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## **J.Y. Interpretation No. 721 (June 6, 2014)\***

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### **Election of Party-list Proportional Representatives Case**

#### **Issue**

Are the electoral provisions setting forth the Single Electoral Constituency with Two Votes system for legislator elections and the number of seats for party-list representatives and five percent threshold for political parties therein unconstitutional?

#### **Holding**

Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution (hereinafter the “Constitutional Amendment”) provides for a Parallel Voting System of the Single Electoral Constituency with Two Votes system, the number of seats for party-list proportional representatives and its threshold for political parties to win such seats. Such provisions do not breach the constitutional democratic order upon which the Constitution hinges. The provision regarding the Parallel Voting system and the threshold for political parties in Article 67, Paragraph 2 of the Civil Servants Election and Recall Act has the same content as the aforesaid Constitutional Amendment. Hence, it raises no conflict with the Constitution either.

#### **Reasoning**

[1] The Constitution is the fundamental and supreme law of this country. Any amendment to it shall be made by the governmental body governing constitutional amendment in accordance with constitutional due process. The

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\* Translation and Note by Eleanor Y. Y. CHIN

National Assembly is the constitution-amending body established by the Constitution; an amendment it enacts based on its powers bestowed by the Constitution is of equal status with the original constitutional provisions. If, nonetheless, an amendment were to be allowed that would alter the existing constitutional provisions that have essential significance and upon which the governing order is founded, the integral governing order of the Constitution would be effectively destroyed. For this reason, such an amendment would lack the requisite appropriateness. Among the constitutional provisions, principles such as the principle of the democratic republic under Article 1 of the Constitution, the principle of popular sovereignty under Article 2, the protection of fundamental rights of the people under Chapter II as well as the principle regarding checks and balances of governmental powers shall have essential significance, upon which the integrality of fundamental constitutional principles hinges. Such provisions form the constitutional democratic order, which is the foundation of the current Constitution and by which any governmental body established by the Constitution is obligated to abide. Unless its process of amendment contains clear and gross flaws or its content involves a breach of the constitutional democratic order, an amendment to the Constitution shall be respected (*see* J.Y. Interpretation No. 499). In other words, so long as an amendment to the Constitution does not contradict the principle of the democratic republic and the principle of popular sovereignty, nor involve alteration of the core contents of fundamental rights of the people or the principle of checks and balances of governmental powers, such an amendment does not breach the constitutional democratic order.

[2] Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution provides that: “Beginning with the Seventh Legislative Yuan, the Legislative Yuan shall have 113 members, who shall serve a term of four years, which is renewable after re-election. The election of members of the Legislative Yuan

shall be completed within three months prior to the expiration of each term, pursuant to the following provisions, the restrictions in Articles 64 and 65 of the Constitution notwithstanding: (1) Seventy-three members shall be elected from the Special Municipalities, counties, and cities in the free area. At least one member shall be elected from each county and city. (2) Three members each shall be elected from among the lowland and highland aborigines in the free area. (3) A total of thirty-four members shall be elected from the nationwide constituency and among citizens residing abroad” (hereinafter “Amendment 1”). “Members for the seats set forth in Subparagraph 1 of the preceding paragraph shall be elected in proportion to the population of each Special Municipality, county, or city, which shall be divided into electoral constituencies equal in number to the number of members to be elected. Members for the seats set forth in Subparagraph 3 shall be elected from the lists of political parties in proportion to the number of votes won by each party that obtains at least five percent of the total vote, and the number of elected female members on each party’s list shall not be less than one-half of the total number” (hereinafter “Amendment 2”). These two amendments adopt the Single Electoral Constituency with Two Votes System, namely, a two-vote system combining a single electoral constituency system with a proportional representation system. Legislators elected from Special Municipalities, counties, and cities are elected based on the single constituency system in accordance with the first clause of Amendment 2, with one legislator elected from one constituency each. As to those elected from the nationwide constituency and among citizens residing abroad, pursuant to the latter part of the same Amendment they are elected based on a proportional representation system in which ballots are cast to a party list, and a five percent threshold is required for political parties to be allotted seats. Only those political parties winning five percent or more of political party ballots will be allotted seats for legislators from the nationwide constituency and citizens residing abroad.

The election results of the single electoral constituency and those of political-party ballots are calculated separately in deciding the quotas of these two categories of legislators-elect (the calculation method thereof is hereinafter referred to as the “Parallel Voting System,” with reference to the minutes and stenographic records of the National Assembly published in October 2005, at page 304).

[3] Article 129 of the Constitution stipulates that: “The various kinds of elections prescribed in this Constitution, except as otherwise provided by this Constitution, shall be by universal, equal, and direct suffrage and by secret ballot.” The equal suffrage referred to therein is specifically prescribed by the right to equality and suffrage under Articles 7 and 17 of the Constitution. Judging by the language therein, it follows that the constitution-amending body is given room to consider the relevant circumstances and assess advantages and disadvantages. However, since elections are an indispensable means to implement fundamental democratic principles such as considering public opinion and accountability while manifesting the principle of popular sovereignty, the voting method prescribed must not impede the realization of the principle of the democratic republic and the principle of popular sovereignty, nor shall it alter the core contents of the rights to equality and suffrage. As to legislative elections in different countries, some give more weight to the representation of electoral constituencies and adopt relative majority rule, while others give more weight to the differences in political parties and adopt a party-list proportional representation system. These are different alternatives of democratic politics and reflect the differences among political cultures in respective countries. Provisions regarding adjustment to the voting methods of electing legislators of the Legislative Yuan stated in Amendments 1 and 2 adopt the Parallel Voting System and require the number of seats for party-list proportional representatives to be thirty-four seats. This reflects the choice made by our citizens with respect to

democratic politics, with the intention of satisfying both the representativeness of electoral constituencies and diversity of political parties. These amendments, providing that the number of seats for party-list representatives shall be allotted based on earned political party ballots, aim to enhance the operation of party politics by means of party-list proportional representatives as a way to aid and complement regional representatives. Such a combination and its allotment of seats are a display of the general will of the people, and they do not contradict the principle of the democratic republic and the principle of popular sovereignty. Allegations invoking the practices of other electoral systems (such as a coexisting system) to challenge the Parallel Voting System provided in Amendments 1 and 2 as a breach of the constitutional democratic order shall not be sustained. Although the five percent threshold for political parties provided in Amendment 2 may result in a certain discrepancy between the percentages of ballots received by, and seats allotted to, political parties and create an appearance of unequal ballots, its purpose is to ensure that the efficiency of legislative operations and the smooth interaction between the executive branch and the Legislature are not impeded by a clustering of small parties and fragmentation of the political party system. In addition, it may be observed from the election results of party-list proportional representative elections in recent years that the possibility of winning elections for those political parties that are not the two main parties has not been completely ruled out. As a result, the provision concerning the threshold for political parties stated in Amendment 2 does not hinder the realization of the principle of the democratic republic and the principle of popular sovereignty, nor does it alter the core contents of the rights to equality and suffrage. As such, it is within the scope of the constitution-amending body to consider the relevant circumstances and assess advantages and disadvantages, which is not in violation of the aforementioned constitutional democratic order. As for the provision regarding the Parallel Voting System and

the threshold for political parties stated in Article 67, Paragraph 2 of the Civil Servants Election and Recall Act, since it was enacted according to Amendment 2 and its content is identical thereto, such a provision raises no conflict with the Constitution.

[4] The Petitioner, the Taiwan Constitution Association, was a candidate party in a party-list proportional representative election. Subparagraph 1 of Amendment 1 provides that at least one legislator shall be elected from each county and city. Such a provision relates to the division of electoral constituencies instead of to the party-list proportional representative elections. Furthermore, the Petitioner did not state how its constitutional right had been injured. This part of the Petition does not meet the requirements provided in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. Under Subparagraph 3 of the same provision, such a petition for constitutional interpretation shall not be granted. Moreover, the other Petitioner, the Green Party, was a participant in a final and binding judgment and not a party to the judgment at issue. As such, its constitutional right was not impaired as a result of the judgment, and it may not file a petition for constitutional interpretation on such grounds. Hence, it shall be hereby stated that the petition shall not be accepted in accordance with the aforementioned provisions.

### **Background Note** by the Translator

The seventh legislative election took place on January 12, 2008, pursuant to Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution and Article 67, Paragraph 2 of Civil Servants Election and Recall Act, adopting the Single Electoral Constituency with Two Votes System, with one vote cast to a regional candidate, and the other to a political party. The regional legislators thereof were elected from electoral constituencies equal in number to the number of members to be elected (single electoral constituency system), while legislators

of the nationwide constituency and citizens residing abroad were elected based on a party list, with those political parties receiving five percent or more of political party ballots being elected in proportion to their ratio of received ballots (party-list proportional representation system). The Central Election Commission publicized the list of legislators-elect on the 18th day of the same month and year.

The petitioner, the Taiwan Constitution Association, along with the Civil Party filed an election lawsuit, which was supported by the Green Party, alleging that the preceding provisions governing the said legislative election were contradictory to the principle of popular sovereignty and harmed the principle of equal election, as well as the guarantee of the right to equality and suffrage, and that these provisions, in so providing, constituted causes for invalid election and for invalidation of the non-regional legislators-elect thereof. The lawsuit was dismissed in Taiwan High Court Civil Judgment 97-Xuan-Shang-9 (2009). The Taiwan Constitution Association and the Green Party thus filed a petition for constitutional interpretation on the grounds that the preceding provisions in relation to the Parallel Voting System of Single Electoral Constituency with Two Votes System, the number of seats for party-list proportional representatives, and the threshold for political parties set forth therein as applied in the final binding judgment were contradictory to the principle of popular sovereignty under Article 2 of the Constitution and the principle of equal election manifested in Articles 7 and 129 of the Constitution.

This Interpretation began by referring to the theory of limitations on constitutional amendments first introduced in J.Y. Interpretation No. 499 to discuss the constitutionality of the subject matters involved in this Interpretation. If there are no clear and gross flaws manifested by the constitution-amending body during the constitutional amendment process, and if the content of the amendment does not contradict with the principle of the democratic republic, the

principle of popular sovereignty, the protection of the fundamental rights of the people and the principle of checks and balances of governmental powers, then such amendment shall be deemed to be constitutional. To explain in further detail, for the allotment of seats for legislators-at-large, there exist in various democratic countries the Parallel Voting System and the Compensatory System. The determination as to which system to adopt is a value judgment of legislators. The legislators have chosen the Parallel Voting System, and such system does not contradict the principles of the democratic republic and popular sovereignty, and therefore raises no doubt of conflict with the Constitution. Furthermore, the purpose of the five percent threshold for political parties is to ensure that the efficiency of legislative operations and the smooth interaction between the executive and legislative branches are not impeded by a clustering of small parties and fragmentation of the political party system. Moreover, the legislative election results in recent years have shown that such amendment has not deprived the possibility of political parties other than the two major parties being elected. As such, the core contents of the rights to equality and suffrage have not been altered, and the electoral amendments outline in this case are constitutional.