

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

**ISSUE:** Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act preclude a defendant convicted under military law from appealing to a civil court. Does the said provision violate Articles 8, 16, 77, and 80 of the Constitution, thus being null and void?

**RELEVANT LAWS:**

Articles 8, Paragraph 1, and 9, 16, 23, 77, 80 of the Constitution (憲法第八條第一項、第九條、第十六條、第二十三條、第七十七條、第八十條); Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act (軍事審判法第十一條、第一百三十三條第一項、第三項及第一百五十八條) .

**KEYWORDS:**

military trial (軍事審判), in-active-service soldiers (現役軍人) .\*\*

**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

**解釋文：**憲法第八條第一項規定，人民身體之自由應予保障，非由法院依法定程序不得審問處罰；憲法第十六條並規定人民有訴訟之權。現役軍人亦為人民，自應同受上開規定之保障。

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\* Translated by Chi-chang Yu.

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

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

又憲法第九條規定：「人民除現役軍人外，不受軍事審判」，乃因現役軍人負有保衛國家之特別義務，基於國家安全與軍事需要，對其犯罪行為得設軍事審判之特別訴訟程序，非謂軍事審判機關對於軍人之犯罪有專屬之審判權。至軍事審判之建制，憲法未設明文規定，雖得以法律定之，惟軍事審判機關所行使者，亦屬國家刑罰權之一種，其發動與運作，必須符合正當法律程序之最低要求，包括獨立、公正之審判機關與程序，並不得違背憲法第七十七條、第八十條等有關司法權建制之憲政原理；規定軍事審判程序之法律涉及軍人權利之限制者，亦應遵守憲法第二十三條之比例原則。本於憲法保障人身自由、人民訴訟權利及第七十七條之意旨，在平時經終審軍事審判機關宣告有期徒刑以上之案件，應許被告直接向普通法院以判決違背法令為理由請求救濟。軍事審判法第十一條，第一百三十三條第一項、第三項，第一百五十八條及其他不許被告逕向普通法院以判決違背法令為理由請求救濟部分，均與上開憲法意旨不符，應自本解釋公布之日起，至遲於屆滿二年時失其效力。有關機關應於上開期限內，就涉及之關係法律，本此原則作必要之修正，並對訴訟救濟相關之審

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,

級制度為配合調整，且為貫徹審判獨立原則，關於軍事審判之審檢分立、參與審判軍官之選任標準及軍法官之身分保障等事項，亦應一併檢討改進，併此指明。

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.

**REASONING:** Physical freedom is a basic human right under the Constitution and deserves the most thorough protection. Interpretation of the Constitution and establishment of the law shall both be in compliance with this principle. 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

**解釋理由書：**人民身體自由在憲法基本權利中居於重要地位，應受最周全之保護，解釋憲法及制定法律，均須貫徹此一意旨。憲法第八條第一項規定，人民身體之自由應予保障，非由法院依法定程序不得審問處罰；憲法第十六條並規定人民有訴訟之權，現役軍人亦為人民，自應同受上開規定之保障。又憲法第九條規定：「人民除現役軍人外，不受軍事審判」，乃因現役軍人負有保衛國家之特別義務，基於國家安全與軍事需要，對其犯罪行為得設軍事審判之特別訴訟程序。查其規範意旨係在保障非現役軍人不受軍事審判，非謂軍事審判機關對於軍人之犯罪有專屬之審判權，而排除現役軍人接受普通法院之審判。至軍事審判之建制，憲法未設明文規定，雖得以法律定之，惟軍事審判

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 tribunals; nevertheless, such system may be established in the law. The initiation and operation of the military tribunal, 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 of the constitutional principle as stated in Article 77, “the Judicial Yuan is the highest judicial body of the nation,” and Article 80, “judges shall, in accordance with the law, hold trials independently, free from any interference” of the Constitution. The

機關所行使者，亦屬國家刑罰權之一種，具司法權之性質，其發動與運作，必須符合正當法律程序之最低要求，包括獨立、公正之審判機關與程序，並不得違背憲法第七十七條司法院為國家最高司法機關，掌理刑事訴訟審判，第八十條法官依法律獨立審判，不受任何干涉等有關司法權建制之憲政原理；規定軍事審判程序之法律涉及軍人權利之限制者，亦應遵守憲法第二十三條之比例原則。

laws governing the procedures of military tribunals which limit the rights of military servicemen 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 military tribunal system shall be regulated differently in wartime and in peacetime. The defendant receiving the sentence of imprisonment in a final and conclusive judgment made by a 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. Article 11 of the Military Justice Act states that the Ministry of National Defense is the highest military tribunal body that empowers the military department to control military trials fully, which has the nature of exercising judicial power, and thus is in violation of the principle of separation of powers. Article 133, Paragraphs 1 and 3, of the Military Justice Act provides that sen-

本於憲法保障人身自由、人民訴訟權利及第七十七條之意旨，應就軍事審判制度區分平時與戰時予以規範。在平時經終審軍事審判機關宣告有期徒刑以上之案件，應許被告逕向普通法院以判決違背法令為理由請求救濟。軍事審判法第十一條規定：「國防部為最高軍事審判機關」，使軍事機關完全掌理具司法性質之軍事審判，有違權力分立原則；第一百三十三條第一項、第三項規定軍事審判機關長官有判決核可權及覆議權；第一百五十八條規定軍事審判庭之組成須簽請軍事長官核定，使行政權介入軍事審判權之行使；及其他不許被告逕向普通法院以判決違背法令為理由請求救濟部分，均與上開憲法意旨不符，應自本解釋公布之日起，至遲於屆滿二年時失其效力。有關機關應於上開期限內，就涉及之關係法律，本此原則作必要之修正，並對訴訟救濟相關之審級制度為配合調整，且為貫徹審判獨立

ior officers of the military tribunal shall have the right to approve and review the judgment. In addition, Article 158 of the Military Justice Act stipulates that a military tribunal shall be formed upon the approval of the commander that empowers the administrative power to intervene in the judicial power. Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act and the rest of the Act where the dependent 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 the relevant laws based on this principle, adjust the relevant 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.

原則，關於軍事審判之審檢分立、參與審判軍官之選任標準及軍法官之身分保障等事項，亦應一併檢討改進，併此指明。

Justice Chi-Nan Chen filed concurring opinion.

Justice Hsiang-Fei Tung filed concurring opinion.

Justice Tze-Chien Wang filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion in part.

Justice Young-Mou Lin filed dissenting opinion in part.

本號解釋陳大法官計男、董大法官翔飛與王大法官澤鑑分別提出協同意見書；孫大法官森焱、林大法官永謀分別提出部分不同意見書。