendered J.Y. Interpretation No. 599 on June 10, 2005, which temporarily enjoined the application of Article 8, Paragraphs 2 and 3 of the Act and denied

the petition with regard to Paragraph 1 of the same Article.

With regard to the petition for constitutional interpretation, the Constitutional Court, in accordance with Article 13, Paragraph 1 of the Constitutional Court Procedure Act, invited representatives of the petitioners, the authority concerned, scholars, and civic organizations to present briefs on June 30 and July 1, 2005. The Constitutional Court then held oral arguments on July 27 and 28 in the same year.

J.Y. Interpretation No. 748 (May 24, 2017)*

Same-Sex Marriage Case

Issue

Do the provisions of Chapter II on Marriage of Part IV on Family of the Civil Code, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life, violate the Constitution's guarantees of freedom of marriage under Article 22 and right to equality under Article 7?

Holding

The provisions of Chapter II on Marriage of Part IV on Family of the Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. The said provisions, to the extent of such failure, are in violation of the Constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7. The authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years from the date of announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage. If the authorities concerned fail to amend or enact the laws as appropriate within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two

* Translation and Note by Szu-Chen KUO

or more witnesses in accordance with the said Marriage Chapter.

Reasoning

[1] One of the petitioners, the Taipei City Government, is the competent authority of household registration prescribed by Article 2 of the Household Registration Act. The household registration offices within its jurisdiction, in processing the marriage registrations applied for by two persons of the same sex, believed unconstitutional the applicable provisions under Chapter II on Marriage of Part IV on Family of the Civil Code (hereinafter "Marriage Chapter") as well as the Ministry of the Interior (hereinafter "MOI") Letter Tai-Nei-Hu-1010195153 of May 21, 2012 (hereinafter "2012 MOI Letter"), which refers to the Ministry of Justice (hereinafter "MOJ") Letter Fa-Lu-10103103830 of May 14, 2012. Therefore, the Taipei City Government, through referral by its supervising authorities, the MOI and the Executive Yuan, filed a petition to this Court, claiming that the Marriage Chapter and the 2012 MOI Letter were in violation of Articles 7, 22, and 23 of the Constitution. Regarding the challenge against the Marriage Chapter, this Court considered this part of the petition as satisfying the requirements of Article 5, Paragraph 1, Subparagraph 1 and Article 9 of the Constitutional Court Procedure Act (hereinafter "Act") and accordingly granted review. The other petition filed by Chia-Wei CHI arose from a case involving household registration. Petitioner CHI filed a petition to this Court, claiming that Articles 972, 973, 980, and 982 of the Civil Code as applied in the Supreme Administrative Court Judgment 103-Pan-521 (2014) (the final judgment) violated Articles 7, 22, and 23 of the Constitution as well as Article 10 of the Additional Articles of the Constitution. We considered his petition as satisfying the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Act and accordingly granted review as well. We further decided that both petitions were concerned with the constitutionality of the Marriage Chapter and thus

consolidated the two petitions. On March 24, 2017, we heard oral arguments pursuant to Article 13, Paragraph 1 of the Act.

[2] The petitioner, the Taipei City Government, claims that the Marriage Chapter is in violation of Articles 7, 22, and 23 of the Constitution. Its arguments are summarized as follows. Prohibiting two persons of the same sex from entering into a marriage restricts their freedom to choose whom to marry as protected by the freedom of marriage. Neither the importance of its ends nor the relationship between the means and the ends justifies such prohibition. The prohibition fails the review under the proportionality principle as required by Article 23 of the Constitution. Furthermore, different treatment based on sexual orientation should be subject to heightened scrutiny. Excluding same-sex couples from marriage is not substantially related to the furthering of important public interests. As a result, the Marriage Chapter infringes upon both the people's freedom of marriage under Article 22 and the right to equality under Article 7 of the Constitution.

[3] The petitioner, Chia-Wei CHI, claims that Articles 972, 973, 980, and 982 of the Civil Code violate Articles 7, 22, and 23 of the Constitution as well as Article 10, Paragraph 6 of the Additional Articles of Constitution. His arguments are summarized as follows. (1) The freedom of marriage guaranteed by Article 22 of the Constitution is an inherent right in personality development and human dignity, the essence of which is the freedom to choose one's own spouse. Restrictions on such freedom can only be allowed to the extent compatible with the requirements of Article 23 of the Constitution. Prohibiting a person from marrying another person of the same sex, however, does not serve any important public interest. Nor are such prohibitive means substantially related to the ends, if at all. The prohibition, consequently, contravenes Articles 22 and 23 of the Constitution. (2) The term "sex" as referred to in Article 7 of the Constitution and Article 10, Paragraph 6 of the Additional Articles of the Constitution shall include sex, gender identity, and sexual orientation. Classifications based on sexual

orientation, accordingly, shall be reviewed with heightened scrutiny. The means that prohibits same-sex couples from entering marriages is ostensibly not related to the alleged end of encouraging procreation and hence in violation of equal protection. (3) Article 10, Paragraph 6 of the Additional Articles of the Constitution imposes on the State the obligation to eliminate sex discrimination and actively promote substantive gender equality. The legislature is obliged to enact laws to protect same-sex couples' right to marriage. The legislature's long-time failure to pass such laws thus amounts to legislative inaction violative of its constitutional obligation.

[4] The arguments of the authority concerned, the MOJ, are summarized as follows. (1) The precedents of the Constitutional Court have long held "marriage" as a union between husband and wife, a man and a woman. Therefore, it is rather difficult to argue that the freedom of marriage under Article 22 of the Constitution necessarily guarantees "the freedom to marry a person of the same sex." Proper protection of the rights and benefits of same-sex couples is a task better left to legislation. (2) The Civil Code, which regulates people's interactions in the private sphere, is an "enacted statute based on social autonomy." Statutory legislation on family should defer to the fact that the institution of family has existed since long before the enactment of the Civil Code. It follows that the legislature has ample discretion in shaping "private autonomy in marriage." Having considered "the social order rooted in the marriage institution of husband and wife," the legislature enacted the Marriage Chapter to protect the marriage institution. The marriage institution provided for in the Marriage Chapter is meant to serve social functions such as maintenance of human ethical orders and sex equality, as well as child raising; it is also a building block of family and society. All of the above are certainly legitimate ends. Restricting marriage to opposite-sex couples only, as a means, is not arbitrary, but rationally related to the ends of the marriage institution. The provisions of the Marriage Chapter, therefore, are

not violative of the Constitution.

[5] The arguments of the authority concerned, the MOI, are summarized as follows. As the competent authority of household registration, the MOI, upon certifying marriages, has followed the positions taken in those letters issued by the MOJ, which is the competent authority of the Civil Code. The MOI defers to the MOJ's opinions on the constitutionality of the Marriage Chapter.

[6] The arguments of the authority concerned, the Household Registration Office at Wan-Hua District of Taipei City, are summarized as follows. According to the letters issued by the MOJ, the competent authority of the Civil Code, marriage as referred to in the Marriage Chapter shall be limited to the union between a man and a woman. As to the constitutionality of the Marriage Chapter, it is within the competence of the Constitutional Court to have the final word.

[7] This Court, taking all arguments into consideration, made this Interpretation on the constitutional challenges to the Marriage Chapter raised by the petitioners. The reasoning is as follows:

[8] In 1986, the petitioner Chia-Wei CHI petitioned to the Legislative Yuan (hereinafter "LY") for "prompt legislative actions to legalize same-sex marriages." The Judicial Committee of the LY, after discussions among its full members, proposed to dismiss CHI's petition by a resolution stating that "there is no need to initiate a bill on the subject matter of this petition." The [First] LY adopted a floor resolution to confirm the said committee proposal in its Thirty-Seventh Meeting of the Seventy-Seventh Session in 1986 (*see* Citizen Petition Bills No. 201-330, LY Bill-Related Documents Yuan-Tzung-527 of June 28, 1986). In the committee deliberation, the Judicial Committee referred to the statement made by the representative of the Judicial Yuan at that time:

> The union of marriage is not merely for sexual satisfaction. It too serves to produce new human resources for both State and society. It is related

> to the existence and development of State and society. Therefore it is distinguishable from pure sexual satisfaction between homosexuals…

and the statement made by the representative of the MOJ at that time:

> Same-sex marriage is incompatible with the provisions of our nation's Civil Code, which provides for one-man-and-one-woman marriage. It is not only in conflict with good morals of the society, but also incompatible with our national conditions and traditional culture. It seems inappropriate to legalize such marriage.

Then Chia-Wei CHI proceeded to petition both the MOJ and the MOI, but to no avail. On August 11, 1994, the MOJ issued Letter 83-Fa-Lu-Jue-17359, which stated:

> In our Civil Code, there is no provision expressly mandating the two parties of a marriage be one male and one female. However, scholars in our country agree that the definition of marriage must be "a lawful union between a man and a woman for the purpose of living together for life." Some further expressly maintain that the same-sex union is not the so-called marriage under our Civil Code .... Many provisions of Part IV on Family in our Civil Code are also based on the concept of such opposite-sex union .... Therefore, the so-called "marriage" under our current Civil Code must be a union between a man and a woman and does not include any same-sex union.

(For similar statements, *see* the MOJ Letter Fa-Lu-10000043630 of January 2, 2012, the MOJ Letter Fa-Lu-10103103830 of May 14, 2012, and the MOJ Letter Fa-Lu-10203506180 of May 31, 2013.) In 1998, Chia-Wei CHI applied to the

Taiwan Taipei District Court for its approval to have a marriage ceremony performed by the notary public. His application was denied, but he did not seek any judicial remedy for the denial. In 2000, he applied to the same court for the same approval and was rejected again. After exhaustion of ordinary judicial remedies, CHI brought his case to this Court for constitutional interpretation. In May 2001, this Court dismissed his petition on the grounds that his petition did not specifically explain how the statutes or regulations applied in the court decisions violated the Constitution. In 2013, CHI applied for marriage registration at the Household Registration Office at Wan-Hua District of Taipei City and failed again. He then brought his case for administrative appeal and suit. In September 2014, the Supreme Administrative Court ruled against him, ending his quest for ordinary judicial remedies. In August 2015, CHI once again petitioned this Court for constitutional interpretation. For more than three decades, Chia-Wei CHI has been appealing to the legislative, executive, and judicial departments for the right to same-sex marriage.

[9] In addition, Legislator Bi-Khim HSIAO and her colleagues introduced a bill on the Same-Sex Marriage Act in the LY for the first time in 2006. This bill fell short of committee deliberation owing to lack of majority support among legislators. Later, in 2012 and 2013, some non-governmental organizations in the movement for marriage equality proposed legislative bills to amend the relevant laws. Echoing such calls, Legislator Mei-Nu YU and her colleagues introduced a bill on partial amendment of Part IV on Family of the Civil Code. Then, Legislator Li-Chiun CHENG and her colleagues further introduced another bill on partial amendment of Part IV on Family and Part V on Succession of the Civil Code. For the first time ever, both bills advanced to the Judiciary and Organic Laws and Statutes Committee for committee deliberation. The Committee held several public hearings to seek out various opinions. Both bills were deemed dead when the term of the Members of the Eighth LY came to an end in January 2016.

Later in 2016, Legislator Mei-Nu YU and her colleagues once again introduced a bill on partial amendment of Part IV on Family of the Civil Code. The LY caucus of the New Power Party, Legislator Yu-Jen HSU, and Legislator Yi-Yu TSAI also introduced several other amendment bills. On December 26, 2016, all of the above bills cleared the first reading after deliberation by the Judiciary and Organic Laws and Statutes Committee. However, it is still uncertain when these bills will be reviewed on the floor of the LY. Evidently, after more than a decade, the LY is still unable to pass the legislation regarding same-sex marriage.

[10] This case concerns the very controversial social and political issues of whether homosexuals shall have the autonomy to choose whom to marry and of whether they shall enjoy the equal protection of the same freedom of marriage as heterosexuals. The representative body is to conduct negotiations and reach compromise and then to enact or amend the legislation concerned in due time based upon its understandings of the people's opinions and taking into account all circumstances. Nevertheless, the timetable for such legislative solution is hardly predictable now and yet these petitions concern the protection of people's fundamental rights. It is the constitutional duty of this Court to render a binding judicial decision, in time, on issues concerning the safeguarding of constitutional basic values such as the protection of people's constitutional rights and the free democratic constitutional order (*see* J.Y. Interpretations Nos. 585 and 601). For these reasons, this Court, in accordance with the principle of mutual respect among governmental powers, has made its best efforts in granting review of these petitions and, after holding oral hearing on the designated date, made this Interpretation to address the above constitutional issues.

[11] Those prior J.Y. Interpretations mentioning "husband and wife" or "a man and a woman" were made within the context of opposite-sex marriage, in terms of the factual backgrounds of the original cases from which they arose. For instance, J.Y. Interpretations Nos. 242, 362, and 552 addressed the exceptional

circumstances that would tolerate the validity of bigamy under the Civil Code. J.Y. Interpretation No. 554 ruled on the constitutionality of punishing adultery as a crime. J.Y. Interpretation No. 647 adjudicated upon the issue of excluding opposite-sex unmarried partners from the tax exemption available to married couples. J.Y. Interpretation No. 365 considered the constitutionality of a patriarchal clause. Thus far, this Court has not made any Interpretation on the issue of whether two persons of the same sex are allowed to marry each other.

[12] Section 1 on Betrothal of the Marriage Chapter provides, in Article 972, "A betrothal agreement shall be made by the male and the female parties in their own concord." It expressly stipulates a betrothal agreement ought to be concluded between two parties of one male and one female based on their autonomous concord to create a marriage in the future. Articles 980 to 985 of Section 2 on Marriage provide for the formal and substantive requirements for concluding a marriage. Though Section 2 on Marriage does not stipulate again that a marriage ought to be concluded between parties of one male and one female out of their own wills, the same construction of one-male-and-one-female marriage can be inferred from Article 972, which mandates a betrothal agreement to marry in the future be concluded only between a man and a woman. If we further refer to the naming of "husband and wife" as the appellations for both parties of marriage as well as their respective rights and obligations in those corresponding provisions of the Marriage Chapter, it is obvious that marriage shall mean a union between a man and a woman, *i.e.*, two persons of the opposite sex. The MOJ, being the competent authority of the Civil Code, has issued the following four Letters (83-Fa-Lu-Jue-17359 of August 11, 1994, Fa-Lu-10000043630 of January 2, 2012, Fa-Lu-10103103830 of May 14, 2012, and Fa-Lu-10203506180 of May 31, 2013), stating that "marriage is a lawful union between a man and a woman for the purpose of living together for life." Based upon the above MOJ Letters, the MOI, being the competent authority for marriage registration, ordered the local

authorities in charge of household administration to exercise mere formalistic review on applications for marriage registration. Therefore, the local authorities in charge of household administration have been denying all applications for marriage registration filed by two persons of the same sex. As a result, two persons of the same sex have been unable to conclude a legally-recognized marriage so far.

[13] Unspoused persons eligible to marry shall have their freedom of marriage, which includes the freedom to decide "whether to marry" and "whom to marry" (*see* J.Y. Interpretation No. 362). Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity and therefore is a fundamental right to be protected by Article 22 of the Constitution. Creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons of the same sex will not affect the application of those provisions on betrothal, conclusion of marriage, general effects of marriage, matrimonial property regimes, and divorce as provided for in Sections 1 through 5 of the Marriage Chapter, to the union of two persons of the opposite sex. Nor will it alter the social order established upon the existing opposite-sex marriage. Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution. The current provisions of the Marriage Chapter do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. This is obviously a gross legislative flaw. To such extent,

the provisions of the Marriage Chapter are incompatible with the spirit and meaning of the freedom of marriage as protected by Article 22 of the Constitution.

[14] Article 7 of the Constitution provides, "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." The five classifications of impermissible discrimination set forth in the said Article are only illustrative, rather than exhaustive. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article.

[15] The current Marriage Chapter only provides for the permanent union between a man and a woman, without providing that two persons of the same sex may also create an identical permanent union. This constitutes a classification on the basis of sexual orientation, which gives homosexuals relatively unfavorable treatment in their freedom of marriage. Given its close relation to the freedom of personality and human dignity, the freedom of marriage promised by Article 22 of the Constitution is a fundamental right. Moreover, sexual orientation is an immutable characteristic that is resistant to change. The contributing factors to sexual orientation may include physical and psychological causes, life experience, and the social environment.[Note 1] The World Health Organization, the Pan American Health Organization (the WHO Regional Office in the Americas),[Note 2] and other major medical organizations, both domestic and abroad, [Note 3] have stated that homosexuality is not a disease. In our country, homosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of *de facto* or *de jure* exclusion or discrimination. Besides, homosexuals, because of the population structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic processes. Accordingly, to determine the constitutionality of different treatment based on

sexual orientation, a heightened standard shall be applied. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest, in order for it to meet the requirements of the right to equality as protected by Article 7 of the Constitution.

[16] The reasons that the State has made laws to govern the factual existence of opposite-sex marriage and to establish the institution of marriage are multifold. The argument that protecting reproduction is among many functions of marriage is not groundless. The Marriage Chapter, nonetheless, does not set forth the capability to procreate as a requirement for concluding an opposite-sex marriage. Nor does it provide that a marriage shall be void or voidable, or a divorce decree may be issued, if either party is unable or unwilling to procreate after marriage. Accordingly, reproduction is obviously not an essential element to marriage. The fact that two persons of the same sex are incapable of natural procreation is the same as the result of two opposite-sex persons' inability, in an objective sense, or unwillingness, in a subjective sense, to procreate. Disallowing the marriage of two persons of the same sex because of their inability to reproduce is a different treatment having no apparent rational basis. Assuming that marriage is expected to safeguard the basic ethical orders, such concerns as the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other are fairly legitimate. Nevertheless, the basic ethical orders built upon the existing institution of opposite-sex marriage will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage pursuant to the formal and substantive requirements of the Marriage Chapter, inasmuch as they are subject to the rights and obligations of both parties during the marriage and after the marriage ends. Disallowing the marriage of two persons of the same sex for the sake of safeguarding basic ethical orders is a different treatment also having no apparent rational basis. Such different treatment is incompatible with the spirit

and meaning of the right to equality as protected by Article 7 of the Constitution.

[17] Given the complexity and controversy surrounding this case, longer deliberation time for further legislation might be needed. On the other hand, overdue legislation will indefinitely prolong the unconstitutionality of such underinclusiveness, which should be prevented. This Court thus orders that the authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years after the date of announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage for two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. If the amendment or enactment of relevant laws is not completed within the said two-year timeframe, two persons of the same sex who intend to create a permanent union of intimate and exclusive nature for the purpose of living a common life may, pursuant to the provisions of the Marriage Chapter, apply for marriage registration to the authorities in charge of household registration, by submitting a document signed by two or more witnesses. Any such two persons, once registered, shall be accorded the status of a legally-recognized couple and then enjoy the rights and bear the obligations arising on couples.

[18] This Interpretation leaves unchanged the party status as well as the related rights and obligations for the institution of opposite-sex marriage under the current Marriage Chapter. This Interpretation only addresses the issues of whether the provisions of the Marriage Chapter, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life together, violate the freedom of marriage protected by Article 22 and the right to equality guaranteed by Article 7 of the

Constitution. This Interpretation does not deal with any other issues. It is also noted here.

[19] The petitioner the Taipei City Government also challenges the constitutionality of the 2012 MOI Letter. This Letter was a reply by the MOI to the Taipei City Government on a specific case regarding the issue of whether the latter should accept an application by two same-sex persons for marriage registration. We hold that the Letter is not a regulation of general application and therefore not eligible for constitutional review. In accordance with Article 5, Paragraph 2 of the Act, we dismiss this part of petition. It is so ordered.

Note 1: For example, the World Psychiatric Association (WPA), released in 2016 a *WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviours*, indicating that sexual orientation is "innate and determined by biological, psychological, developmental, and social factors." (This position statement is available at http://www.wpanet.org/detail.php?section_id=7&content_id=1807, last visited May 24, 2017.) The Supreme Court of the United States, in *Obergefell v. Hodges*, 576 U.S. __ (2015), 135 S. Ct. 2584, 2596 (2015), also held, "Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." (This decision is available at https:// www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf, last visited May 24, 2017.)

Note 2: The World Health Organization (WHO), in Chapter 5 of *The Tenth Revision of the International Statistical Classification of Diseases and Related Health Problems, ICD-10, Version 2016,* of which the first version was released in 1992, retains, under classification of diseases, the Category F66 "psychological and behavioural disorders associated with sexual development and orientation." Nevertheless, it clearly points out, "Sexual orientation by itself is not to be regarded as a disorder." (*See*

http://apps.who.int/classifications/icd10/browse/2016/en#/F66, last visited May 24, 2017.) The Pan American Health Organization, the WHO Regional Office in the Americas, also expressly mentions in its paper, "CURES" FOR AN ILLNESS THAT DOES NOT EXIST, that "there is a professional consensus that homosexuality represents a natural variation of human sexuality ...." Furthermore, "[i]n none of its individual manifestations does homosexuality constitute a disorder or an illness, and therefore it requires no cure." (This paper is available at http://www.paho.org/hq/index.php?option=com_docman&task=doc_view&gid=17703&Itmid=2057, last visited May 24, 2017.）

Note 3: As to the positions of medical organizations abroad, the WPA has clearly expressed its position in *WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviors* as explained in Note 1. In *Sexual Orientation and Marriage,* first published in 2004 and later confirmed in 2010, the American Psychological Association also specifies that since 1975 psychologists and psychiatrists have held homosexuality is "neither a form of mental illness nor a symptom of mental illness." (This document is available at http://www.apa.org/about/policy/marriage.aspx, last visited May 24, 2017.) As to the positions of medical organizations at home, in December 2016, the Taiwanese Society of Psychiatry (TSP) released *Position Statement in Support of the Equal Rights for Groups of Diverse Genders/Sexual Orientations and for Same-Sex Marriage.* In this position statement, the TSP asserts that sexual orientation, sexual behavior, gender identity, and partnership of non-heterosexuality are neither mental disorders nor defects of personality development. Rather, they are normal expressions of the diversity in human development. Moreover, homosexuality by itself will not cause any disorder in mental health and

therefore requires no cure. (This position statement is available at http://www.sop.org.tw/Official/official_27.asp, last visited May 24, 2017.) The Taiwanese Society of Child and Adolescent Psychiatry released its *Position Statement on Gender Equality* in January 2017, which maintains that all sexual orientations are normal, and none of them is an illness or a deviation. (This position statement is available at http://www.tscap.org.tw/TW/News2/ugC_News_Detail.asp?hidNewsCatID=8&hidNewsID=131, last visited May 24, 2017.)

Background Note by the Translator

In 2013, the petitioner Chia-Wei CHI's application for marriage registration was rejected by the Household Registration Office at Wan-Hua District of Taipei City. After exhausting ordinary judicial remedies, CHI filed a petition to the Constitutional Court in August 2015. He claimed that Articles 972, 973, 980, and 982 of the Civil Code which prohibited same-sex marriage violated the Constitution. Another petitioner, the Taipei City Government, petitioned to the Constitutional Court in November 2015, claiming that the Marriage Chapter of the Civil Code was in violation of the Constitution. The Constitutional Court decided to consolidate these two petitions and heard oral arguments on March 24, 2017.