

Minority Representation, Mixed Electoral Systems, and Semi-Presidentialism – The Case of Taiwan

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In the last few decades, the Grand Justices of the Judicial Yuan, the Constitutional Court in Taiwan, have made tremendous progress in the field of equal protection. In particular, the Grand Justices have made great strides regarding various issues relating to sex/gender equality, which is the focus of Professor Chang's paper. One particular statistic highlights this amazing development. While the Grand Justices have delivered eight verdicts concerning sex/gender equality, only one case—J.Y. Interpretation 718—has tackled the equal protection of aboriginal people, which is the topic of Professor Tsai's paper. Irrespective of this statistic, Professor Chang would argue that the Grand Justices can do more to promote gender equality in the areas of social and economic rights, such as to combat employment discrimination.

I agree with Professor Chang's point that the Grand Justices can contribute more to the areas of equal protection. The inactivity of the Legislative Yuan after J.Y. Interpretation 718, which declared same-sex marriage constitutional, is an excellent example. However, in the meantime, perhaps we should ask, "Should the political branches—in particular, the legislative branch—have played a more assertive role in implementing the ideals of equality?" Borrowing Professor Jeremy Waldron's argument that the legislature is in a better position overall to protect *every* right as compared to judicial review, perhaps we should ask whether the legislature is an inalienable part of fulfilling equal protection, especially for those cases with "unalterable traits."

The legislative electoral system enshrined in Taiwan's Constitution—a mixed-member electoral system with additional aboriginal representatives—is designed to achieve the aims of protecting minority rights and promoting diversity. Lamentably, it seems that the Legislative Yuan, the Congress in Taiwan, has not met this expectation. Worse still, J.Y. Interpretation 721 found no fault with this system. Paradoxically, to discuss the future measures of promoting equal protection in Taiwan, we should perhaps begin by studying the legislative electoral system, which has failed to reach its expected goal.

I. The Mixed-Member Legislative Electoral System in Taiwan

In terms of comparative law, the current Constitution of Taiwan has designed a relatively complicated legislative electoral system. Among the older democracies, only New Zealand has a model similar to it. I will elaborate below.

With the 2005 constitutional amendments, Taiwan formally adopted the mixed-member electoral system for its Congress, the Legislative Yuan. Under this system, people can cast two votes in an election: one for a candidate in the local district (the district tier) and one for a

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political party (the list tier or party list). More precisely, among the 113 legislators in total, two-thirds are directly elected by the people through a single plural district and one-third are elected through party ballots based on proportionality. More importantly, following the German model, only a party that can pass the five-percent threshold is qualified to take party seats. Furthermore, no less than half of the representatives elected from the party list should be female. The system becomes more intricate when we consider that there are another six aboriginal representatives, who can only be elected by aboriginal voters.

According to the original intention of this constitutional amendment, Taiwan would introduce a single-member plurality voting system to strengthen the partisan line and the efficiency of the legislature on the one hand, and embrace the proportional representatives from the party list to facilitate minority representation on the other hand.

Nevertheless, many interest groups find that this mixed-member system has not given them favorable treatment, and they have challenged it in the Constitutional Court. As mentioned above, in J. Y. Interpretation No. 721, the Grand Justices chose to uphold the system.

This paper argues that the current legislative electoral system should be modified to facilitate the representation of various minority groups. Next, I will discuss the unique aboriginal representatives in the Constitution.

II. The Aboriginal Representatives

As mentioned in the previous section, in addition to the two kinds of legislators in the normal mixed-member electoral system, Taiwan has a third category of legislators—namely, the aboriginal representatives. The goal of ensuring aboriginal representatives is quite obvious: it is both to maintain and to facilitate the interests of aboriginal people. Nevertheless, after closer scrutiny in terms of theory and practice, some doubts could be raised about this system.

First, although the percentage of aboriginal representatives in the Legislative Yuan is close to that of the aboriginal population, the system probably cannot reflect the diverse composition of the aboriginal population. This is because the aboriginal legislators are elected from two multi-member districts—the lowland and upland districts—which span the whole country.

Second, the distinction between lowland and upland Aborigines is based on the pre-1945 household registration, which took place during the era of Japanese colonial rule. Thus, this distinction could be outdated and might fail to reflect the current indigenous demography.

Third, since this system is based on the assumption that only Aborigines can represent the aboriginal people, there are two quite obvious deficiencies. First, as stated in *Shaw v. Reno*, one district includes “individuals who belong to the same race, but who are widely separated by geographical and political boundaries, and who may have little common with one another but the color of their skin, bear an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group... think alike...” Second, the fact that only people of aboriginal descent can be elected in these two districts could reduce the quality of candidates.

Fourth, in some situations, this system not only fails to represent fairly the voice of the aboriginal people but can also damage the political stability in a semi-presidential government.

III. The five-percent threshold

Similar to other mixed-member electoral systems in the world, the seats belonging to the list tier (party list) are used to reflect and even to promote diversity in the society. Compared to the motherland of the mixed-member proportional (MMP) system, Germany, which initiated the original model, while Taiwan's mixed-member system shares some similarities with Germany's, there are some differences. Similar to the German model, to avoid a blockade from minor parties and maintain political stability, the German model has one significant mechanism: any political party should pass the five-percent threshold to share seats from the party list. However, unlike the German MMP model, which links the two (district and party) lists together and utilizes the latter's proportionality component to determine the total seats that a party can obtain during a particular election, Taiwan has adopted the so-called MMM system, where the district and party lists are two parallel lines. In terms of the outcome, the MMM system is more majoritarian and the MMP system is more proportionate. Therefore, the MMP system is friendlier to various minority parties.

Under these circumstances, since both mechanisms of the five-percent threshold and the MMM system adopted in Taiwan are not conducive to facilitating minority representation, this is why, as mentioned above, these two constitutional designs have been challenged in the Constitutional Court.

J.Y. Interpretation 748 declares this institution constitutional for the following three reasons. First, this institution is not against the constitutional order. Second, the institution is to avoid "clustering of small parties and fragmentation of the political party system." Third, according past experiences, some small parties still can pass the five-percent threshold to enter the congress.

The reasoning of J.Y. Interpretation 748 seems sound and persuasive. However, there is one serious limitation: it seems that the Grand Justices failed to discuss the relationship between this legislative electoral system per se and the larger system of the separation of powers in Taiwan's constitution. In other words, are there different requirements for minority protection in a semi-presidential government? Can the theories that make sense in a parliamentary system still prevail in a presidential government? For example, the five-percent threshold could be a reasonable choice in a parliamentary government, but is it also a meaningful mechanism in a semi-presidential one? On the contrary, is there greater urgency to adopt a five-percent threshold in a semi-presidential government?

In short, to further facilitate diversity and protect minorities in Taiwan, perhaps we should review the pros and cons of the country's current mixed-member electoral system.

單一選區兩票制與雙首長制 - 以弱勢團體保障為中心

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中文摘要

近三十年來，司法院大法官對少數、弱勢團體平等權保障之貢獻，有目共睹，雖然，如張文貞教授所言，在社會經濟權等領域，如就業歧視等議題上，仍有發展之空間。不過，即便有關弱勢團體平等權之實踐仍有待精進之處，本文以為，除司法院大法官外，立法院於此議題上所扮演之角色與功能，亦不能忽視。事實上，當今憲法增修條文所架構之立法委員選舉制度，其宗旨之一，便是在實踐對少數之保護，但很可惜的，從結果看，似乎未能盡如人意。又此一制度雖經釋字第七二一號解釋宣告合憲，但本文以為仍有相當之檢討空間。第一，先就釋字第七二一號解釋所未處理的原住民代表言，雖然六名立法委員之數額與原住民占全國人口比例數相近，但以其採大選區制，是否能反映原住民的組成多樣性？恐是一項問題；此外，平地原住民與山地原住民之區分是否過時？以及此種制度設計是否有違 *Shaw v. Reno* 乙案所宣示之選區劃分原則？等等問題，或皆有檢討價值。第二，就單一選區兩票制言，我國法所採取之併立制以及百分之五門檻，皆不利於弱勢團體於立法院獲得席次之機會，釋字第七二一號解釋雖然從理論之憲政秩序維繫，以及實然之小黨仍有機會獲得勝選等角度，證立是項制度之合憲性，但該號解釋似未討論到，此等源自於內閣制

的機制，在雙首長制甚至是總統制下，其合憲性之判斷，是否得有所不同？因而從學理以及比較憲法等較度看，此一議題，或亦有討論之價值。