

CIC Supplement – Chapter 9

Judicial Review of Constitutional Amendments: Taiwan

*Judicial Yuan Interpretation No. 499 (2000/3/24)*¹

The Constitution is the fundamental basis and supreme law of the country. Its amendment greatly affects the stability of the constitutional order and the well-being of the citizenry and, therefore, must be done by the authorized body in accordance with constitutional due process. ... The exercise of the amendment power must be based upon the principles of openness and transparency ... so as to live up to the reasonable expectations and trust of all the people. Based upon the principle of sovereignty of and by the citizenry (Article 2 of the Constitution), national sovereignty must be ensured by a process of communication through which people express and formulate their opinions. [T]he exercise of national sovereignty ... must be open and transparent to satisfy the requirement of rational deliberation so that the foundation of a constitutional state can be properly laid. [I]n the nine [previous] times the National Assembly undertook to amend the Constitution, ... anonymous balloting was never used ... [T]he applicable procedural rules must especially comply with the spirit upon which the order of freedom and constitutional democracy is founded.

[T]here were indeed many procedural flaws, including the following: (1) the amendment passed the Second and Third Readings on the basis of anonymous voting, (2) the handling of a motion to reconsider did not comply with the Regulations of the National Assembly Proceedings, (3) a valid motion to adjourn did not take precedence and was disposed of, (4) the process of voting repeatedly on previously rejected proposals to amend the Constitution contradicted the general parliamentary rules of order, and (5) the adjustment of language exceeded the scope permitted after the Second Reading. ...

... Judicial precedents from several countries show that their constitutional courts not only review the procedural propriety of constitutional amendments, but also conduct review on substantive grounds. For example, the German Bundesverfassungsgericht (Federal Court of Constitution, or BVerfG) decision of December 15, 1970 (BVerfGE 30, 1ff.); the Italian Corte Costituzionale decision of December 29, 1988, sent. N. 1146/1988; and Turkish Constitutional Court Judgment No. 13855 of June 7, 1971, and No. 14233 of July 2, 1972). [However, for countries that place] differences on both the institution and the process of the constitutional amendment and legislative enactment (such as the United States), diverse viewpoints do exist. Citing the U.S. Supreme

¹ This translation takes as its point of departure the translation available on the TCC's official website, which is credited to Professor Andy Y. Sun, but has been further revised.

Court's opinion on *Coleman v. Miller*, 307 U.S. 433 (1939), the National Assembly claimed that Congress has complete and exclusive power in deciding the process of amending the constitution without subjecting itself to judicial review. In addition, ... it argued that constitutional amendment is a political process and Article 5 of the federal Constitution regarding constitutional amendments is independent from the general legal process and should be subject to no interference by the Judicial Branch (See Laurence H. Tribe, *American Constitutional Law*, 3rd ed., vol. 1, p. 105 (2000), cited by the National Assembly). However, the *Coleman* holding that the court lacks jurisdiction because ratification of a constitutional amendment is a "political question" has not achieved the status of a majority view in the United States. In a 1984 case involving a California citizens' initiative to amend the constitution, [the Court] held that *Coleman* cannot be read expansively to conclude that the process of amending a constitution poses a "political question" exempt from judicial review (*Uhler v. the American Federation of Labor-Congress of Industrial Organizations*, 468 U.S. 1310 (1984)). It is obvious that the U.S. courts may nevertheless conduct proper review [of the constitutionality] of a constitutional amending process, based on the purpose and spirit of the constitution. The same scholar quoted by the National Assembly even stated in the same publication, "[n]or should we expect the courts to defer to a congressional judgment... that ratification by thirty-five out of fifty states satisfies Article V's three-fourths requirement" (Tribe, *id.*, p. 105) and "commentators on the subject tend to disagree mainly on the scope of... judicial review..." (*Id.*, p. 372). [Thus, e]ven if one were to rely on the U.S. authorities cited by the National Assembly, they are insufficient to call into question the scope of this court's review of the amendment process.

[Constitutional amendments enacted by the National Assembly] enjoy equal status with the original constitutional provisions. Yet to allow an amendment designed to alter existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment must be deemed improper. Although our Constitution does not expressly identify those unchangeable provisions, ... principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental principles of the Constitution. Constitutional freedom and democratic rule of law derived from these principles are the foundations upon which the current Constitution is constructed, and all institutions ... are obligated to abide by them. Since the National Assembly is a constitutionally ordained institution and its power is bestowed by the Constitution, it must also be regulated by the Constitution. [A]ny violation that touches upon the basic principles of constitutional freedom and democratic rule of law breaches the fiducial duty to the people, affects the foundation of the very existence of the Constitution, and must be checked and balanced by other constitutionally ordained institutions.

...

Even if we assume that extension of the National Assembly's term would help it to complete the necessary constitutional reforms, the goal does not justify the means. [T]o recuse themselves in light of a conflict of interest is a principle that all public officials must abide by. [A]n outright extension of their own term [that takes effect immediately, instead of the next term] ... violates the principle of democratic constitutional rule of law