

J. Y. Interpretation No.678 (May 14, 2010) *

ISSUE: Are the provisions of the Telecommunications Act that penalize the unapproved use of radio frequency and confiscate the equipment therefrom a violation of the Constitution ?

RELEVANT LAWS:

Articles 11, 15 and 23 of the Constitution (中華民國憲法第十一、十五及二十三條) ; J.Y. Interpretation Nos. 509, 613 and 617 (司法院釋字第五〇九、六一三及六一七號解釋) ; the front portion of Article 48, Paragraph 1, Article 49, Paragraph 1, Article 58, Paragraph 2, Article 60, and Article 67, Paragraphs 3 and 4 of the Telecommunications Act (電信法第48條第1項前段、第49條第1項、第58條第2項、第60條、第67條第3項、第4項) ; Article 2 of the National Communications Commission Organic Act (國家通訊傳播委員會組織法第二條) ; Article 18 of the Radio Regulations of International Telecommunication Union (聯合國所屬國際電信聯合會之無線電規則第十八條) ; Article 109 of United Nations Convention on the Law of the Sea (聯合國海洋法公約第一〇九條) .

KEYWORDS:

freedom of speech (言論自由) , confiscation (沒收) , prin-

* Translated by Roger K. C. Wang.

** Contents within frame, not part of the original text, are added for reference purposes only.

ciple of proportionality (比例原則), protection of property rights (財產權之保障), criminal penalty (刑罰), administrative penalty (行政罰).**

HOLDING: The front portion of Article 48, Paragraph 1, Article 58, Paragraph 2, and Article 60 of the Telecommunications Act concerning the penalty and confiscation over the unapproved and willful usage of radio frequencies do not contradict the principle of proportionality under Article 23 of the Constitution nor the protection of free speech under Article 11 and the protection property rights under Article 15 of the Constitution.

REASONING: Article 11 of the Constitution stipulates that the people's freedom of speech shall be protected. Given that the freedom of speech carries the functions of self-fulfillment, communication of viewpoints, pursuing truth, gratification of the people's right to know, formation of public opinions and promotion of all kinds of rational political and social activities, thus constitutes an essential mechanism in the maintenance of the

解釋文：電信法第四十八條第一項前段、第五十八條第二項及第六十條關於未經核准擅自使用無線電頻率者，應予處罰及沒收之規定部分，與憲法第二十三條之比例原則尚無抵觸，亦與憲法第十一條保障人民言論自由、第十五條保障人民財產權之意旨無違。

解釋理由書：憲法第十一條規定，人民之言論自由應予保障，鑒於言論自由具有實現自我、溝通意見、追求真理、滿足人民知的權利，形成公意，促進各種合理之政治及社會活動之功能，乃維持民主多元社會正常發展不可或缺之機制，國家應給予最大限度之保障（本院釋字第五〇九號解釋參照）。前開規定所保障之言論自由，其內容尚包括通訊傳播自由之保障，亦即人民得使用無線電廣播、電視或其他通訊傳播

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normal development in a democratic and diverse society, the State must endeavor to provide protection to the maximum extent (J.Y. Interpretation No. 509). The safeguard of freedom of speech as such also includes the protection over the freedom of communications and broadcasting, that is, the people's freedom to access information and express opinions through the utilization of radio broadcasting, television or other means of communications or networks (J.Y. Interpretation No. 613). However, the constitutional safeguard over the freedom of speech and the methods of its communications is not absolute and should offer different scope of protection and guidelines of limitations based on the nature therein. Thus it is not that the State may not impose justifiable restrictions by the enactment of laws [as long as they are] in compliance with the meanings and scope of Article 23 of the Constitution (J.Y. Interpretation No. 617).

The front portion of Article 48, Paragraph 1 of the Telecommunications Act stipulates: "The Ministry of Trans-

網路等設施，以取得資訊及發表言論之自由（本院釋字第六一三號解釋參照）。惟憲法對言論自由及其傳播方式之保障，並非絕對，應依其特性而有不同之保護範疇及限制之準則，國家尚非不得於符合憲法第二十三條規定意旨之範圍內，制定法律為適當之限制（本院釋字第六一七號解釋參照）。

電信法第四十八條第一項前段規定：「無線電頻率、電功率、發射方式及電臺識別呼號等有關電波監理業務，

portation and Communications (MOTC) shall regulate radio frequency, power, mode of transmission, radio station identification signals and call signs, and other radio wave related matters; permission from the MOTC must be obtained for operation or alteration of radio wave related matters.” (In accordance with Article 2 of the National Communications Commission (NCC) Organic Act, as of February 22, 2006, the date of the NCC’s establishment, related laws and regulations concerning communication and broadcasting, including, among other things, the Telecommunications Act, that were heretofore under the governing authority of the Department of Transportation but involved with the jurisdiction of the NCC, were to be transferred to the NCC.) Article 58, Paragraph 2 of the Telecommunications Act stipulates: “Anyone who arbitrarily uses or alters radio frequency in violation of Paragraph 1 of Article 48 without authorization shall be penalized with detention, and/or a fine of not more than NT\$200,000.” Article 60 of the same Act further provides that violators of Article 58, Paragraph 2 shall result in

由交通部統籌管理，非經交通部核准，不得使用或變更」（依國家通訊傳播委員會組織法第二條規定，電信法等有關通訊傳播之相關法規，其原屬交通部之職權而涉及國家通訊傳播委員會職掌者，自中華民國九十五年二月二十二日國家通訊傳播委員會成立之日起，其主管機關變更為該委員會）。電信法第五十八條第二項規定：「違反第四十八條第一項規定，未經核准擅自使用或變更無線電頻率者，處拘役或科或併科新臺幣二十萬元以下罰金。」同法第六十條復規定，犯第五十八條第二項之罪者，其電信器材，不問屬於犯人與否，沒收之。準此，人民使用無線電頻率，依電信法第四十八條第一項前段規定，應先經主管機關核准，如有違反，即依同法第五十八條第二項及第六十條規定科處拘役、罰金，併沒收其電信器材。

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the telecommunications equipment being confiscated regardless of ownership. By the same rule, the use of radio frequency, in accordance with Article 48, Paragraph 1 of the Telecommunications Act, is subject to the prior approval of the governing authority, and, in the event of violation, the penalty of detention, fine and confiscation of the equipment(s) in accordance with Article 58, Paragraph 2 and Article 60.

Radio frequencies are public resources that belong to all nationals. In order to prevent usage interference and to ensure efficient and harmonious usage so as to maintain the order of wave usage, public resources and to enhance important public interest, the government must naturally manage with appropriate caution. Taken the above into consideration, the legislative body stipulates in Article 48, Paragraph 1 of the Telecommunications Act that the people's use of radio frequency shall be subject to prior approval. The purpose of such legislation is appropriate. While this regulation restricts the freedom of communications concern-

無線電波頻率屬於全體國民之公共資源，為避免無線電波頻率之使用互相干擾、確保頻率和諧使用之效率，以維護使用電波之秩序及公共資源，增進重要之公共利益，政府自應妥善管理。立法機關衡酌上情，乃於電信法第四十八條第一項前段規定，人民使用無線電波頻率，採行事前許可制，其立法目的尚屬正當。上開規定固限制人民使用無線電波頻率之通訊傳播自由，惟為保障合法使用者之權益，防範發生妨害性干擾，並維護無線電波使用秩序及無線電通信安全（聯合國所屬國際電信聯合會－International Telecommunication Union之無線電規則－Radio Regulations第十八條，及聯合國海洋法公約－

ing the usage of radio frequency, in light of protecting the licensed users' rights and interests, preventing interruptive interferences and maintaining the orderly usage of radio wave and the safety of radio communications (Article 18 of the Radio Regulations of International Telecommunication Union and Article 109 of the United Nations Convention on the Law of the Sea), and in balance, the restrictive measures under this provision is necessary and helpful in achieving the above-stated purposes, and do not contradict the principle of proportionality or the protection of free speech under Article 11 of the Constitution.

To fulfill the pre-approval system under the front protion of Article 48, Paragraph 1 of the Telecommunications Act, Article 58, Paragraph 2 of the same Act provides that anyone who arbitrarily use or alter radio frequency without authorization shall be penalized with detention, and/or a fine of not more than NT\$200,000. The legislators consider the act of unauthorized and arbitrary use of radio frequencies a violation of the li-

United Nations Convention on the Law of the Sea 第一百零九條參照)。兩相權衡，該條項規定之限制手段自有必要，且有助於上開目的之達成，與比例原則尚無抵觸，並無違憲法第十一條保障人民言論自由之意旨。

為貫徹電信法第四十八條第一項前段採行事前許可制，對未經核准而擅自使用無線電波頻率者，依同法第五十八條第二項規定處拘役或科或併科新臺幣二十萬元以下罰金，係立法者衡酌未經核准擅自使用無線電頻率之行為，違反證照制度，為維護無線電波使用秩序，俾澈底有效取締非法使用電波行為（立法院公報第八十八卷第三十七期第二四八頁參照），認為採取行政罰之手段，不足以達成立法目的，乃規定

cense system and the measure of administrative penalty is not sufficient to achieve the legislative purpose of maintaining the order of radio frequency usage as well as thoroughly and effectively banning the illegal usage activities (the Legislative Yuan Gazette, vol. 88, no. 37, p. 248), thus stipulate criminal penalty as the measure of control, which does not contradict the principle of proportionality under Article 23 of the Constitution. As to Article 60 of the Telecommunications Act, which stipulates that the telecommunication equipment used in violation of Article 58, Paragraph 2, regardless of ownership, shall be confiscated, is intended to prevent repeated unlawful use with the same equipment at different locations after the [initial] ban and is meant to prevent recidivism. Furthermore, radio transmitters or other devices used by radio stations to transmit radio frequencies are controlled goods that cannot be possessed or used at will (Article 49, Paragraph 1 and Article 67, Paragraphs 3 and 4 of the same Act). Therefore, the confiscation regulation under Article 60 for violation of Article 58, Paragraph 2 contradicts neither the prin-

以刑罰為管制手段，與憲法第二十三條之比例原則尚無抵觸。至電信法第六十條規定，對於犯同法第五十八條第二項之罪者，其使用之電信器材，不問屬於犯人與否沒收之，旨在防範取締之後，再以相同工具易地反覆非法使用，具有預防再犯之作用，且無線電臺發射電波頻率所使用之無線電發射機等電信管制射頻器材，係屬管制物品，不得任意持有、使用（同法第四十九條第一項、第六十七條第三項、第四項參照）。是上開第六十條有關違反第五十八條第二項之沒收規定，尚未逾越必要之程度，與憲法第二十三條之比例原則、第十五條人民財產權之保障，均無違背。

principle of proportionality under Article 23 of the Constitution nor the protection of people's property rights under Article 15 of the Constitution.

The State should allocate radio frequencies fairly and reasonably to safeguard the freedom of expression under Article 11 of the Constitution. In light of the rapid research and development of radio communication technology, it needs to be pointed out that the governing authority shall timely review the related regulations in tandem with the condition of technology development.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Tzu-Yi Lin filed concurring

為保障憲法第十一條規定之言論自由，國家應對電波頻率之使用為公平合理之分配。鑒於無線電波通訊技術之研發進步迅速，主管機關並應依科技發展之情況，適時檢討相關管理規範，併此指明

本號解釋許大法官宗力提出協同意見書；葉大法官百修提出協同意見書；陳大法官新民提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官春生提出協同意見書；林大法官子儀、李大法官震山共同提出部分協同、部分不同意見書；許大法官玉秀提出一部協同、一部不同意見書。

opinion in part and dissenting opinion in part, in which Justice Chen-Shan Li joined.

Justice Yu-hsiu Hsu filed concurring opinion in part and dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: The Petitioner arbitrarily used the 95.9Hz radio frequency somewhere in Taichung County and established a radio station named "Sound of XX" to broadcast unlawfully since May 2002, although such use did not interfere with the lawful use of radio waves. The Petitioner was raided by the police in March 2003.

The case was reviewed by the Summary Court of the Taichung District Court and the appellate panel of the Taichung District Court. In the final judgment, (92) *Fong Chien Shang Tze* No. 313, the appellate panel imposed a 50-day detention and confiscated all the equipment involved in the case. Believing that the applicable statutes of Article 48, Paragraph 1, Article 58, Paragraph 2, and

編者註：

事實摘要：（一）聲請人於民國91年5月間起，未經向主管機關申請許可核准，擅自在臺中縣某處使用無線電頻95.9兆赫，非法設置「海0之聲」廣播電臺，對外廣播，惟未干擾無線電波之合法使用，於92年3月間被警查獲。

（二）案經第一審臺灣臺中地方法院簡易庭及第二審臺灣臺中地方法院合議庭審理，第二審合議庭以92年度豐簡上字第313號判決，判處拘役50日，扣案之器材均沒收確定。聲請人認上開確定終局判決，所適用之電信法第48條第1項、第58條第2項及第60條等規定，發生有抵觸憲法第11條、第15條及第23條之疑義，聲請解釋。

Article 60 of the Telecommunications Act in the above final judgment, among other things, contradict the freedom of speech under Article 11 of the Constitution, the protection of property rights under Article 15 of the Constitution and the basic right under Article 23 of the Constitution, the petitioner requested for interpretation.