

J. Y. Interpretation No.680 (July 30, 2010) \*

**ISSUE:** Do Article 2, Paragraphs 1 and 3 of the Smuggling Punishment Act contravene the principle of clarity with the authorization of law and the principle of clarity on criminal penalties ?

**RELEVANT LAWS:**

J. Y. Interpretation No. 552 ( 司法院釋字第五二二號解釋 ) ; Article 2, Paragraph 1 and Paragraph 3 and Article 11 of the Smuggling Punishment Act ( 懲治走私條例第二條第一項、第三項及第十一條 ) ; Item C of the “Items and Quantities of the Controlled Articles” amended and published by the Administrative Yuan on October 23, 2003 ( 九十二年十月二十三日行政院修正公告之「管制物品項目及其數額」丙項 ) ; Article 5, Paragraph 1, Item 2 and Paragraph 3 of the Law Governing the Review of Cases by the Judicial Yuan Grand Justices ( 司法院大法官審理案件法第五條第一項第二款及第三項 ) .

**KEYWORDS:**

smuggling of controlled articles ( 私運管制物品 ) , import ( 進口 ) , export ( 出口 ) , public notice ( 公告 ) , the principle of clarity and accuracy of authorization of law ( 授權明確性 ) , the principle of clarity on criminal penalties ( 刑罰明確性原

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\* Translated by Tzu-Yi Hung/ Ching-Yuan Huang.

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

則) , *nullum crimen sine lege* (the principle of no crime without a previous penal law) (罪刑法定原則) .\*\*

**HOLDING:** Article 2, Paragraph 1 of the Smuggling Punishment Act stipulates, “Import or export smuggling of controlled articles or substances which exceeds the published amount is subject to no more than seven years of imprisonment, or in addition thereto, a fine of no more than NT\$3,000,000.” Paragraph 3 of the same Article stipulates, “The controlled articles and its amounts, as indicated in Paragraph 1, shall be promulgated by the Executive Yuan.” The purposes, contents, and scope of this authorization lack clarity, which contravenes the principle of clarity with the authorization of law and the principle of clarity on criminal penalties and shall cease to be effective no later than the second anniversary since the issuance of this Interpretation.

**REASONING:** The petitioners argue that Article 2, Paragraph 1 of the Smuggling Punishment Act (“import or

**解釋文：**本懲治走私條例第二條第一項規定：「私運管制物品進口、出口逾公告數額者，處七年以下有期徒刑，得併科新臺幣三百萬元以下罰金。」第三項規定：「第一項所稱管制物品及其數額，由行政院公告之。」其所為授權之目的、內容及範圍尚欠明確，有違授權明確性及刑罰明確性原則，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

**解釋理由書：**本件聲請人認最高法院九十八年度台上字第三四一七號刑事判決及臺灣高等法院高雄分院

export smuggling of the controlled articles or substances which exceeds the published amount is subject to no more than seven years of imprisonment, or in addition thereto, a fine of no more than NT\$3,000,000”), as applied in the Supreme Court Criminal Judgment 98 *Tai Shang Zi* No. 3417 (2009) and the Taiwan High Court Kaohsiung Branch Criminal Judgment 97 *Shang Sue Zi* No. 2032 (2008), are unconstitutional. Paragraph 3 of the same provision stipulates, “The controlled articles and its amounts, as indicated in Paragraph 1, shall be published by the Executive Yuan.” Since Paragraphs 1 and 3 must be combined to form an integral penal provision, it is pointed out that they are combined to be the subject matter of this Interpretation.

Although the Constitution permits the legislative body to take the means of legislation by delegation, i.e. to authorize the administrative agencies to promulgate regulations to supplement the laws, the purposes, contents, and scopes of such authorization should be clear and

九十七年度上訴字第二〇三二號刑事判決，所適用之懲治走私條例第二條第一項「私運管制物品進口、出口逾公告數額者，處七年以下有期徒刑，得併科新臺幣三百萬元以下罰金」之規定，有違憲疑義，向本院聲請解釋。因同條第三項規定：「第一項所稱管制物品及其數額，由行政院公告之。」該條第一項與第三項規定須相結合，始為一完整之刑罰規定，而併得為釋憲之客體，合先說明。

立法機關以委任立法之方式，授權行政機關發布命令，以為法律之補充，雖為憲法所許，惟其授權之目的、內容及範圍應具體明確。至於授權條款之明確程度，則應與所授權訂定之法規命令對人民權利之影響相稱。刑罰法規關係人民生命、自由及財產權益至鉅，

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concrete. The degree of clarity in the authorizing provision should correspond with the impact on people's rights by the authorized regulations. Since criminal laws deeply concern the people's life, liberty, and property rights, they must be enacted through statutory legislation and in conformity with the principle of *nullum crimen sine lege*. When a law authorizes the governing authority to promulgate regulations to supplement the statute, the culpability of the act must be foreseeable in the authorizing law so that the authorization is clear and concrete, and in conformity with the principle of clarity on criminal penalties (*see* J.Y. Interpretation No. 522). Observing from the totality of the authorizing statute, as long as it is sufficient for the people to foresee that certain act is likely to be subject to criminal penalty, such authorization is not in contradiction with the doctrine of foreseeable culpability, and no affirmation of the culpable act is necessary.

The criminal penalty imposed under Article 2, Paragraph 1 of the Smuggling

自應依循罪刑法定原則，以制定法律之方式規定之。法律授權主管機關發布命令為補充規定時，須自授權之法律規定中得預見其行為之可罰，其授權始為明確，方符刑罰明確性原則（本院釋字第五二二號解釋參照）。其由授權之母法整體觀察，已足使人民預見行為有受處罰之可能，即與得預見行為可罰之意旨無違，不以確信其行為之可罰為必要。

懲治走私條例第二條第一項所科處之刑罰，對人民之自由及財產權影響

Punishment Act has an enormous effect on people's liberty and property rights. However, as to the contents of requirement that constitute the offence, such as the items and amounts of the controlled article, Paragraph 3 of the same Article authorizes the Executive Yuan to decide and publish. It does not specify the purposes of the control nor identify the factors that should be considered when the items and amounts of the controlled articles are published. Moreover, the authorizing statute lacks the regulations upon which other relevant matters may be based and inferred, thus the contents of the culpable acts can only be known from the "Items and Amounts of the Controlled Articles" promulgated and published by the Executive Yuan. Even by observing the totality of the Smuggling Punishment Act, it is still not foreseeable the smuggling of what items to what amount is likely to be penalized. As such, the authorization is certainly not clear and concrete, and thus not in conformity with the meaning and purpose of the Constitution to protect the people's right. Since

極為嚴重。然有關管制物品之項目及數額等犯罪構成要件內容，同條第三項則全部委由行政院公告之，既未規定為何種目的而為管制，亦未指明於公告管制物品項目及數額時應考量之因素，且授權之母法亦乏其他可據以推論相關事項之規定可稽，必須從行政院訂定公告之「管制物品項目及其數額」中，始能知悉可罰行為之內容，另縱由懲治走私條例整體觀察，亦無從預見私運何種物品達何等數額將因公告而有受處罰之可能，自屬授權不明確，而與上述憲法保障人民權利之意旨不符。鑒於懲治走私條例之修正，涉及國家安全、社會秩序及經貿政策等諸多因素，尚須經歷一定時程，該條例第二條第一項及第三項規定，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

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the amendment to the Smuggling Punishment Act involves many elements such as national security, social order, and economic and trade policies, and the process may take certain period of time, Article 2, Paragraphs 1 and 3 of the Smuggling Punishment Act shall cease to be effective no later than the second anniversary since the issuance of this Interpretation.

On the part that concerns the petitioners' argument that Article 11 of the Smuggling Punishment Act and Item C of the "Items and Amounts of the Controlled Articles," as promulgated by the Executive Yuan on October 23, 2003, are unconstitutional, it was only based on their personal opinions to question the constitutionality without pointing out specifically what parts of the aboveindicated provisions contradict the Constitution. As this part of the petition is inconsistent with Article 5, Paragraph 1, Item 2 of the Constitutional Interpretation Procedure Act, it is hereby dismissed in accordance with Paragraph 3 of the same Article.

本件聲請人認懲治走私條例第十一條規定及中華民國九十二年十月二十三日行政院修正公告之「管制物品項目及其數額」丙項違憲部分，僅係以個人見解質疑其合憲性，並未具體指摘上開規定有何抵觸憲法之處。此部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理

Justice Lai, In-Jaw filed concurring opinion, in which Justice Tzu-Yi Lin joined.

Justice Tzu-Yi Lin filed concurring opinion, in which Justice Lai, In-Jaw joined.

Justice Mao-Zong Huang filed concurring opinion, in which Justice Pai-Hsiu Yeh joined.

Justice Tzong-Li Hsu filed concurring opinion, in which Justice Tsay-Chuan Hsieh joined.

Justice Sea-Yau Lin filed dissenting opinion

#### **EDITOR'S NOTE:**

Summary of facts: The three petitioners are the captain, chief engineer, and engineer of a fishing vessel, respectively. In September, 2007, the petitioners purchased tuna and sailfish, among other things, from unidentified source in the open sea and smuggled the fish into the territory of Taiwan without truthful declaration. They were prosecuted after being discovered.

本號解釋賴大法官英照、林大法官子儀共同提出協同意見書；林大法官子儀、賴大法官英照共同提出協同意見書；黃大法官茂榮、葉大法官百修共同提出協同意見書；許大法官宗力、謝大法官在全共同提出協同意見書；林大法官錫堯提出不同意見書。

#### **編者註：**

事實摘要：聲請人3人分別為漁船船長、輪機長及輪機員。96年9月間，於外海向不詳人士購入鮪魚、旗魚等魚貨，未據實申報，即私運進入臺灣地區遭查獲及起訴。

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The Taiwan High Court Kaohsiung Branch sentenced the petitioners to one year, nine months, and six months imprisonment respectively, for violation of Article 2, Paragraph 1 of the Smuggling Punishment Act. On appeal, the Supreme Court affirmed the judgment and dismissed the appeal on the procedural ground, holding that the petitioners did not specifically identify which parts of the High Court judgment were in violation of the laws. The judgment was final.

The petitioners filed for a constitutional Interpretation, arguing that Article 2, Paragraph 1 and Article 11 of the Smuggling Punishment Act and Item C of the “Items and Amounts of the Controlled Articles,” as promulgated by the Executive Yuan on October 23, 2003 and applied in the Supreme Court Criminal Judgment 98 *Tai Shang Zi* No. 3417 and the Taiwan High Court Kaohsiung Branch Criminal Judgment 97 *Shang Sue Zi* No. 2032, are inconsistent with the principles of clarity with the authorization of law, equality, and proportionality, thus contra-

臺灣高等法院高雄分院以聲請人違反懲治走私條例第2條第1項走私罪，分別判處聲請人1年、9月及6月有期徒刑。案經上訴至最高法院，該院以上訴未具體指摘二審判決有何違背法令之處，予以程序駁回，全案確定。

聲請人認最高法院98年度台上字第3417號刑事判決及臺灣高等法院高雄分院97年度上訴字第2032號刑事判決，所適用之懲治走私條例第2條第1項、第11條及92年10月23日行政院修正公告之「管制物品項目及其數額」丙類，違反授權明確性原則、平等原則及比例原則，有牴觸憲法第7條、第15條及第23條規定之疑義，聲請解釋。

vene the right to equal protection under Article 7 of the Constitution, the right to life, and property right under 15 of the Constitution, and contradict Article 23 of the Constitution regarding restrictions on people's fundamental rights.