J.Y. Interpretation No. 384 (July 28, 1995)*

The Constitutionality of the *Liumang* (Hoodlums) Act Case

Issue

The Act for Eliminating *Liumang* (Hoodlums) allows the police to force people to appear before the police and allows the court to use the testimony of secret witnesses, who are not confronted and examined by the transferred people, as evidence. Are these rules constitutional?

Holding

[1] Article 8, Paragraph 1 of the Constitution reads:

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute. No person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by statute. Any arrest, detention, trial, or punishment not conducted in accordance with the procedure prescribed by statute may be rejected.

Regarding so-called "the procedure prescribed by statute", it means that all the decisions made by the government to restrain personal liberty and security of the people must be prescribed by law, no matter whether the people are criminal defendants or not. In addition, the restraints should be subject to substantive due

* Translation and Note by Kai-Ping SU

process review and in line with the relevant conditions provided in Article 23 of the Constitution. Article 6 and Article 7 of the Act for Eliminating *Liumang* (Hoodlums) (hereinafter referred to as "the Act") authorize the police to force people to appear before the police, without following necessary judicial process. Article 12, regarding secret witnesses, deprives the rights of the transferred person to confront and to examine witnesses, and obstruct discovery of truth in court. Article 21, without considering the necessity of specific deterrence, imposes the sanction of reformatory training on people who were already sentenced or punished, which jeopardizes their right to personal liberty and security. All of the above provisions of the Act exceed the necessary level, fail the substantive due process requirement, and contradict the intent of the aforementioned Articles of the Constitution. Furthermore, Article 5 of the Act also contradicts the intent of Article 16 of the Constitution, because this Article provides that the people determined to be *liumang* and therefore warned by the police can only file a motion of objection to the National Police Agency, Ministry of the Interior, and they are not allowed to file an administrative appeal or litigation against the police decision. All these articles of the Act mentioned above shall become null and void once this Interpretation is announced and no later than December 31st, 1996.

Reasoning

[1] The people's right to personal liberty and security is an important and fundamental human right, and fully safeguarding this right is a prerequisite to exercising other freedoms protected by the Constitution. Article 8 of the Constitution, therefore, has specific and detailed provisions about the protection of the people's right to personal liberty and security. Paragraph 1 of this Article reads:

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person

> shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute. No person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by statute. Any arrest, detention, trial, or punishment not conducted in accordance with the procedure prescribed by statute may be rejected.

It indicates that the people, whether they are criminal defendants or not, are protected by the above provision from any measures restraining the people's right to personal liberty and security, except as otherwise provided for in the Constitution. Except for cases of *in flagrante delicto* which shall be separately prescribed for by law, all other procedures related to protection of the people's right to personal liberty and security shall also be based on law. At the same time, those laws passed by the legislative body must be subject to substantive due process review and in line with the conditions set up in Article 23 of the Constitution. These are the mechanisms for institutional protection of liberty and security of person, which include all kinds of institutions guaranteeing liberty and security of person in our country since the Constitution has taken effect, as well as include the rights and protections of liberty and security of person generally granted by modern rule-of-law countries. Otherwise, the protection of liberty and security of person would be nothing but empty talk, and the above provisions of the Constitution would never be implemented.

[2] The above substantive due process of law covers both substantive law as well as procedural law. In substantive law, for instance, it must comply with the principle of *nulla poena sine lege* (no punishment without a law authorizing it). In procedural law, major processes include: except for *in flagrante delicto*, that the arrest of a suspect shall follow required judicial process; the confession of the accused shall be made voluntarily; a conviction shall be based upon evidence; no

person shall be punished for the same offence more than once; the parties have the right to confront and to examine witnesses; distinction between trial and prosecution; trials shall be made in public in principle; and the right to appeal against lower court decisions. Except for situations that martial law is declared, or that the country or the people are in a state of emergency, any statutory provisions departing from the aforementioned principles are deemed violations of the substantive due process of law. The predecessor of the current Act was enacted in the Period of Mobilization for the Suppression of the Communist Rebellion, and this regulation of the Act has lasted since then. The Act has had the value of maintenance of social order. When statues are made to prevent behavior, as enumerated in Article 2 of the Act, the content of these statutes, as a matter of course, has to be in accordance with the substantive due process of law.

[3] Article 4 of the Act, regarding the sanctions of warning and listing people who are determined to be *liumang*, not only affects the reputations of the people involved, but may lead to the imposition of reformatory training on the people and therefore jeopardize their liberty and security of person. It is definitely an administrative act damaging the rights and interests of the people. Article 5 of the Act provides that, if a person who is determined to be a *liumang* and warned by the police accordingly does not accept these sanctions, the person may file a motion of objection, with a written statement of reasons and within ten days of receiving the written warning, to the National Police Agency, Ministry of the Interior. However, the decision of the National Police Agency, Ministry of the Interior, is final and the person can appeal no more. This Article excludes the application of administrative litigation, and therefore it obviously contradicts Article 16 of the Constitution, which guarantees the right to administrative appeals and judicial remedy.

[4] Article 6 of the Act reads:

> Once a person is determined to be a serious *liumang*, the city or county police departments may summon the person to appear before the police without any prior warning. If the person summoned fails to appear, the police may force the person to appear before them.

Its Article 7 reads:

> Within a year of a person having been determined to be a *liumang* and given such warning, if the person still meets any condition as prescribed in any Subparagraphs of Article 2, the city or county police departments may summon the person to appear. If the person summoned fails to appear, the police may force the person to appear before them. For those who are carrying out the *liumang* acts, they can be forced to appear without a prior summons.

The above articles authorize the police to force people to appear before them. Nonetheless, a *liumang* may be an offender who also commits criminal offenses, or someone whose acts are not sufficiently serious to be considered criminal offenses. As for criminal offenders, the Code of Criminal Procedure provides specific formats and procedures for their arrest and detention. The above Articles of the Act do not distinguish whether or not a person is committing a crime and generally allows the police to force people, without any judicial approval, to appear, similar to *in flagrante delicto*. These articles have exceeded the necessary level and violated the intent of Article 8, Paragraph 1 of the Constitution, which clearly distinguishes the procedures applied to people who are caught *in flagrante* and the procedures applied to those who are not.

[5] Article 12, Paragraph 1 of the Act reads:

> While handling *liumang* cases, the police and the court shall separately examine the reporter, the victim, or the witness as if they are a secret witness, if these people request that their names and identities remain confidential. In any notices, transcripts, and documents, their names or identities shall be replaced by code names. Names or identities of secret witnesses shall not be disclosed.

Its Paragraph 2 reads:

> The transferred person and his lawyer may not request to confront or to examine secret witnesses.

Without considering the circumstances of the case, these provisions demand that the court separately examines witnesses as secret witnesses and prevent the transferred person and his lawyer from confronting or examining secret witnesses, simply because the reporter, the victim, or the witness request that their names and identities remain confidential. These provisions deprive the right of the transferred person to his defense, obstruct discovery of truth in court, and may impose reformatory training on the transferred person without sufficient evidence, which are, of course, not permitted by the Constitution.

[6] Article 21 of the Act regards the implementation rules in a situation where a person receiving the sanction of reformatory training violates both the Act and criminal laws. Without considering the necessity of specific deterrence, this Article further imposes reformatory training on the people who were already sentenced or punished, which may again endanger their liberty and security of person. In addition, as provided in Article 96 of the Criminal Code, the Criminal Code already has rehabilitative provisions and measures for acts violating both the Act and criminal laws, when the court considers it necessary. The sanction of

reformatory training is a sanction in addition to the rehabilitative measures provided in the Criminal Code and the Act Governing the Enforcement of Rehabilitative Measures. When reformatory training is imposed, the liberty and security of person of the transferred person is substantially restrained for as long as up to three years. Furthermore, pursuant to the Act, reformatory training shall be enforced prior to any other similar rehabilitative measures provided in other statutes. As a result, it is not unusual that the transferred person, who is not prosecuted by the prosecutor or convicted by the court in a regular criminal proceeding, has to receive reformatory training. Although the transferred person may file a motion of reconsideration of reformatory training when he is not prosecuted or not convicted, as provided in Article 16, Paragraph 1, Subparagraph 7 of the Act, his liberty and security of person has been jeopardized permanently. All these provisions above are contrary to the historically established principles that protect liberty and security of person of the people as well as interests of the criminal defendant. Even though the above provisions of the Act may intend to prevent infringement upon the freedoms of others or to maintain social order, they exceed the necessary level, violate substantive due process, and therefore shall not be permitted under the Constitution.

[7] Accordingly, Article 5 of the Act violates Article 16 of the Constitution which protects the rights to administrative appeals and judicial remedy of the people; Articles 6, 7, 12, and 21 contradict the intent of Article 8, Paragraph 1 of the Constitution which protects liberty and security of person of the people. These Articles of the Act shall become null and void, once this Interpretation is announced and no later than December 31st, 1996, by which date the authorities concerned shall thoroughly re-examine the Act from a perspective which can balance the protection of personal rights and the maintenance of social order.

Background Note by the Translator

Petitioners of this Interpretation included inmates receiving the sanction of reformatory training, and judges trying *liumang* cases. Several inmates receiving the sanction of reformatory training petitioned for constitutional interpretation in February, April, and July of 1995, respectively, after exhaustion of all legal remedies. They argued that the following provisions authorizing the government agencies to impose the sanctions of reformatory training were unconstitutional, because these provisions contradicted Articles 8, 10, 15, 16, 23 of the Constitution. The provisions they challenged were Articles 2, 4, 5, 6, 7, 11 (Section 1), 12, 13 (Section 2), 16, 19 (the fore of Section 1), and 21 of the Act, as well as Articles 11, 18, and 36 of the Implementing Rules for the Act for Eliminating *Liumang*.

At the same time, three judges trying *liumang* cases also petitioned for constitutional interpretation in July, 1995. These judges considered that the provisions of the Act, which were to have been applied to their *liumang* cases, contradicted Articles 7, 8, and 16 of the Constitution. Therefore, these judges ruled to suspend the pending procedures and petitioned for constitutional interpretation. The Constitutional Court decided to combine and hear all of these cases together.

This Interpretation was the very first time that the Constitutional Court found articles of the *liumang* Act unconstitutional. Before the entire Act was abolished by the Legislature in 2009, different parts of the Act had been found unconstitutional for three times, respectively in J.Y. Interpretations Nos. 384, 523, and 636. The historical process of dealing with the constitutionality of the *liumang* Act in the Constitutional Court has been an important course of human rights development in Taiwan.

Before Interpretation No. 384, the Constitutional Court had touched upon the constitutionality of a punishment of similar nature - compulsory correction or re-education provided for in the Act Governing the Punishment of Police Offences (hereinafter “the Act”). The petitioner of Interpretation No. 384 was

imposed a sanction of compulsory correction by the police department in 1985. In 1989, after exhaustion of all legal remedies, the petitioner petitioned the Constitutional Court for an Interpretation of Article 28 of the Act, which provision, he argued, was against the intent of Article 8, Paragraph 1 of the Constitution.

The Constitutional Court found:

> The detention and forced labor imposed by police departments under the Act are punishments imposed on liberty and security of person of the people. To be consistent with the intent of Article 8, Paragraph 1 of the Constitution, the authority which may impose these punishments shall be changed, as soon as possible, from the police to a court following legal procedure. This issue was already addressed by this Constitutional Court in Interpretation No. 166, on November 7th, 1980.
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> The sanction of "[being] sent to a certain place for correction or living skills training", provided in Article 28 of the Act, is also a restraint on liberty and security of person of the people. This sanction is also inconsistent with the intent of Article 8, Paragraph 1 of the Constitution, because it can be imposed by police departments. The determination process of this sanction shall be made by a court in accordance with the procedure prescribed by statute, as the determination process of detention and forced labor shall. The rules regarding determination processes of detention and forced labor, which were interpreted in Interpretation No.166, as well as the rule of the sanction above, should be null and void no later than July 1st, 1991, by when the related statues should be amended.
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> This Interpretation is a supplement to an earlier decision of the

Constitutional Court, *i.e.*, Interpretation No. 166. The petitioner of Interpretation No. 166 was the Control Yuan, one of the five branches of the Government and an investigatory agency that monitors the other branches of government. The Control Yuan argued that the Act Governing the Punishment of Police Offences permitting the police to impose sanctions of administrative detention and forced labor upon offenders contradicted Article 8 of the Constitution.

In this Interpretation No. 166, the Constitutional Court ruled that administrative detention and forced labor are related to liberty and security of person of the people and should be decided only by a court based on legal procedure, as provided in Article 8, Paragraph 1 of the Constitution.

J.Y. Interpretations Nos. 166 and 251 are predecessors of the Interpretation 384, in terms of the interpretation of Article 8, Paragraph 1 of the Constitution. This Paragraph reads (excerpt):

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute.

In all the three Interpretations, the Constitutional Court repetitively announced that so-called "the procedure prescribed by statute" means that all the decisions made by the government to restrain personal liberty and security of the people must be prescribed by law, no matter whether the people are named criminal defendants, *liumang* (as in J.Y. Interpretation No. 384), or offenders of "police offenses" (as in J.Y. Interpretations Nos. 166 and 251).