
J.Y. Interpretation No. 588 (January 28, 2005)*

Deprivation of Personal Liberty and Security Case

Issue

Are the various reasons for arrest and custody listed in Article 17, Paragraph 1 of the Administrative Execution Act unconstitutional? Are the provisions of Article 17, Paragraphs 2 and 3 and Article 19, Paragraph 1 of the said Act consistent with the principle of due process of law?

Holding

[1] For purposes of substantial public interests, the Constitution stipulates that the legislature may use compulsory measures that restrain the freedom of people in order to ensure that they fulfill their legal obligations within the scope that is consistent with the principle of proportionality. The provision concerning “custody” in the Administrative Execution Act is intended to satisfy the obligation of monetary payment under public law whereby an indirect compulsory measure to restrain the obligor’s body is taken when the obligor is able but unwilling to perform, which is not disallowed by the Constitution. However, in respect of those reasons under which application may be made to the court for an order of custody as listed in Article 17, Paragraph 1 in reference to Paragraph II of the same Article, only Subparagraphs 1, 2, and 3 of Paragraph 1, which provide, respectively: “where the obligor is apparently able to perform but intentionally does not perform”; “where the obligor apparently is likely to abscond”; and “where the obligor has concealed or disposed of the assets that are subject to the compulsory execution,” are difficult to consider as beyond the

* Translation and note by Vincent C. KUAN

scope of necessity. The remaining provisions, *i.e.*, Subparagraphs 4, 5 and 6 of the same Paragraph, which provide, “where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution”; “where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate”; and “where the obligor refused to appear without legitimate reason after legal notice was served,” are clearly beyond the boundary of necessity and thus violate the intent of Article 23 of the Constitution.

[2] In respect of those reasons under which application may be made to the court for an order of arrest as listed in Article 17, Paragraph 2 in reference to Paragraph 1 of the same Article, only Subparagraphs 2 and 6 of Paragraph 1 which provide, respectively, “where the obligor apparently is likely to abscond,” and “where the obligor refused to appear without legitimate reason after legal notice was served,” may be deemed to have satisfied the requirement of the principle of proportionality. The remaining provisions, *i.e.*, Subparagraphs 1, 3, 4, and 5 of the same paragraph, which provide, “where the obligor is apparently able to perform but intentionally does not perform”; “where the obligor has concealed or disposed of the assets that are subject to the compulsory execution”; “where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution”; and “where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate,” are clearly beyond the boundary of necessity and thus also violate the intent of Article 23 of Constitution.

[3] Liberty and security of person is an essential prerequisite for people to enjoy their various rights of freedom under the Constitution. The phrase “the procedure prescribed by law” described in Article 8, Paragraph 1 of the Constitution means that the procedure based on which the government imposes any measures to restrain a person's liberty, whether he or she is a criminal defendant or not, must

not only have statutory foundation, but also fulfill necessary judicial procedure or other due process of law. This procedure is within the scope of constitutional reservation, and even the legislative body cannot limit it by enacting statutes to that effect. However, the restrictions imposed on the liberty and security of the person of a criminal defendant and a non-criminal defendant are, after all, different in nature, and therefore the judicial procedure or other due process of law need not be identical. Custody is meant to confine a person to a bounded area during a certain period of time, which shall fall within the meaning of “detention” as prescribed in Article 8, Paragraph 1 of the Constitution. Therefore, it is essential before the decision of custody is made that certain necessary proceedings be carried out, under which the matter will be heard by an impartial and fair third party, *i.e.*, the court, and the obligor will appear and participate in the proceeding so as to both ascertain whether the legal requirements and necessity of the custody are satisfied, and to enable the obligor to have an opportunity to defend himself/herself by producing evidence in his or her favor for the court to investigate. Thus, the constitutional guarantee of the liberty and security of person may be realized. In accordance with Article 17, Paragraph 3 of the Administrative Execution Act, the court should render its ruling concerning custody within five days of the application. In other words, the court may elect not to try and hear the matter immediately after the application is filed, which renders the protection of human rights incomplete. The provision that a ruling should be made “within five days” is ill considered, and the authorities concerned shall review and rectify it accordingly. In addition, under Article 17, Paragraph 2 of the Administrative Execution Act, which provides, “Where the obligor neither performs the obligation nor provides collateral afterward upon expiration of the deadline prescribed in the preceding paragraph, the Administrative Enforcement Office may apply to the competent court for an order of arrest and custody”; and Article 19, Paragraph 1 thereof, which provides,

“After rendering the order of arrest and custody, the court shall deliver the warrant of arrest and custody to the Administrative Enforcement Office, which office shall assign junior enforcement officers to make the arrest and send the arrested obligor to the institution of custody,” when the Administrative Enforcement Office applies for arrest and custody concurrently and the court makes a concurrent order of arrest and custody, it is impossible to carry out a hearing, since the obligor concerned will not have appeared in court, for the arrest has not yet been made. Nevertheless, the court can still go so far as to render a ruling of custody, which, in particular, violates the requirement of the aforementioned due process of law. Furthermore, if and when an application for custody is made under Article 17, Paragraph 2 and Article 17, Paragraph 1, Subparagraph 6 of the Administrative Execution Act, which provides, “Where the obligor refused to appear without legitimate reason after legal notice was served,” it is also impossible for the court to carry out a hearing and trial, since the obligor is not present. However, the court can still render a ruling of custody, which violates the aforementioned constitutional intent of due process of law as well.

[4] The “police organ” prescribed in Article 8, Paragraph 1 of the Constitution, providing, “Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law” means not only the institution named “police” under organizational law but also any agency or person who is authorized by law to use the means of interference and suppression for the purposes of preserving social order or promoting public interests. Therefore, the provision of Article 19, Paragraph 1 of the Administrative Execution Act in respect of the arrest and custody exercised by the junior enforcement officers sent by the Administrative Enforcement Office is not in violation of the constitutional intent mentioned above.

[5] The aforesaid provisions of the Administrative Execution Act that violate the constitutional intents shall become null and void no later than six months from the date of publication of this Interpretation.

Reasoning

[1] For purposes of substantial public interests, the Constitution stipulates that the legislature may use compulsory measures that restrain the freedom of people in order to ensure that they fulfill their legal obligations within the scope that is consistent with the principle of proportionality. The Administrative Execution Act is the procedural rule for the purposes of practicing administrative law, upholding their effective exercise, and compelling people to perform their obligations under public law by using the force of the state. With respect to the monetary obligations under public law, the indicated obligor shall perform automatically without the enforcement of the state, and the realization of the payment under public law has a material relationship with the finance and the measures of society, health and welfare of the state; the maintenance of the order of society is based on it, and the public interest relies on it to increase revenue. “Custody” is a compulsory measure whereby the obligor's body is restrained in a bounded area for a period of time for the purpose of compelling him or her to perform his or her obligations, and is a method of indirect measure of enforcement. Although custody restrains an obligor's body, the rule concerning “custody” in the Administrative Execution Act is intended to fulfill the obligation of monetary payment under public law, where the obligor is indeed able but unwilling to perform, which is an indirect and compulsory method to compel the person to fulfill the obligation of monetary payment under public law that he or she is able to perform but has refused to perform. Given the above statement, it is not disallowed by the Constitution.

[2] Although the principle of proportionality is a fundamental principle on the

constitutional level, attention should always be paid to the interpretation and application of individual regulations; in particular, to “legislation,” the purpose of which is to prevent people from excessive intrusion by the legislative authorities. In respect of those reasons under which application may be made to the court for an order of custody as listed in Article 17, Paragraph 1 in reference to Paragraph 2 of the same Article, only Subparagraphs 1, 2, and 3 of Paragraph 1, which provide, respectively: “where the obligor is apparently able to perform but intentionally does not perform”; “where the obligor apparently is likely to abscond”; and “where the obligor has concealed or disposed of the assets that are subject to the compulsory execution,” are difficult to consider as beyond the scope of necessity and therefore may be justified because they require the prerequisite that the enforcement authorities hold substantial evidence to corroborate the obligor's capability of performance (*see* Article 8, Paragraph 1, Subparagraph 3 of the Administrative Execution Act). The remaining provisions, *i.e.*, Subparagraphs 4, 5, and 6 of the same Paragraph, which provide, “where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution”; “where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate”; and “where the obligor refused to appear without legitimate reason after legal notice was served,” are clearly beyond the boundary of necessity and thus violate the intent of Article 23 of the Constitution because they fail to ascertain whether the obligor has the capability of performance and whether the enforcement authorities have less intrusive means available (*e.g.*, having not exhausted all other available execution measures) under the circumstances to investigate the assets of liability subject to the execution but, instead, once any such conditions occur, no tracking of assets is required before an application may be made to the court for an order of custody. With respect to the judgment as to the capability of performance, the authorities concerned should review the relevant information

about the obligor's income, property and ability to work to determine whether payment (performance) may be anticipated from the obligor's salary or other resources (*e.g.*, disposal of property, reduction of living expenses, etc.). Naturally, it should be taken into account whether there remain assets necessary to maintain the obligor's basic livelihood (*see* Article 21, Subparagraph 1 of the Administrative Execution Act); and, as to "work ability," the age and health status of the obligor, as well as demand and supply in the labor market, should also be considered.

[3] Arrest is a measure to force an obligor to appear and is also a kind of restraint on the liberty and security of person. The arrest of the obligor as prescribed in Article 17 of the Administrative Execution Act is for the purpose of compelling the obligor to appear, state or report. Although the restraint imposed on the liberty and security of person is less restrictive than custody, and the degrees of intrusion are different, it does not mean that the application of the principle of proportionality provided by Article 23 of the Constitution can be excluded. In respect of those reasons under which application may be made to the court for an order of arrest as listed in Article 17, Paragraph 2 in reference to Paragraph 1 of the same Article, only Subparagraphs 2 and 6 of Paragraph 1 which provide, respectively, "where the obligor apparently is likely to abscond," and "where the obligor refused to appear without legitimate reason after legal notice was served," may be deemed to have satisfied the requirement of the principle of proportionality; the remaining provisions, *i.e.*, Subparagraphs 1, 3, 4 and 5 of the same paragraph which provide, "where the obligor is apparently able to perform but intentionally does not perform"; "where the obligor has concealed or disposed of the assets that are subject to the compulsory execution"; "where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution"; and "where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate,"

are clearly beyond the boundary of necessity and thus also violate the intent of Article 23 of the Constitution because they fail to stipulate whether the enforcement authorities should first execute the assets of liability or make further asset tracking, or whether the obligor has made a statement to the enforcement personnel, thus rendering it unnecessary to make the arrest, but, instead, it constitutes a reason for the authority to apply for an order of arrest once the obligor neither performs in due time nor furnishes collateral.

[4] Liberty and security of person is an essential prerequisite for people to enjoy their various rights of freedom under the Constitution. The phrase “the procedure prescribed by law” described in Article 8, Paragraph 1 of the Constitution means that the procedure based on which the government imposes any measures to restrain a person's liberty, whether he or she is a criminal defendant or not, must not only have statutory foundation, but also fulfill the necessary judicial procedure or other due process of law (*see* J.Y. Interpretation No. 384). This procedure is within the scope of constitutional reservation, and even the legislative body cannot limit deprive it by enacting statutes to that effect. However, the restrictions imposed on the liberty and security of the person of a criminal defendant and a non-criminal defendant are, after all, different in nature, and therefore the judicial procedure or other due process of law need not be identical. Custody is meant to confine a person to a bounded area during a certain period of time, which shall fall within the meaning of “detention” as prescribed in Article 8, Paragraph 1 of the Constitution. However, it is different from the detention in a criminal procedure in terms of purposes. Detention emphasizes procedural security that aims to ensure the appearance of the defendant throughout the entire criminal procedure so as to facilitate the effective proceeding of investigation and trial, as well as effective execution of the judgment. The purpose of custody, as mentioned above, is to make the obligor perform the obligation of paying money. It is a kind of indirect measure of

execution, which is not designed to secure the obligor's body, so the required judicial procedure need not be exactly the same as that of detention. Nonetheless, as is true with detention, it is essential before the decision of custody is made that certain necessary proceedings be implemented, under which the matter will be heard by an impartial and fair third party, *i.e.*, the court, and the obligor will appear and participate in the proceeding so as to both find out whether the legal requirements and necessity of the custody are satisfied, and to enable the obligor to have an opportunity to defend himself/herself by producing evidence in his or her favor for the court to investigate. Thus, the constitutional guarantee of the liberty and security of person may be realized.

[5] Article 17, Paragraphs 2 and 3 and Article 19, Paragraph 1 of the Administrative Execution Act provide, respectively, "Where the obligor neither performs the obligation nor provides collateral upon expiration of the deadline prescribed in the preceding paragraph, the Administrative Enforcement Office may apply to the competent court for an order of arrest and custody"; "The court shall render the order within five days of the application provided in the preceding paragraph. In case of dissatisfaction with the order, the Administrative Enforcement Office or the obligor may file an appeal within ten days; the provisions concerning the appeal to set aside court rulings as prescribed under the Code of Civil Procedure shall apply *mutatis mutandis* to the proceeding of the aforesaid appeal"; and "After rendering the order of arrest and custody, the court shall deliver the warrant of arrest and custody to the Administrative Enforcement Office, which office shall assign junior enforcement officers to make the arrest and send the arrested obligor to the institution of custody." With respect to the order of custody, the Compulsory Execution Act and the Code of Criminal Procedure shall be applicable *mutatis mutandis* in accordance with Article 17, Paragraph 5 of the said Act. However, the Administrative Execution Act simultaneously provides for arrest and custody (*see* Article 17, Paragraph 2

et seq.), which is different from the Compulsory Execution Act (*see* Article 21, Article 22, Paragraphs 1 and 2 thereof) and the Code of Criminal Procedure (*see* Articles 75 et seq., 93, 101 et seq. and the second sentence of 228, Paragraph 4 thereof). Therefore, besides “arrest,” or “custody” alone or “custody subsequent to arrest,” the Administrative Enforcement Office may decide to consolidate them and apply for arrest and custody, and the court may render an order consolidating arrest and custody. Additionally, according to the said Article 19, Paragraph 1 of the Administrative Execution Act, “after rendering the order of arrest and custody, the court...may carry out the arrest of the obligor and send the obligor directly to the institution of custody,” which is also a special provision under the said act that is absent in the Compulsory Execution Act. Even the Code of Criminal Procedure does not expressly provide that, after arrest, the defendant may be sent to prison directly (*see* the first sentence of Article 91 and Article 103, Paragraph 1 thereof). Therefore, it is impossible for the Compulsory Execution Act and the Code of Criminal Procedure to be applied *mutatis mutandis* under these circumstances. In addition, under Article 17, Paragraph 3 of the Administrative Execution Act, the court shall render its ruling concerning custody “within five days” of the application, which is also a special provision that is different from the Compulsory Execution Act (*see* Article 22-5 thereof), to which the Code of Criminal Procedure shall be applicable *mutatis mutandis*. According to Article 93, Paragraph 5 of the Code of Criminal Procedure, after receiving the application for detention, the court shall interrogate the defendant immediately. Articles 100 and 101-1 thereof further provide that, “upon interrogation of the defendant by the court,” the defendant may (by a ruling) be detained if the court deems it appropriate or necessary. In other words, after accepting the application for detention, the court shall interrogate immediately and decide whether the detention should be ordered. The reason for immediate interrogation is to afford the “defendant” an opportunity to plead against the

detention, whereas the court may also investigate into the necessity of detention. The reason for an immediate decision as to whether detention should be made after interrogation is to protect human rights by preventing unreasonable restraint of a defendant's physical freedom. Nonetheless, under the aforesaid provisions of the Administrative Execution Act, the court may elect not to try and hear the matter immediately after the application is filed and may render its ruling "within five days," which obviously renders the protection of human rights incomplete. The provision that a ruling should be made "within five days" fails to consider the foregoing reasons and, accordingly, shall be reviewed and rectified for its inadequacy in protecting human rights.

[6] Furthermore, where the Administrative Enforcement Office applies for arrest and custody concurrently, the obligor for whom a ruling of custody is issued naturally cannot appear by means of arrest, and it is thus unlikely that he or she will have a hearing and trial. However, the court can still render an order of custody based merely on information furnished unilaterally by the Administrative Enforcement Office without any oral hearing and trial to determine whether the application for custody satisfies statutory requirements and whether custody is necessary. And, thus, the obligor is not given any opportunity to defend himself/herself by proffering favorable pleas and pointing out means of proof for the court to deliberate before the court issues an order for his or her custody and sends him or her directly to an institution of custody after his/her arrest. There is no hearing at all, not even an inquiry as to his/her "identity," (*i.e.*, inquiry as to whether the person is the one subject to the arrest) so it violates the requirement of due process of law more than anything else. Moreover, as for another reason that the court may give an order of custody, *i.e.*, "where the obligor refused to appear without legitimate reason after legal notice was served," it is also not found in the Compulsory Execution Act (*see* Article 22, Paragraphs 1 and 2 thereof) and the Code of Criminal Procedure (*see* Articles 101 and 101-

1 thereof). Since the obligor did not appear, it is also impossible for the court to carry out the trial. However, the court can still render an order of custody as per an application based on written hearings, which, needless to say, is contrary to the aforesaid constitutional intent of due process of law as well.

[7] As to the proceedings regarding hearings on custody, an obligor should be given an opportunity to appear for the hearing, which is absolutely essential. In addition, if the materials submitted by the Administrative Enforcement Office are considered by the court to be insufficient or still ambiguous, the court may order the said office to have personnel appear before the court to make supplementary statements or submissions, and the office cannot refuse to do so. It should be noted that the required burden of proof for the office to apply under the said proceedings is met subject to the court's discretion rather than beyond a reasonable doubt.

[8] The “police” is a state administrative action or entity that is characterized by its authority to use compulsory means (interference, suppression) for the purposes of preserving social order or promoting public interests; it is a word of multiple meanings, *i.e.*, both broad and narrow, which are also substantive and formal, respectively. The broad, or substantive, meaning is observed in terms of its “function,” *i.e.*, any and all actions that have the abovementioned qualities of the “police” or, in other words, that exercise the authority under this meaning. On the other hand, the narrow, or formal, meaning focuses on the organization of the police and limits the scope of the term to the form of a police organ--the Police Act. Thus, only the authorities and personnel expressly provided under the said Act satisfy the definition, while those who merely carry out the actions of police or shoulder the missions of the police do not. The said Administrative Execution Act provides expressly for the custody and arrest and the required order rendered by the court. In other words, a judicial review is required before it is granted so the “execution” can be made by the competent authority, namely,

the personnel of the Administrative Enforcement Office (*see* J.Y. Interpretation No. 559). Therefore, the “police organ” prescribed in Article 8, Paragraph 1 of the Constitution, which provides, “Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law” has adopted the broad meaning, denoting not only the institution named “police” under organizational law but also the functional “police,” *i.e.*, any agency or person who is authorized by law to use the means of interference and suppression for the purposes of preserving social order or promoting public interests. Therefore, the provision of Article 19, Paragraph 1 of the Administrative Execution Act in respect of the arrest and custody exercised by the junior enforcement officers sent by the Administrative Enforcement Office is not in violation of the constitutional intent mentioned above.

[9] The aforesaid provisions of the Administrative Execution Act that violate the constitutional intents shall become null and void no later than six months from the date of publication of this Interpretation.

Background Note by the Translator

Petitioner, *i.e.*, Kuo-Hsun CHANG, Judge of the Shilin District Court of Taiwan (ten cases in total)

Kuo-Hsun CHANG, Judge of the Shilin District Court of Taiwan, while hearing a total of ten cases with respect to the applications for arrest and custody, had doubt as to the constitutionality of the applicable provisions of the Administrative Execution Act, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.

Petitioner, *i.e.*, Yan-Cheng WEN, Judge of the Taoyuan District Court of Taiwan (fourteen cases in total)

Yan-Cheng WEN, Judge of the Taoyuan District Court of Taiwan, while hearing a total of fourteen cases with respect to the applications for arrest and custody, suspected that Article 17 of the Administrative Execution Act and other applicable provisions thereof were in conflict with the Constitution, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.

Petitioner, *i.e.*, Yu-Jie KAO, Judge of the Shilin District Court of Taiwan
Yu-Jie KAO, Judge of the Shilin District Court of Taiwan, while hearing a case with respect to the application for arrest and custody, suspected that Article 17 of the Administrative Execution Act and other applicable provisions thereof were in conflict with the Constitution, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.