
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 (*Abhörenscheidung*) 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, 1972² 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.