J.Y. Interpretation No. 756 (December 1, 2017)*

Prisoners' Freedom of Secrecy of Correspondence and Freedom of Expression Case

Issue

1. Does Article 66 of the Prison Act violate the freedom of secrecy of correspondence protected under Article 12 of the Constitution?
2. Does Article 82, Subparagraphs 1, 2 and 7 of the Enforcement Rules of the Prison Act exceed the authorization of the enabling statute, namely the Prison Act?
3. Does Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act violate the *Gesetzesvorbehalt* principle in Article 23 and freedom of expression in Article 11 of the Constitution?

Holding

[1] Article 66 of the Prison Act provides, "Incoming and outgoing mail of inmates shall be subject to inspection and perusal by prison officials. If the content is found to pose a risk to prison discipline, the prison officer has the authority to order deletion of the designated passage upon exposition of reasons, before the letter may be mailed out of the prison. The prison officer has the authority to delete passages in an incoming letter found to pose a risk to prison discipline, before it is received by the inmate." The purpose of inspection of mail is to ensure there is no contraband attached. To the extent that the measures of inspection are reasonably connected with this purpose, the inspection clause of the statute in question does not contravene the freedom of secrecy of

* Translation by Jimmy Chia-Shin HSU

correspondence protected in Article 12 of the Constitution. Regarding the perusal of mail, the statute in question does not distinguishing between types of mail, nor does it take into account the circumstances of individual cases. It indiscriminately authorizes prison officers to read the content of the mail. It is a clear infringement of the freedom of secrecy of correspondence of both the inmate and the correspondent. It amounts to an excessive restriction of the fundamental right. The statute in question is hence inconsistent with the freedom of secrecy of correspondence protected in Article 12 of the Constitution. Deletion of the content of correspondence should be limited to the extent necessary to maintain prison discipline. A copy of the original correspondence in its entirety should be preserved and should be returned to the inmate upon release from prison, so as to be commensurate with the principle of proportionality. To the extent that the statute in question meets such a requirement, it is not inconsistent with the constitutional protection of freedom of secrecy of correspondence and freedom of expression.

[2] It is provided in Article 82, Subparagraphs 1, 2 and 7 of the Enforcement Rules of the Prison Act that "the phrase 'posing a risk to prison discipline' contained in Article 66 of the Prison Act refers to correspondence involving the following elements: 1. Statements that are obviously untrue, fraudulent, insulting, or threatening, and which pose a risk that others may be defrauded, distressed, or disturbed. 2. Statements that pose a threat to fair and proper administration of correctional measures…..7. Statements that violate Article 18, Paragraph 1, Subparagraphs 1 to 4, 6, 7, and 9 of the Enforcement Rules of the Prison Act." In those cases referred to in Article 82, Subparagraph 1 of the Enforcement Rules, where the inmate's correspondent is not an inmate, and in those cases referred to in Subparagraph 7 of the same Article, which concern the several Subparagraphs of Paragraph 1 of Article 18 of the Enforcement Rules, the aims to be achieved are not necessarily related to the maintenance of prison

discipline. Where the regulation is irrelevant to the maintenance of prison discipline, the Enforcement Rules in question exceed statutory authorization. They are hence inconsistent with the *Gesetzesvorbehalt* principle in Article 23 of the Constitution.

[3] Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act, which provides that "submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison" is in contravention of the *Gesetzesvorbehalt* principle in Article 23 of the Constitution. Such purposes as "appropriate theme" and "reputation of the prison" do not qualify as important public interests and are therefore inconsistent with the protection of freedom of expression guaranteed by Article 11 of the Constitution. As for the purpose of "discipline of the prison", the regulation in question does not contemplate less intrusive measures, and hence violates freedom of expression protected in Article 11 of the Constitution.

[4] The aforementioned provisions, which contravene the Constitution, shall cease to be effective no later than two years after the date of announcement of this Interpretation, with the exception that the restrictions concerning "appropriate theme" and "reputation of the prison" of Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act shall cease to be effective from the date of announcement of this Interpretation.

Reasoning

[1] Petitioner Ho-Shun CHIU was sentenced to death by a final and binding decision. During his time in prison, he applied to prison authorities for permission to mail personal memoirs to his friend for the purpose of future publication. After inspecting the content, the Taipei Detention Center, which is supervised by the Agency of Corrections of the Ministry of Justice, determined

that some parts jeopardized the reputation of the institution. The petitioner was asked to modify the content before reapplying for permission. The petitioner did not accept the decision. The Taipei Detention Center called a review board meeting to deliberate on his appeal. The board meeting upheld the original decision and required the petitioner to reexamine his own content before reapplying for permission. The petitioner filed a suit to the administrative court. His case was eventually rejected by the Supreme Administrative Court in Judgment 102-Pan-514 (2013) (hereinafter "Final Judgment"). The petitioner claims that the sources of law in the Final Judgment, which include Article 66 of the Prison Act (hereinafter "Disputed Provision I"), Article 82, Subparagraphs 1,2 and 7 of the Enforcement Rules of the Prison Act (hereinafter "Disputed Provision II"), and Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act (hereinafter "Disputed Provision III"), are unconstitutional. He petitioned this Court for constitutional interpretation.

[2] Provisions I and III disputed in the petition were invoked and construed in the Final Judgment, and hence should be considered duly applied in the ruling. Though Disputed Provision II was not applied in the Final Judgment, because it is an exegetical provision of Disputed Provision I and should be seen as integral to it, this Court considers it a legitimate object of review. Therefore, the petition meets the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. This Court decides to admit the petition, for which this Interpretation is issued for the following reasons:

[3] 1. Concerning Disputed Provision I, which authorizes prison officers to inspect, peruse, and delete the content of mail sent to or received by inmates

[4] Article 12 of the Constitution provides, "The people shall have the freedom of secrecy of correspondence." The purpose of this fundamental right is to protect the people's right to choose whether, with whom, when, how, and what to communicate without arbitrary interference by the State or others. This

is one of the concrete modes of the right to privacy protected by the Constitution. It is a fundamental right essential for maintaining human dignity, individual autonomy and sound development of personality. Furthermore, this right is necessary to safeguard the personal intimate sphere of life from arbitrary invasion by the State or others, and it is necessary for upholding autonomous control of personal information (*see* J.Y. Interpretation No. 631). Moreover, Article 11 of the Constitution guarantees freedom of speech and other forms of expression, on the grounds that freedom of expression underpins self-realization, exchange of ideas, pursuit of truth, realizing the people's right to know, formation of the public will and facilitating all reasonable functions of political and social activities. It is a mechanism indispensable for the sound functioning of a democratic pluralistic society (*see* J.Y. Interpretation Nos. 509, 644, 678 and 734).

[5] The purpose of incarceration is to facilitate reform and rehabilitation (*see* Article 1 of Prison Act). It does not aim at total deprivation of rights and liberties.[Note] Except for the restriction of liberty of person and other incidentally restricted liberties, such as freedom of residence and migration, inmates enjoy constitutional rights not essentially different from what is guaranteed to other people. The inmate's fundamental rights such as freedom of secrecy of correspondence and freedom of expression are protected by the Constitution. Except for measures necessary to achieve the purposes of incarceration (including the maintenance of order and security of the prison, the enforcement of proper corrective treatment and the prevention of inmates' involvement in unlawful activities), inmates' fundamental rights should not be restricted. The same applies to death row inmates during the period of their imprisonment.

[6] Disputed Provision I provides that "incoming and outgoing mail of inmates shall be subject to inspection and perusal by prison officials. If the content is found to pose a risk to prison discipline, the prison officer has the authority to

order deletion of the designated passage upon exposition of reasons, before the letter may mailed out of the prison. The prison officer has the authority to delete passages in incoming mail found to pose a risk to prison discipline, before it is received by the inmate." The inspection and perusal clauses constitute restrictions of the secrecy of correspondence of the inmate and his/her correspondent. The purpose of inspection is for the prison officers to learn the content of the mail (including packages), in order to detect contraband. This does not necessarily intrude into the content of the correspondence. To the extent that the measures of inspection are reasonably connected to such a purpose (for example, checking the exterior of the object or examining it with instruments after unpacking the mail), the inspection part of Dispute Provision I does not exceed the requirement of necessity of Article 23 of the Constitution, and hence is not inconsistent with the guarantee of secrecy of correspondence of Article 12 of the Constitution.

[7] The perusal part of Disputed Provision I that authorizes prison officers to read the incoming and outgoing letters of inmates compromises the confidentiality of the content of correspondence. This restriction touches upon the core of the constitutional protection of secrecy of correspondence. The purpose of this restriction is legitimate, only insofar as it serves a penal function. However, the provision does not distinguish between types of correspondence (for example, whether it is between the inmate and relevant governmental authorities or his/her attorney), nor does it take into account circumstances of individual cases (for example, an inmate's behavioral performance during the prison term), and it indiscriminately authorizes prison officers to read the content of correspondence. It amounts to a clear infringement of the freedom of secrecy of correspondence of both the inmate and his/her correspondent. It is therefore an excessive restriction of such freedom. The provision in question is inconsistent with the proportionality principle of Article 23 of the Constitution

and contravenes the constitutional protection of secrecy of correspondence.

[8] The latter part of Disputed Provision I provides, "…If the content is found to pose a risk to prison discipline, the prison officer has the authority to order deletion of the designated passage upon exposition of reasons, before the letter may be mailed out of the prison. Similarly, the prison officer has the authority to delete passages in incoming mail found to pose a risk to prison discipline, before it is received by the inmate." Such a measure restricts not only the freedom of secrecy of correspondence but also the freedom of expression of inmates and their correspondents. Insofar as the provision in question serves to maintain prison discipline, such a regulative purpose can be deemed legitimate. The deletion, however, should be limited to what is necessary to maintain prison discipline. A copy of the original correspondence in its entirety should be preserved, and should be returned to the inmate upon release from prison, so as to be commensurate with the principle of proportionality. To the extent that the provision in question meets such a requirement, it is not inconsistent with the constitutional protection of secrecy of correspondence and freedom of expression.

[9] 2. Concerning Disputed Provision II, which offers exposition of the phrase "posing a risk to prison discipline" contained in the enabling statute.

[10] When administrative agencies are authorized by statute to issue supplemental regulations, such regulations should be consistent with the legislative intent and must not exceed the scope of power granted by the enabling statute, in order to be constitutionally permissible (*see* J.Y. Interpretation No. 568). In cases in which the enabling statute offers general authorization for administrative agencies to promulgate rules of enforcement, whether such rules exceed the authorization depends on whether the rules can be construed to rest within the parameters of the textual meaning of the enabling statute (s*ee* J.Y. Interpretation No. 710). Disputed Provision I permits prison

officers to delete the relevant passages of the correspondence only when it is necessary to maintain prison discipline. Article 93-1 of the Prison Act provides, "The rules of enforcement of this Act shall be promulgated by the Ministry of Justice." Disputed Provision II, promulgated under the authorization of Article 93-1 of Prison Act, provides, "The phrase 'posing a risk to prison discipline' contained in Article 66 of the Prison Act refers to correspondence with the following elements: 1. Statements that are obviously untrue, fraudulent, insulting, or threatening, and which pose a risk that others may be defrauded, distressed, or disturbed. 2. Statements that pose a threat to fair and proper administration of correctional measures…..7. Statements that violate Article 18, Paragraph 1, Subparagraphs 1 to 4, 6, 7, and 9, of the Enforcement Rules of the Prison Act." In those cases referred to in Article 82, Subparagraph 1 of the Enforcement Rules, where the inmate's correspondent is not an inmate, and in those cases referred to in Subparagraph 7 of the same Article, which invokes the several Subparagraphs of Paragraph 1 of Article 18 of the Enforcement Rules, the aims to be achieved are not necessarily related to the maintenance of prison discipline. Where the regulation is irrelevant to the maintenance of prison discipline, the Enforcement Rules in question exceed statutory authorization. They are hence inconsistent with the *Gesetzesvorbehalt* principle in Article 23 of the Constitution. If the agency in charge considers the phrase "posing a risk to prison discipline" insufficient for its penal purpose, it should amend the statute for further specification.

[11] 3. Concerning the part of Disputed Provision III, which restricts publication of inmates' writings

[12] Any restriction placed on the people's constitutionally protected fundamental rights shall be substantiated by statutes, or regulations concretely and specifically enabled by statutes, so as to be commensurate with the *Gesetzesvorbehalt* principle of Article 23 of the Constitution. Regarding

secondary matters concerning details and technicalities of law enforcement, competent authorities may promulgate necessary regulations (*see* J.Y. Interpretation No. 443). Disputed Provision III provides, "Submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison." This regulation constitutes a concrete restriction of inmates' constitutionally protected freedom of expression. It is not a secondary matter of technicality or detail. Since the Prison Act does not concretely and specifically authorize the executive agency to make such restrictions, it clearly violates the *Gesetzesvorbehalt* principle of Article 23 of the Constitution.

[13] Furthermore, freedom of expression is a significant fundamental right guaranteed by the Constitution. It upholds human dignity, individual autonomy, and sound development of personality. In principle, prior restraint by the State is presumed unconstitutional (*see* J.Y. Interpretation No. 744). Even though prior restraint as applied to inmates' speech is in principle not unconstitutional insofar as it serves the purpose of prison management, in view of the serious restrictions imposed on, and interference with, freedom of speech by prior restraint, the purpose of such restrictions must serve significant public interests, and the measures should be substantially connected to those purposes. In Disputed Provision III, the restriction concerning "appropriate theme" involves regulation of viewpoint, which, together with the restriction concerning "reputation of the prison", fails to serve significant public interests, and both are inconsistent with the freedom of expression guaranteed by Article 11 of the Constitution. Prison discipline, by contrast, is a significant public interest. After reading the content of the inmate's essays, if the prison officer finds that the content poses concrete dangers to prison order and security (for example, by escape or riots), it is only reasonable that the prison authorities may take precautionary or regulatory measures to address these dangers. However, the prison authorities should use

caution to ensure that the damage inflicted upon freedom of expression does not outweigh the benefits gained by the restrictive measures. The authorities should also carefully search for alternative measures that are less intrusive to freedom of expression, and should allow sufficient opportunities for the inmate to submit the essays in the future (for example, preserving the original copy for future submission, or permitting submission after modification of content). The prison authorities should not comprehensively prevent inmates from submitting their essays to newspapers or magazines, on the pretext of maintaining prison discipline. To the extent that it exceeds constitutional parameters, the part of Disputed Provision III which provides that "submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison" violates the freedom of expression guaranteed in Article 11 of the Constitution.

[14] Those parts of Disputed Provisions I, II and III which are declared unconstitutional shall cease to be effective no later than two years after the date of announcement of this Interpretation, with the exception that the restrictions concerning "appropriate theme" and "reputation of the prison" of Disputed Provision III shall cease to be effective from the date of announcement of this Interpretation.

[15] 4. Petitions dismissed or handled separately

[16] The petitioner petitioned for constitutional Interpretation of the complete text of Article 82 of the Enforcement Rules of the Prison Act. Except for Disputed Provision II, which is related to the case at issue and thus should be admitted, the other subparagraphs are not related to the case and fail to meet the requirement of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. They are hereby dismissed pursuant to Paragraph 3 of the same Article. As for the part of the petition concerning constitutional

interpretation of Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of the Enforcement Rules of the Prison Act, this Court has already announced Interpretation No. 755. These matters are hereby explicated.

Note: See Article 5 of the Basic Principles for the Treatment of Prisoners, passed by the General Assembly of the United Nations, Resolution A/RES/45/111 on December 14, 1990, which provides, "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

Background Note by Szu-Chen KUO

On December 1, 2017, the Constitutional Court announced two Interpretations, J.Y. Interpretations Nos. 755 and No. 756, with the former concerning inmates' right to judicial remedy and the latter inmates' freedoms of secrecy of correspondence and expression. These two Interpretations are milestones in the Constitutional Court's history both in terms of the protection of inmates' human rights and breakthroughs of the doctrine of special relationship of subordination. Inmates and the State were believed to be in a special relationship of subordination. According to the doctrine, inmates did not enjoy the same full rights as other citizens and were prohibited from filing a suit against the State. J.Y. Interpretations No. 755 and 756 are the first two cases in which the Constitutional Court has ever confirmed that inmates, except for the restriction of personal liberty of person and other incidentally restricted liberties, enjoy constitutional rights guaranteed to other people.

Despite the fact that the Constitutional Court found that inmates enjoy the freedom of secrecy of correspondence and freedom of expression as others do, it adopted a less stringent standard of review in this Interpretation. In examining the constitutionality of mail inspection, the Constitutional Court used rational basis review, requiring that measures of inspection be reasonably related to legitimate purposes. In reviewing the provision that allows the prison to decide whether inmates may submit essays to newspapers or magazines, the Constitutional Court, though citing that prior restraint by the State is presumed unconstitutional, in fact applied intermediate scrutiny to the prior restraint of inmates' correspondence. Whether the Constitutional Court will apply less stringent scrutiny in every inmate case is yet to be determined.