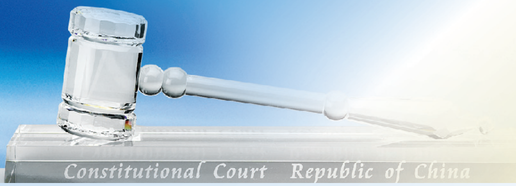
HUMAN RIGHTS PROTECTION & GENDER EQUALITY:
12 Landmark Interpretations Issued by the Justices



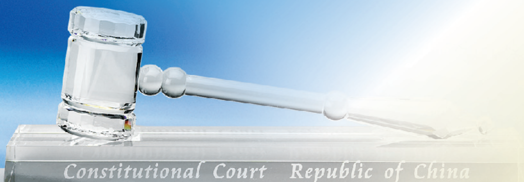
FOREWORD

The Republic of China (Taiwan) is a nation founded on the principles of human rights, which embraces freedom, democracy and rule of law. The Justices of the Judicial Yuan (who are equivalent to judges of a foreign constitutional court) have given numerous significant interpretations based on their ideas of serving as the final line of defense for the preservation of the constitutional order and the protection of human rights. These interpretations have struck a positive note in improving the nation's image as a free, democratic state under the rule of law and established their landmark status in the international community.

In order to help the international community become aware of the nation's efforts and accomplishments in the protection of human rights and the preservation of gender equality, the Judicial Yuan has selected twelve representative interpretations among the various interpretations and is ready to publish a booklet containing such interpretations along with their impact on the subsequent amendments to the relevant laws and regulations, which will be printed not only in Chinese, but also in English and Japanese, so as to facilitate the reference by foreign readers who are concerned with human rights protection and gender equality.

Yueh-sheng Weng

September 2007



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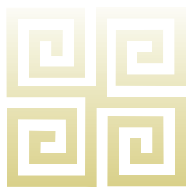
J.Y. Interpretation No. 365 (September 23, 1994)

Issue: Article 1089 of the Civil Code provides that in case of parental disagreement in exercising parental rights over a minor, the father shall have the right of final decision. Is the provision of said Article contrary to the Constitution?

A Summary of No. 365 and the Corresponding Amendments to the Relevant Laws & Regulations

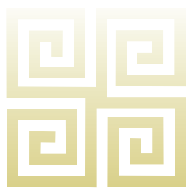
The Civil Code, in stipulating that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is contrary to the Constitution and the Amendments thereto, which aim to eliminate sexual discrimination. This Article should be examined and amended and shall be void within two years from the day of this Interpretation.

A number of members of the Legislative Yuan responded to said Interpretation by proposing a bill to amend certain articles of the Civil Code, Part IV Family, including Article 1089 thereof, on May 31, 1996. Later on, the Legislative Yuan deliberated and passed the relevant amend-



ments on September 6, 1996, which were then promulgated by the President on September 25 of that same year as per Directive No. (85)-Hua-Zong-(1)-Yi-8500231840.

Instead of stipulating that the father shall have the right of final decision in case of parental disagreement in exercising parental rights over a minor, the newly amended Article 1089 of the Civil Code provides that where there is inconsistency between the parents in the exercise of the rights in regard to the grave events of the minor child, they may petition the court for a decision in accordance with the best interests of the child (Paragraph II).



Holding

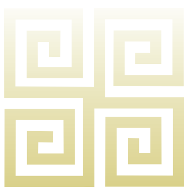
Article 1089 of the Civil Code, which stipulates that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is incompatible with Article 7 of the Constitution, which proclaims that both sexes are equal under the law, as does Article 9, Paragraph 5, to the Amendment in eliminating sexual discrimination. This Article should be examined and amended. This Article shall be void within two years from the day of this Interpretation.

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

Issue: The Gangster Prevention Act authorizes the police to arbitrarily classify a person as a gangster, to force him to appear before the police or arrest him, to adopt a secret witness system, and to impose the correction and training programs upon him irrespective of due process of law. Are such provisions contrary to the Constitution?

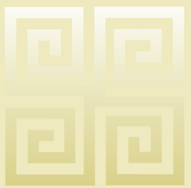
A Summary of No. 384 and the Corresponding Amendments to the Relevant Laws & Regulations

The Gangster Prevention Act, in authorizing the police to force people to appear before the police without following any necessary judicial procedure, depriving the right of the accused to confront the witnesses, allowing the imposition of a rehabilitative program on a prisoner even after he has served his criminal sentence, and denying a person's right to file an administrative appeal and administrative litigation against the police's decision to consider him as a gangster and to issue him admonitions, is in violation of the constitution. All of the aforesaid provisions shall become null and void no later than December 31, 1996.

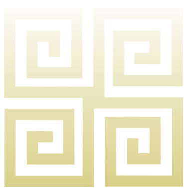


In response to said Interpretation, the Executive Yuan proposed amendments to Articles 5-7, 12 and 21 of the Gangster Prevention Act and submitted same to the Legislative Yuan for the latter's deliberation and discussion on August 19, 1996. Later on, the Legislative Yuan deliberated and passed such amendments on December 30 of that same year, which were then promulgated by the President on the same day as per Directive No. (85)-Hua-Zong-(1)-Yi-8500307310.

The original Article 5 of said Act, which provided that no administrative appeal or administrative litigation may be filed against the police's decision to consider a person as a gangster and to issue him admonitions, was so amended that a person unsatisfied with the decision made in response to his objection may now seek remedies in accordance with the administrative appeal and administrative litigation procedures. Articles 6 and 7 thereof originally authorized the police to force people to appear before the police without following any necessary judicial procedure. However, the provisions were so amended that an application for warrant

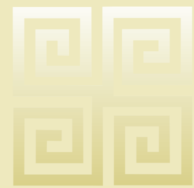


may be made with the court in case of any unjustifiable non-appearance after due notice is given, and that warrantless detention is authorized only under extraordinary circumstances, provided that an application for warrant shall still be forthwith made with the court and the detained person shall be released immediately if the court refuses to issue the warrant. Article 12 thereof, which denied the right of the accused to confront the witnesses, was deleted. And, Article 21 thereof, which allowed the imposition of the correction and training programs on a prisoner even after he has served his criminal sentence, was so amended that the term of the correction and training programs may be offset against the terms of imprisonment, detention or rehabilitative measures.



Holding

Article 8, Paragraph 1, of the Constitution provides that "Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a court in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment not carried out in accordance with the procedure prescribed by law may be resisted. "The phrase" in accordance with the procedure prescribed by law" in the above Paragraph means that the procedure a governmental organ uses as a basis upon which to impose any measures restraining people's liberty, no matter whether their status is that of a criminal defendant or not, must be prescribed by law. The contents of the law must be proper in substance, and comply with the relevant conditions set up in Article 23 of the Constitution. Articles 6 and 7 of the Act for the Prevention of Gangster [hereinafter the "Act"] authorize the police to force people to



appear before the police bureau without following any necessary judicial procedure. The secret witness provision of Article 12 of said Act deprives of the right of the accused to confront the witnesses, and hampers the court's truth-finding function. Article 21 of said Act, without considering the necessity of detention, allows the imposition of correction and training programs on a prisoner, even after he has served his criminal sentence, and, therefore, jeopardizes his liberty. All the above articles of said Act exceed the extent of necessity, lack substantive propriety, and are inconsistent with the essence of the above Article of the Constitution. Furthermore, Article 5 of said Act, regarding the police's decision to consider a person as a gangster and to issue him admonitions, contradicts Article 16 of the Constitution because he could only appeal the decision to the National Police Administration, Ministry of the Interior, but has no right to lodge administrative appeal and institute administrative litigation. All of the Act's above Articles shall become null and void no later than December 31, 1996 after the promulgation of this Interpretation.

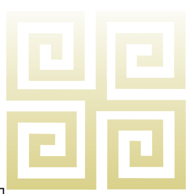
J.Y. Interpretation No. 392 (December 22, 1995)

Issue: Are the relevant provisions of the Code of Criminal Procedure in regard to the prosecutor's power to detain a person and the relevant requirements of the Habeas Corpus Act inconsistent with the Constitution?

A Summary of No. 392 and the Corresponding Amendments to the Relevant Laws & Regulations

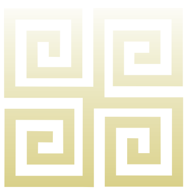
The various provisions of the Code of Criminal Procedure in regard to the prosecutor's power to detain a person are contrary to the Constitution, so are the provisions of the Habeas Corpus Act in stipulating "unlawful arrest or detention" as a condition for surrendering the detainee to a court for trial. The said provisions shall cease to be effective within two years from the date of promulgation of this Interpretation.

In response to said Interpretation, the Executive Yuan and the Judicial Yuan jointly proposed a bill on May 10, 1997 to amend Articles 101, 102, 105-III, 121-I and 259-I of the Code of Criminal Procedure whereas the Judicial Yuan also proposed amendments to Article 1 of the Habeas Corpus Act on that same day. Both bills were submitted to the



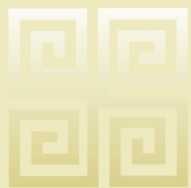
Legislative Yuan for deliberation and discussion. In addition, a number of Legislators also proposed a separate bill to amend the Code of Criminal Procedure. Upon the Legislative Yuan's deliberation and passage of the aforesaid bills, the President promulgated the amended Code of Criminal Procedure on December 19 of that same year as per Directive No. (86)-Hua-Zong-(1)-Yi-8600272590 and the amended Habeas Corpus Act on December 15, 1999 as per Directive No. (88)-Hua-Zong-(1)-Yi-8800299070.

Articles 101 and 101-1 of the Code of Criminal Procedure, as amended, set forth more precise and exact requirements and causes for detention and provided expressly that the power is vested in a judge (Paragraphs I and II). It is added in Article 102 thereof that a writ of detention shall be signed by a judge (Paragraph IV). Article 105 thereof originally empowered the public prosecutor to approve orders given by



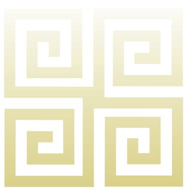
head of the detention house. However, the power is transferred to a judge except in case of emergency where the public prosecutor or the detention house may take necessary actions, provided that the same shall be reported immediately to the court concerned for approval (Paragraph III). The various powers of the public prosecutor in regard to the detention of the accused (criminal suspect) as set forth in Article 121-I are transferred to a judge. Finally, it is expressly provided in Article 259-I thereof that if an accused who is detained receives a non-prosecution ruling, the detention is considered to be withdrawn and the public prosecutor shall then release the accused and notify the court immediately.

As for the Habeas Corpus Act, "unlawful arrest or detention" as a condition for surrendering the detainee to a court for trial as set forth in Article 1 thereof is deleted.



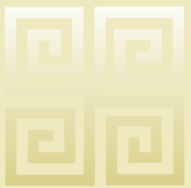
Holding

Criminal procedure, the judicial proceeding to try criminal cases, is one of the powers held by the judicial branch. It is a process with the purpose of carrying out the penal power of a state. A criminal trial begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to carry out its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. Therefore, the term "judicial organ" used in Article 8, Paragraph 1, of the Constitution would not have the same meaning as the term "judicial



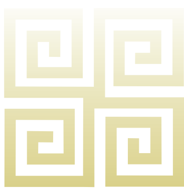
organ" used in Article 77 of the Constitution. Instead, the term is applied as an expansive definition in order that the prosecutor's offices may be included therein.

The term "trial" defined in Article 8, Paragraphs 1 and 2, of the Constitution means trial by court. He who has no authority to try a case cannot conduct this proceeding. The "court" defined in Article 8, Paragraphs 1 and 2, means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2, of the Constitution, if any organ other than a court arrested or detained a person, such organ shall surrender the detainee to a competent court for trial within 24 hours of said action. Therefore, the Code of Criminal Procedure, Article 101, and Article 102, Paragraph 3, applies mutatis mutandis to Article 71, Paragraph 4, and Article 120, which empowers a prosecutor other than a judge to detain suspects; Article 105, Paragraph 3, of the same Code which empowers a prosecutor to grant a request for



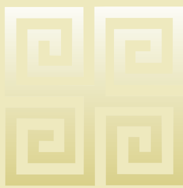
detention submitted by the chief officer of the detention house; Article 121, Paragraph 1, and Article 259, Paragraph 1, of the same Code which empowers a prosecutor to withdraw, suspend, resume, continue detention, or to take any other measures in conjunction with a detention.

These provisions are incongruous with the spirit of the aforementioned Article 8, Paragraph 2, of the Constitution.Article 8, Paragraph 2, of the Constitution merely provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. Said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender



of said person for trial." It does not impose an "unlawful arrest or detention" condition for surrendering the detainee to court for trial. Whereas Article 1 of the Habeas Corpus Act prescribes that "When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition the District Court or High Court of the arresting place to issue a writ directing the detainor to surrender the detainee to court for trial." It does add an extra term "unlawful arrest or detention" as a condition for petitioning the writ. Therefore, this provision violates the aforementioned Article 8, Paragraph 2, of the Constitution.

It is hereby declared that the abovementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Yuan-je Tze No. 4034 of this Yuan shall be modified accordingly. As to the 24-hour requirement stated in the "turn over within 24 hours" clause of Article 8, Paragraph 2, of the Constitution, it shall



refer to objectively feasible time for conducting an investigation. Interpretation No. 130 of this Yuan shall still be binding. In the case where good causes exist, any other constitutionally permissible defenses for timeliness shall also be exempted from the 24-hour limit. It is hereby pointed out as well.

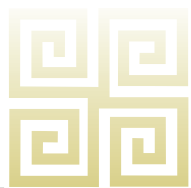
J.Y. Interpretation No. 436 (October 3, 1997)

Issue: Are the relevant provisions of the Military Justice Act in violation of the Constitution?

A Summary of No. 436 and the Corresponding Amendments to the Relevant Laws & Regulations

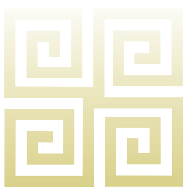
The military trial shall meet the requirement of the due process of law, which includes an independent and just tribunal and procedure and the compliance with the constitutional principles regarding the institution of the judicial power as stated in the Constitution. In light of the spirit of protecting physical freedom and the right of instituting legal proceedings, a defendant sentenced to imprisonment in a final and conclusive judgment made by the military tribunal in peacetime shall be permitted to appeal directly to an ordinary court on the ground that the judgment received is in violation of the law. Where the Military Justice Act is in violation of the Constitution, the relevant provisions shall be invalidated within two years of the announcement of this Interpretation.

In response to said Interpretation, the Executive Yuan and the

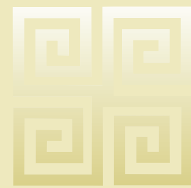


Judicial Yuan jointly proposed a bill on March 29, 1999 to amend the Military Justice Act and submitted same to the Legislative Yuan for deliberation and discussion. Upon the Legislative Yuan's deliberation and passage of the aforesaid bill on October 1 of that same year, the President promulgated the amended law on the next day, i.e., October 2, as per Directive No. (88)-Hua-Zong-(1)-Yi-8800234380.

The whole text of the Military Justice Act was amended to reconstruct the military tribunals so as to comply with the constitutional principles regarding the institution of the judicial power, resulting in 238 articles in eight parts. The major points of the General Principles (Part I) are as follows: The military trial authorities no longer belong to the troops but, instead, are established according to the various districts; the Ministry of National Defense ("MND") sets up a three-tier court system, namely, "district," "superior"and "supreme" courts-martial, with their respec-

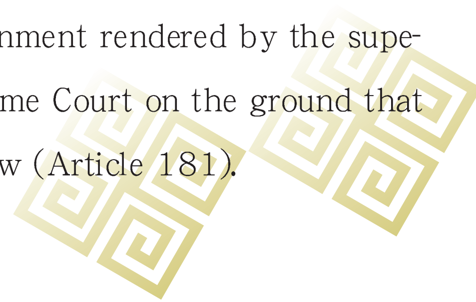


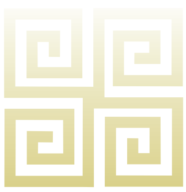
tive organizations and jurisdictions expressly defined; the MND's supervision over said courts' administrative matters shall not affect the exercise of their jurisdictions; the scope of active-duty soldiers is tightened; the term "active-duty soldiers" is redefined; the status of military tribunal officers is strengthened (the aforesaid provisions being provided in Chapters I through III); separation of trial and prosecution is strictly enforced, providing expressly that the military prosecutor's offices at the various courts-martial shall exercise their authorities independently (Chapter IV); the military prosecutor's power to detain is cancelled and transferred to the courts-martial, and provisions of human rights protection are added in reference to the Code of Criminal Procedure (Chapters V through X); a new chapter is dedicated to evidence to bring the principle of evidence-based trials into play (Chapter XI). Moreover, the original Article 11 thereof, which provided that the MND was the supreme military trial tribunal, Articles 13 and 34, which dealt with military officers' participation in trials, Article 133, which provided for a superior officer's power to



approve and appeal a judgment, and Article 158, which provided that the formation of a tribunal must be approved by a superior officer, are outright removed so as to ensure judicial independence.

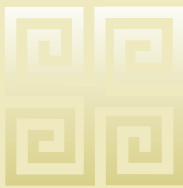
In addition, those provisions in regard to investigation, prosecution, trial, appeal, interlocutory appeal, retrial, extraordinary appeal and enforcement procedure (Parts II through VII) are subjected to a major overhaul based on the holding of said Interpretation. In response to the Interpretation's holding that a defendant shall be permitted to appeal directly to an ordinary court for relief, it is added that a person unsatisfied with a sentence of imprisonment rendered by the supreme military tribunal or a sentence of death or life imprisonment rendered by the superior military tribunal may appeal to the Supreme Court on the ground that the judgment received is in violation of the law (Article 181).



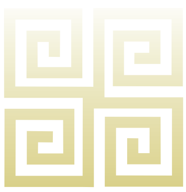


Holding

It states in Article 8, Paragraph 1, of the Constitution that physical freedom shall be guaranteed to the people and that no person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by law. It also provides in Article 16 of the Constitution that the people shall have the right of instituting legal proceedings. Active-duty soldiers are also "the people" and thus deserve the abovementioned protection. In addition, it stipulates in Article 9 of the Constitution: "except for those who are in active military service, no person shall be subject to trial by a military tribunal." Given that active-duty soldiers have the special obligation of protecting the country, a military tribunal is established for the crimes committed by said soldiers for the purpose of national security and military need. It shall not be interpreted such that military tribunals have the exclusive jurisdiction upon the crimes committed by active-duty soldiers. There is no stipulation in the



Constitution concerning military trial; nevertheless, such system may be established under the law. The initiation and operation of the military trial, which is within the power of punishment of the nation, shall meet the minimum requirement of the due process of law, which requirement includes an independent and just tribunal and procedure and the compliance with constitutional principles as stated in Articles 77 and 80 of the Constitution. The laws governing the procedure of a military trial which limit the rights of active-duty soldiers shall be in compliance with the principle of proportionality (Verhältnismäßigkeitsprinzip) as stated in Article 23 of the Constitution. In light of the spirit of protecting physical freedom and the right of instituting legal proceedings and the provision of Article 77, the defendant receiving the sentence of imprisonment in a final and conclusive judgment made by the military tribunal in peacetime shall be permitted to appeal directly to a normal court on the ground that



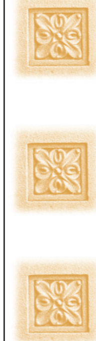
the judgment received is in violation of the law. Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act and the rest of the Act which state that the defendant is not permitted to appeal to the normal court on the ground that the judgment received from the military tribunal is in violation of the law are unconstitutional and shall be invalidated two years after the announcement of this Interpretation, at the latest. The relevant authority shall, within the two-year period, revise relevant laws based on this principle, adjust the relevant appeal system, improve the separation of prosecution and trial in the military trial system and improve the criteria to appoint army officers to participate in military tribunals and the status protection of military judges to meet the principle of independent trial.

J.Y. Interpretation No. 445 (January 23, 1998)

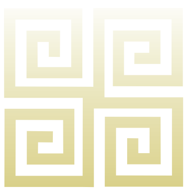
Issue: Are the relevant provisions of the Assembly and Parade Act unconstitutional?

A Summary of No. 445 and the Corresponding Amendments to the Relevant Laws & Regulations

Certain provisions of the Assembly and Parade Act, which provides for numerous essential conditions for which the competent authority may deny the application for assembly, are inconsistent with the constitutional intention of protecting the freedom of expression and the freedom of assembly, and thus shall become null and void from the date of this Interpretation.



In response to said Interpretation, the Executive Yuan proposed a bill to amend Articles 6, 9 and 11 of the Assembly and Parade Act on October 17, 2000 and submitted same to the Legislative Yuan for deliberation and discussion. Upon the Legislative Yuan's deliberation and passage of the aforesaid bill on June 4, 2002, the President promulgated the amended law on June 26 of that same year as per Directive No. (91)-Hua-



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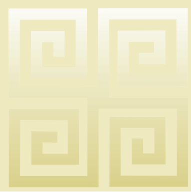
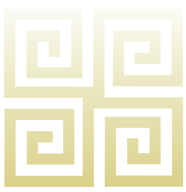
The Assembly and Parade Act, as amended, modified the proviso of Article 9-I by removing the six-day prior application restriction for an application for an assembly or parade because of any unforeseeable major accident, hence protecting the people's freedom of an incidental assembly or parade. Article 11 thereof was also amended to make the previously generalized provisions clear and specific in respect of the situations where an outdoor assembly or parade will not be approved. The provision of said article, which would deny the application for an assembly that "advocates communism or secession of territory," was deleted so as to protect the participants' freedom of expressing their political views.



Holding

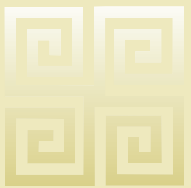
Article 14 of the Constitution provides that the people have the freedom of assembly. Like Article 11 of the Constitution, which provides for the freedom of speech, teaching, writing and publication, it is also a kind of freedom of expression that is the most important fundamental human right in practicing democracy. In order to guarantee the people's freedom of assembly, the nation shall provide appropriate places for, and ensure the safety and regular process of, assemblies and parades. In restricting the rights of assembly and parade by law, the principle of clarity and definiteness of law and the provisions of Article 23 of the Constitution must be complied with.

Article 8-I of the Assembly and Parade Act provides that, unless any of the situations otherwise provided in the proviso of the same paragraph exists, anyone who wants to hold an outdoor assembly or a parade shall



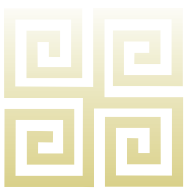
apply for permission from the competent authority. Article 11 of said Act provides that, unless any of the situations listed in the same article exists, the application for an outdoor assembly or a parade shall be approved. To the extent that those items in regard to time, place, and manner are irrelevant to the purposes or contents of the assembly or parade, and that they are necessary to the maintenance of social order and the advancement of public welfare, they should fall within the scope of legislative discretion and will not result in any infringement of the purpose of freedom of expression. Therefore, the constitutional intent of protecting the freedom of assembly is not violated.

Article 11 (i) of the Assembly and Parade Act, which provides that any violation of Article 4 of the said Act is one of the essential conditions for which the competent authority may deny the application for an outdoor assembly, prohibits? any speech that "advocates communism or secession of territory." The said provision, which allows the competent authority to censor the contents of a political speech prior to the approval

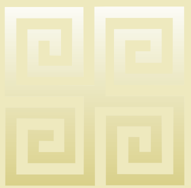


of an assembly or a parade, is inconsistent with the intention of protecting the freedom of expression under the Constitution. Subparagraph 2 of said article, providing that "There are facts showing the likelihood that national security, social order or public welfare will be jeopardized," and Subparagraph 3 thereof, providing that "There is the likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property," are neither specific nor clear enough. The mere basis on which the competent authority may either approve or deny an application for an assembly or a parade is the future possibility of occurrence instead of a factual showing of clear and present danger. As such, the said provisions are inconsistent with the constitutional intention of protecting the freedom of assembly, and thus shall become null and void from the date of this Interpretation.

Article 6 of the Assembly and Parade Act, which stipulates a restricted

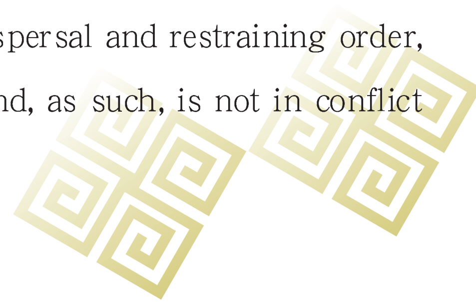


area for assembly and parade, is intended to protect the security of government leaders and military facilities, and to maintain the unobstructed flow of traffic and communications. Article 10 of said Act stipulates the qualifications for the person in charge of the assembly or parade, his or her agent or picket. Article 11(iv) thereof provides that an application for an assembly or a parade shall be denied if the same time, place, and route have been applied for by another and been approved. Article 11(v) thereof provides that the application for an assembly or a parade by a group may be denied if such group is not established according to the law, or permission for its establishment has been withdrawn, or it has been ordered to dissolve. Article 11(vi) thereof provides that the application may not be approved if the application does not conform to Article 9, which, among other things, requires the applicant to submit a completely filled-out application form. All of the foregoing provisions are meant to ensure a peaceful assembly or parade and to prevent any disturbance of the public quiet, which are necessary to either prevent infringement upon the freedom of



other people, to maintain social order or to advance public welfare, and thus are not in conflict with Article 23 of the Constitution. Nonetheless, the proviso of Article 9-I of the said Act reads, "An application may be submitted two days (prior to an assembly or parade) where there is any justifiable reason because of any natural disaster or any other unforeseeable major accident." Denying an application for an incidental assembly or parade that is not filed two days prior to such assembly or parade is in violation of the constitutional intention of protecting the people's freedom of assembly and thus requires prompt and speedy review and revision.

Article 29 of the Assembly and Parade Act, which imposes criminal liability on a chief violator who disobeys a dispersal and restraining order, is within the scope of legislative discretion and, as such, is not in conflict with Article 23 of the Constitution.



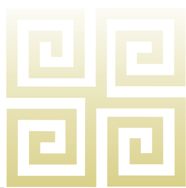
J.Y. Interpretation No. 452 (April 10, 1998)

Issue: Is the provision of the Civil Code that allows one spouse to unilaterally determine the couple's domicile in violation of the Constitution?

A Summary of No. 452 and the Corresponding Amendments to the Relevant Laws & Regulations

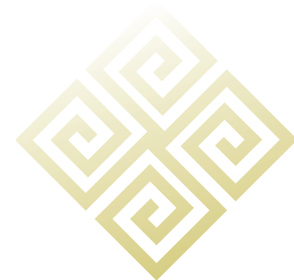
The provision of the Civil Code that allows one spouse to unilaterally determine the couple's domicile does not take into consideration that the other party to the marriage also has the right to choose the domicile and does not cover specific circumstances, which is in violation of the Constitution and hence shall become void within one year from the date of this Interpretation.

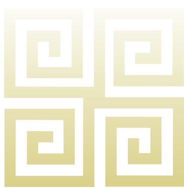
A number of Legislators first proposed a bill to amend Article 1002, inter alia, of the Civil Code, Part IV Family, on December 20, 1997. Upon the announcement of said Interpretation, the Legislative Yuan



passed it after deliberation on May 28, 1998 and the President promulgated the amended law on June 17 of that same year as per Directive No. (87)-Hua-Zong-(1)-Yi-8700121300.

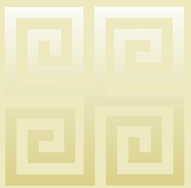
Article 1002 of the Civil Code, as amended, modified the original provision that a spouse may unilaterally determine the couple's domicile and provides that such domicile shall be determined by mutual agreement and that, in case of any lack of such an agreement or any failure to reach such an agreement, an petition may be made with the court to determine it.





Holding

It stipulates in Article 1002 of the Civil Code that the residence of the wife shall be that of the husband and the residence of the taken-in husband shall be that of the wife; nevertheless, in case there is an agreement that the residence of the husband shall be that of the wife or the residence of the wife shall be that of the taken-in husband, the agreement shall be upheld. Though the proviso renders the opportunity for the husband or the wife to make an agreement on the residence, one shall accept the residence of another as his/her residence in the case where the husband or the wife of the taken-in husband refuses to make such an agreement or in the case where no agreement can be made. The above law does not take into consideration that the other party of the marriage also has the right to choose the residence and does not cover specific circumstances, which is in violation of the principle of equality and proportionality of the Constitution. The above law shall become void within one year from the date of this Interpretation. In addition, the designation of the



residence of the couple is different from the marital obligation to cohabitation. The residence stipulation is made to determine the effect of legal matters related to the couple, which shall not be viewed as the only place designated by the Civil Code where the couple may perform their marital obligation to cohabitation. Both parties to the marriage have the obligation to live together as long as the marriage shall last, regardless of whether or not a residence may have been designated.

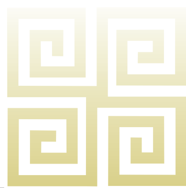
J.Y. Interpretation No. 457 (June 12, 1998)

Issue: Are the relevant provisions of the Regulation for the Handling of the Government Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death, which deprive a married daughter of a veteran of her heirship in respect of the distributed farmland and its subsequent cultivation upon the veteran's death, in violation of the Constitution?

A Summary of No. 457 and the Corresponding Amendments to the Relevant Laws & Regulations

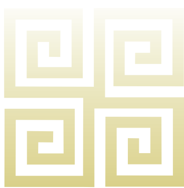
The state-owned farmland distributed to a veteran may be inherited by his son only, regardless of the son's marital status, but shall be reclaimed unconditionally upon the marriage of his daughter. Said provisions are inconsistent with the principle of gender equality and hence the competent authority shall, within six months from the date of this Interpretation, review and revise the relevant provisions.

Based on the intent of said Interpretation, the Veterans Affairs Commission, Executive Yuan, issued the Regulation for the Handling of the Applications Made by Surviving Dependents of Married Veterans for



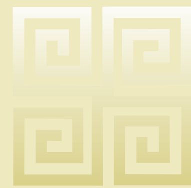
Continual Cultivation on Plantations Owned by Veterans Affairs Commission after the Veterans' Death on December 16, 1998 and repealed the Regulation for Handling of the Houses and Lands Vacated by Married Veterans Working on Plantations Owned by Veterans Affairs Commission after their Hospitalization, Retirement or Death.

Based on the intent of said Interpretation, the newly issued Regulation expressly provides that those surviving dependents who are eligible to apply for continual cultivation and indirect care shall be limited to the deceased veteran's spouse, major children and adopted children who meet specific requirements (Section 3 thereof). The provision of the erstwhile Regulation that the farmland would be reclaimed unconditionally upon the marriage of the daughter is deleted.

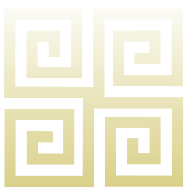


Holding

"All citizens of the Republic of China, irrespective of sex, shall be equal before the law; the state shall further substantive gender equality." The foregoing provisions are unambiguously set forth in Article 7 of the Constitution and Article 10-VI of the Amendments to the Constitution, respectively. The state organ, in implementing public administration missions, shall also comply with the aforesaid constitutional provisions while engaging in private acts that are subject to private law. The Regulations for the Handling of the Government Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death as proclaimed by the Veterans Affairs Commission, the Executive Yuan, are undoubtedly designed to ensure the livelihood of veterans and their surviving dependents, whereby parcels of state farmland are distributed to veterans as special and preferential treatment by the state. As such, the rights and legal benefits so conferred are different from those



acquired by ordinary citizens. A legal relationship of loan for use is formed between a veteran and the state as far as the distributed farmland is concerned. Upon the death of the veteran or the fulfillment of the loan for use, the competent authority should terminate the contract to reclaim the farmland so as to use the national resources in a reasonable manner. If, instead, the competent authority allows the veteran's surviving dependents to continue using and cultivating the originally distributed housing and farmland for the specific purpose of ensuring their livelihood, it should then consider whether the scope of the term "dependents" should extend to the veteran's children, and should consider their abilities to earn a living and cultivate the farmland to determine whether it is necessary to continue the assistance before making appropriate plans based on the principle of gender equality. Section 4-III of the aforesaid Regulations for Handling of the Housing and Lands provides, "If the surviving spouse of



the deceased veteran remarries but without issue or only has daughter(s), the land and housing shall be reclaimed unconditionally upon the marriage of the daughter(s); and the rights of the veteran may be inherited by his son, if any." The relevant provisions stating to the effect that the right of inheritance in respect of a deceased veteran is limited to his son regardless of the son's marital status are inconsistent with the aforesaid principle. Therefore, the competent authority shall, within six months from the date of this Interpretation, carefully review and revise the relevant provisions based on the aforesaid essence of this Interpretation.

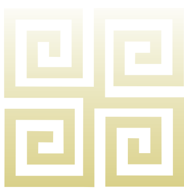
J.Y. Interpretation No. 471 (December 18, 1998)

Issue: Does the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife, in imposing mandatory rehabilitative measures upon the convicted, violate the Constitution?

A Summary of No. 471 and the Corresponding Amendments to the Relevant Laws & Regulations

The provision of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife imposes a mandatory measure of three-year compulsory labor without considering the necessity of prevention or treatment of the person's propensity to endanger the society. Thus, it may restrain the movement and liberty of those without such propensity, rendering it in violation of the principle of proportionality under the Constitution. As such, such provisions shall be null and void from the date of this Interpretation.

In response to said Interpretation, the Ministry of Justice issued a directive to its subordinate prosecutors' offices on January 26, 1999, to review the cases concluded prior to the date of said Interpretation where a mandatory three-year compulsory labor is conclusively imposed in accordance with Article 19-I of the Act Governing the Control and

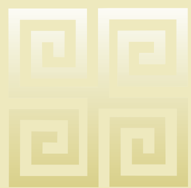


Prohibition of Gun, Cannon, Ammunition, and Knife and see if any and all of them are consistent with the principle of proportionality under the Constitution. In case of any inconsistency with said principle, a petition shall be made with the court to cancel or terminate the enforcement thereof, as the case may be.

Moreover, the Executive Yuan proposed a bill to amend Article 19, inter alia, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife, and submitted same to the Legislative Yuan for the latter's deliberation and discussion on November 14, 2000.

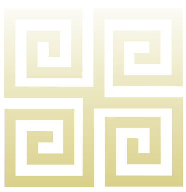
Upon the Legislative Yuan's deliberation and passage of the aforesaid bills on October 31, 2001, the President promulgated the amended law on November 14 of that same year as per Directive No. (90)-Hua-Zong-(1)-Yi-9000223470.

Deleted is the original provision of Article 19 of said Act that imposed a mandatory rehabilitative measure.

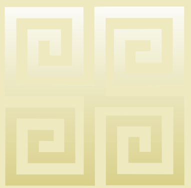


Holding

Article 8 of the Constitution provides that physical freedom shall be guaranteed to the people. Contents of statutes restraining physical freedom must comply with the conditions set forth in Article 23 of the Constitution. Rehabilitative measures are supplemental to the criminal punishment, and aim at rehabilitation and treatment of the person with criminal propensity by restraining his movement and liberty. Based on the principles established in the rule of law which protect human rights, as well as the protection function of the Criminal Code, rehabilitative measures under the statutes must be governed by the principle of proportionality. The measures imposed must be proportionate to the seriousness of the act, the person's criminal propensity, and the future expectation of such person. Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife [hereinafter "the Act"] provides: "If convicted under Articles 7, 8, 10, 11, Paragraphs 1 to 3 of



Article 12, and Paragraphs 1 to 3 of Article 13 and sentenced to imprisonment, a prisoner shall be sent to a place of labor, and be compelled to labor for three years after he has served his sentence or has been pardoned." The provision imposes a mandatory measure of three-year compulsory labor without considering the necessity of prevention or treatment of the person's propensity to endanger the society. Thus, it may restrain the movement and liberty of those without such propensity, making it disproportionate to its purpose under Article 23 of the Constitution. The mandatory measure of three-year compulsory labor for those convicted under Article 19 of the Act, without considering the necessity of prevention or treatment of the person's propensity to endanger the society, is inconsistent with this Interpretation and shall be null and void from the date of this Interpretation. The measures of the Act may still be imposed on those convicted under Article 19, Paragraph 1, of the Act as long as they are proportionate under the circumstances. If the measures of the Act are disproportionate, a trial judge may, at his discretion, apply Article



90, Paragraph 1, of the Criminal Code and impose other measures if he believes it is necessary to do so. In the latter case, Article 2, Paragraph 2, of the Criminal Code shall not apply. That is, the principle of applying the newer or the more lenient law shall still govern.

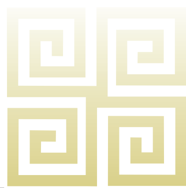
J.Y. Interpretation No. 535 (December 14, 2001)

Issue: Are the relevant provisions of the Police Duty Act in respect of the execution of checkpoint searches in violation of the Constitution?

A Summary of No. 535 and the Corresponding Amendments to the Relevant Laws & Regulations

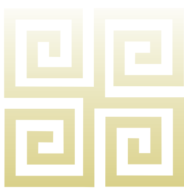
The ways in which police checks are conducted may have a great effect upon personal freedom, property right and right of privacy and therefore such checks must be in accordance with the legal principles guiding police functions and legal enforcement in a rule-of-law nation. The existing laws concerning the police law enforcement are not sufficient; therefore, the competent government authorities should conduct an overall review of the relevant laws and regulations within two years from the date of this interpretation.

Following the issuance of said Interpretation, the National Police Agency, Ministry of the Interior, immediately sent it via facsimile to the various police authorities and demanded that the police officers wear uni-



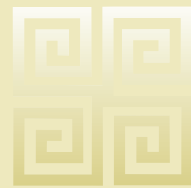
forms, show their identifications and make known the reasons while implementing checkpoint searches, roadside checks or interrogations, etc. The said Agency also demanded precision in formulating the requirements and procedures for conducting checkpoint searches while attending to the techniques and attitudes in law enforcement, with an aim to improving the quality of law enforcement. Furthermore, it also prescribed the Regulation Governing the Police Enforcement of Checkpoint Searches and the Standard Operation Procedure for the Police Enforcement of Checkpoint Searches to provide for a more precise procedural basis. In addition, it held numerous seminars and symposia on the related topics.

Furthermore, in respect of the incompleteness of the relevant laws and regulations, certain members of the Legislative Yuan proposed a bill to enact the Police Functioning Act on May 29, 2002 whereas the

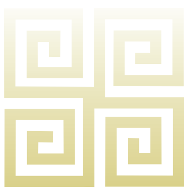


Executive Yuan also submitted a draft of the Act Governing the Implementation of Police Duties to the Legislative Yuan for the latter's deliberation and discussion on December 13 of that same year. Later on, the Legislative Yuan reviewed both bills simultaneously and passed the law titled the Police Functioning Act on June 5, 2003, which was promulgated by the President on June 25 as per Directive No. (92)-Hua-Zong-(1)-Yi-09200116580.

The newly enacted Police Functioning Act consists of thirty-two articles in five chapters, which clearly provides for the requirements and procedures for conducting checkpoint searches, as well as the remedies for illegal checkpoint searches. The law, at its very beginning, makes clear that it is intended to have the police exercise their authorities according to law and to require that the police should, in exercising their authorities,

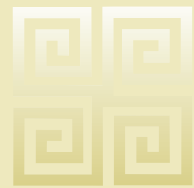


not go beyond the degree of necessity but use the least intrusive means, wear uniforms or show their identifications to identify themselves, make known the reasons, etc. (Chapter I). Then, the law clearly specifies the requirements and procedures for the verification of a person's identification and data collection, as well as the implementation of instantaneous compulsory measures in the event of emergency and dangerous situations (Chapters II and III). Finally, it expressly provides for the rights and remedies of a person who believes that the police, while exercising their authorities, have infringed upon his or her interests (Chapter IV). The promulgation of the law marks the new era of institutionalizing the police functions.

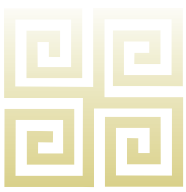


Holding

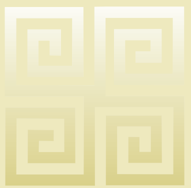
The Police Service Act, whose provisions involve police services, organizations, and their division of labor as well as detailed methods by which police services are to be implemented, is not merely an organic act, but also legislation of a regulatory nature. According to Article 11, Clause 3, of said Act, a police check is authorized as a way for police to facilitate law enforcement. However, the ways in which police checks are conducted including searches, street checks, and interrogations may have a great effect upon personal freedom, right to travel, property right and right of privacy and therefore such checks must be in accordance with the rule of law as well as legal principles guiding police functions and legal enforcement. Thus, to fully ensure the constitutional protection of people's fundamental rights and freedoms, the requirements and procedures of police checks as well as legal remedies for unlawful checks must be prescribed clearly in the law.



The relevant provisions concerning police checks in the aforementioned Act never delegate police unlimited authority to exercise any check, law enforcement or interrogation without due consideration of time, place, manner and subjects. Unless prescribed otherwise in the law, the police shall limit checking authority to public transportation, public places, or other places where danger exists or may exist according to reasonable and objective judgment. Among these places, some places may be private residences that must be protected to the same extent as any home. Police shall not exercise checking authority over any persons unless there is a reasonable belief that actions taken by such persons have caused or may cause danger; and in so doing, police must abide by the principle of proportionality and not go beyond the degree of necessity. Before conducting any checks, police must inform the involved persons immediately of the reasons for exercising such checks and identify themselves clearly



as law enforcement officers. Any police check must be conducted on the spot. If police do not obtain the consent of persons to be checked and, with no alternative to identify persons to be checked or conduct on-the-spot checks, they still conduct such checks, this may have harmful effects or may impede traffic flow and interfere with social tranquility. Moreover, police are not permitted to ask checked persons to go to a police station for further interrogation. After the identification of such persons has been confirmed, police should permit them to leave without delay unless they are suspected of having committed a crime, in which case criminal law procedures should be followed. Insofar as construed and applied, Article 11, Clause 3, of the aforementioned Act is read as constitutional and not inconsistent with the constitutional protection of human rights. Nonetheless, the current laws concerning police law enforcement are not sufficient; therefore, the competent government agencies should review relevant provisions, taking into consideration this interpretation as well as social circumstances, and enact new laws within two years after the



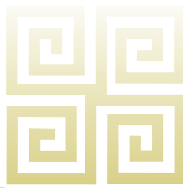
release of this interpretation, which would allow police to deal with unexpected occurrences in law enforcement while sufficiently ensuring people's freedom and their own safety.

J.Y. Interpretation No. 556 (January 24, 2003)

Issue: Shall a member of a criminal syndicate be deemed to be continuously participating in the syndicate under the Organized Crime Prevention Act as ruled in Interpretations Nos. 68 and 129, if he voluntarily surrenders himself to the authorities before his act of participation is discovered or has had no contact with the syndicate or has not participated in syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, or shall the said Interpretations be overruled?

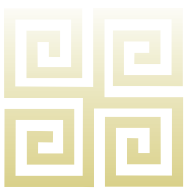
A Summary of No. 556 and the Corresponding Amendments to the Relevant Laws & Regulations

The burden of proof falls on the prosecutor when it comes to whether the participation in a criminal syndicate is in a continuous state. Where a syndicate member voluntarily surrenders himself to the authorities before his act of participation is discovered or has neither had any contact with the syndicate nor has participated in the syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, he should no longer be consid-



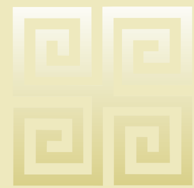
ered to be continuously participating in the syndicate. The interpretations concerned should be modified accordingly.

J.Y. Interpretation Nos. 68 and 129, as well as Interpretation Yuan-Tze No. 667, should be modified to the extent that they concern whether the act of participation in a criminal syndicate is continuous and the share of the burden of proof. The relevant cases and decisions shall no longer be cited and applied.

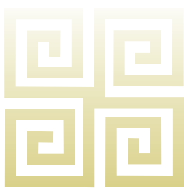


Holding

The existence of criminal syndicates poses a potential threat of harm to the legal interest protected by law, and must, of course, be prevented and eliminated. The purposes of the Organized Crime Prevention Act are to maintain the social order and safeguard the legal interest of individuals by means of preventing and restraining criminal activities of an organized pattern. The term "participation in a criminal syndicate" used in Article 3, Paragraphs 1 and 2, of the Act denotes that to constitute the offense it is sufficient that one joins a criminal syndicate and becomes a member thereof, regardless of whether or not he participates in any activity of the syndicate. Whether such an act is in a continuous state is determined by the fact of whether he continuously participates in activities of the syndicate or maintains contact with the syndicate. The burden of proof of this criminal act lies legally with the prosecutor that represents the state in the prosecution of crimes. Where a syndicate member voluntarily surren-



ders himself to the authorities before his act of participation is discovered or has had no contact with the syndicate or has not participated in syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, he should no longer be considered to be continuously participating in the syndicate. The first sentence of this Yuan's Interpretation No. 68, which is intended to explicate the Betrayers Punishment Act, quotes: "A person who participated in a rebel organization shall certainly be deemed to be continuously participating in the organization before he voluntarily surrenders himself to the authorities or where there is no evidence to prove that he has definitely broken away from the organization." Now that this Act has been repealed, the above-cited Interpretation together with other similar interpretations delivered by this Yuan, namely Interpretation Yuan-Tze No. 667 and Interpretation No. 129, must be overruled to the extent that any



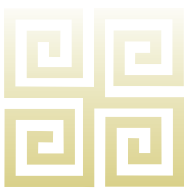
part thereof is inconsistent with the purpose of our holding here in respect of whether the act of participation in a criminal syndicate is continuous and the share of the burden of proof. Furthermore, the provision of Article 18, Paragraph 1, of the Organized Crime Prevention Act with respect to the interim period does not preclude the application of this Interpretation in line with the foregoing purpose, and is not contrary to the Constitution in the protection of the physical freedom of the people.

J.Y. Interpretation No. 587 (December 30, 2004)

Issue: Article 1063 of the Civil Code and relevant precedents limit a child's right to bring an action for disavowal against the legitimate father as well as a natural father's right to bring an action for disavowal against the child who has been presumed to be another's legitimate child. Are such limits unconstitutional?

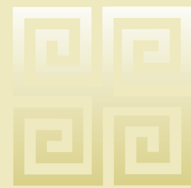
A Summary of No. 587 and the Corresponding Amendments to the Relevant Laws & Regulations

A child's right to identify his or her blood filiations and to ascertain his/her paternity is concerned with the right to personality and shall be protected by the Constitution. The Civil Code, in failing to provide that a child is entitled to bring an action for disavowal against his or her natural father and to provide for the statute of limitations and the accrual of such a cause of action for his or her petition, is inconsistent with the constitutional principles of protecting the right to personality and the right of instituting legal proceedings. Accordingly, the authorities concerned shall endeavor to review and amend the relevant laws.



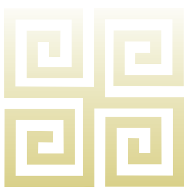
Upon the issuance of said Interpretation, the Executive Yuan and the Judicial Yuan jointly proposed a bill on April 20, 2006 to amend Article 1063, inter alia, of the Civil Code, Part IV Family, and submitted same to the Legislative Yuan for deliberation and discussion. A number of Legislators also proposed relevant amendments on April 19 of that same year. Upon the Legislative Yuan's simultaneous deliberation and passage thereof on May 4, 2007, the President promulgated the amended law on May 23 of that same year as per Directive No. (96)-Hua-Zong-(1)-Yi-09600064111.

Article 1063 of the Civil Code, as amended, entitles a child to bring an action for disavowal against his or her legitimate father (Paragraph II).



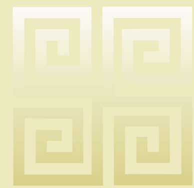
Holding

A child's right to identify his/her blood filiations and to ascertain his/her paternity is concerned with the right to personality and shall be protected by the Constitution. Article 1063 of the Civil Code stipulates, "Where the conception of the wife is during the continuance of a marital relationship, the child so born is presumed to be legitimate. In regard to the presumption of legitimacy provided in the preceding paragraph, either the husband or the wife may bring an action for disavowal if he or she can prove that the conception of the wife is not from the husband; but such disavowal shall be effected within one year after the knowledge of the child's birth." Such law is intended to balance the maintenance of a stable status order and the protection of a child's interests. However, such right may only be exercised by either of the spouses, while the child is not entitled to bring an action for disavowal. Nor does the provision con-



sider the reasonableness of extinctive prescription for a child's petition. Therefore, the law has inappropriately restricted the right of a child to litigation, and is thus insufficient in defending the right to personality. Within this ambit, such law is inconsistent with the constitutional principles of protecting the right to personality and the right to litigation. The relevant holdings of the Supreme Court Precedents Year 23-No.3473 (1934) and Year 75-No.2071 (1986) should no longer be applied. In response, the concerned legislative authorities shall endeavor to amend relevant laws regarding the legal subject and the extinctive prescription of disavowal of paternity in line with the abovementioned constitutional principles.

According to J.Y. Interpretations Nos.177 and 178, if a statute or a precedent invoked by a finalized judgment is declared unconstitutional by this Yuan as a result of the people's application for a judicial interpretation, the disadvantaged party of the judgment may, basing the petition on



that judicial interpretation, apply for relief according to the law of litigation procedure. If the party of this case is not entitled to a retrial, he/she shall be allowed, within a year after this Interpretation is announced, to bring an action for disavowal against the legally presumed father. In such case, relevant provisions on the disavowal of paternity in the Code of Civil Procedure shall apply mutatis mutandis. When the action is initiated by a statutory agent, it should be brought for the child's best interests.

The law which disqualifies a natural father from bringing an action for disavowal re his child presumed to be born in wedlock is intended to prevent damage to marriage stability, family harmony and the right of a child to education and nurture, and is thus not contrary to the Constitution. As to whether the law is to be amended to loosen the restrictions for such actions to a certain extent, this is a matter of legislative discretion.

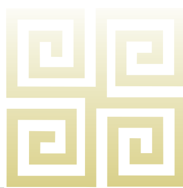
J.Y. Interpretation No. 603 (September 28, 2005)

Issue: Are the relevant provisions of Article 8-II and III of the Household Registration Act, stating to the effect that the new ROC identity card will not be issued without the applicant being fingerprinted, unconstitutional?

A Summary of No. 603 and the Corresponding Amendments to the Relevant Laws & Regulations

Fingerprints are important information of a person, who shall have self-control of such fingerprinting information, which is protected under the right of information privacy. The Household Registration Act, in refusing to issue an ROC identity card to one who fails to be fingerprinted thereunder, is no different from conditioning the issuance of an identity card upon compulsory fingerprinting for the purpose of record keeping. As such, it is inconsistent with the constitutional intent and thus shall no longer apply as of the date of this Interpretation.

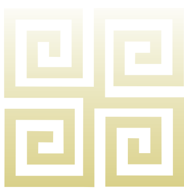
In regard to Article 8 of the Household registration Act, the Executive Yuan proposed a bill on April 23, 2005 to strike out Paragraphs 2 and 3 thereof and submitted same to the Legislative Yuan for deliberation and discussion. Nevertheless, the Legislative Yuan did not



pass it.

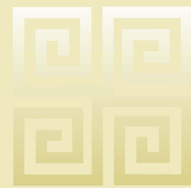
Upon issuance of said Interpretation, the Ministry of the Interior deleted the relevant provisions of Article 22 of the Enforcement Rules of the Household Registration Act in respect of fingerprinting based on the holding of said Interpretation. The relevant provisions that the overall replacement of identity cards must be conditioned on fingerprinting were also struck out. Beginning on December 21, 2005, the overall replacement of identity cards was launched—without fingerprinting any person.

As for Article 8-II and -III of the Household Registration Act, the draft amendment thereto (deletion of Paragraphs 2 and 3) is consistent with the intent of said Interpretation. Since the issuance of this Interpretation, the Ministry of the Interior has actively endeavored to coordinate with the Legislative Yuan in deliberating and amending the law so as to protect the fundamental human rights.



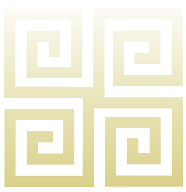
Holding

To preserve human dignity and to respect free development of personality is the ore value of the constitutional structure of free democracy. Although the right of privacy is not among those rights specifically enumerated in the Constitution, it should nonetheless be considered as an indispensable fundamental right and thus protected under Article 22 of the Constitution for purposes of preserving human dignity, individuality and moral integrity, as well as preventing invasions of personal privacy and maintaining self-control of personal information. (See J. Y. Interpretation No. 585) As far as the right of information privacy is concerned, which regards the self-control of personal information, it is intended to guarantee that the people have the right to decide whether or not to disclose their personal information, and, if so, to what extent, at what time, in what manner and to what people such information will be disclosed. It is also designed to guarantee that the people have the right

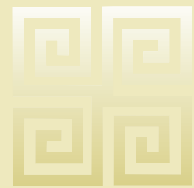


to know and control how their personal information will be used, as well as the right to correct any inaccurate entries contained in their information. Nevertheless, the Constitution does not make the right of information privacy absolute, which means that the State may impose appropriate restrictions on such right by enacting unambiguous laws as far as such laws do not transgress the scope contemplated by Article 23 of the Constitution.

Fingerprints are important information of a person, who shall have self-control of such fingerprinting information, which is protected under the right of information privacy. However, the issuance of ROC identity cards will directly affect the people's exercise of their fundamental rights. Article 8-II of the Household Registration Act provides, "While applying for an ROC identity card pursuant to the preceding paragraph, the applicant shall be fingerprinted for record keeping; provided that no national

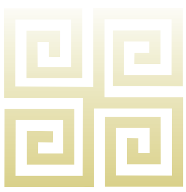


who is under fourteen years of age will be fingerprinted until he or she reaches fourteen years of age, at which time he or she shall then be fingerprinted for record keeping." Article 8-III thereof provides," No ROC identity card will be issued unless the applicant is fingerprinted pursuant to the preceding paragraph." Refusal to issue an ROC identity card to one who fails to be fingerprinted according to the aforesaid provisions is no different from conditioning the issuance of an identity card upon compulsory fingerprinting for the purpose of record keeping. The failure of the Household Registration Act to specify the purpose thereof is already inconsistent with the constitutional intent to protect the people's right of information privacy. Even if it may achieve such objectives as anti-counterfeit or prevention of false claim or use of an identity card, or identification of a roadside unconscious patient, stray imbecile or unidentified corpse, it fails to achieve balance of losses and gains and uses excessively unnecessary means, which is not in line with the principle of proportionality. The relevant provisions of Article 8-II and III of the Household



Registration Act, providing to the effect that no ROC identity card will be issued unless an applicant is fingerprinted for record keeping, are inconsistent with the intent of Articles 22 and 23 of the Constitution, and thus shall no longer apply as of the date of this Interpretation. Needless to say, the replacement of ROC identity cards, which follows the remaining applicable provisions of the Household Registration Act, may still carry on.

Where it is necessary for the State to engage in mass collection and storage of the people's fingerprints and set up databases to keep same for the purposes of any particular major public interest, it shall not only prescribe by law the purposes of such collection, which shall be necessary and relevant to the achievement of the purposes of such major public interest, but also prohibit by law any use other than the statutory purposes. Having taken into account the contemporary development of relevant technologies, the competent authority shall engage in the aforesaid collec-



tion in a manner that is sufficient to ensure the accuracy and safety of the information, and take any and all necessary protective measures both organizationally and procedurally as to the files of fingerprints so collected so as to be in line with the constitutional intent to protect the people's right of information privacy.