

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

ISSUE: Does Article 19, Paragraph 1 of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition and Knife imposing mandatory rehabilitative measures upon the convicted violate the principle of proportionality as specified in Article 23 of the Constitution?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution (憲法第八條、第二十三條); Articles 2, Paragraph 2, and 90 of the Criminal Code (刑法第二條第二項、第九十條); Articles 7, 8, 10, 11, 12, 13 and 19, Paragraph 1 of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition and Knife (槍砲彈藥刀械管制條例第七條、第八條、第十條、第十一條、第十二條、第十三條、第十九條第一項); Article 3, Paragraph 1, of the Act Governing the Rehabilitative Measures for Offenses of Caching and Receiving Stolen Property (竊盜犯贓物犯保安處分條例第三條第一項).

KEYWORDS:

personal freedom (人身自由), rehabilitative measures (保安處分), criminal punishment (刑罰), compulsory labor (強制勞動), principle of proportionality (比例原則).**

* Translated by Jaw-Perng Wang.

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

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

解釋文：人民身體之自由應予保障，憲法第八條設有明文。限制人身自由之法律，其內容須符合憲法第二十三條所定要件。保安處分係對受處分人將來之危險性所為拘束其身體、自由等之處置，以達教化與治療之目的，為刑罰之補充制度。本諸法治國家保障人權之原理及刑法之保護作用，其法律規定之內容，應受比例原則之規範，使保安處分之宣告，與行為人所為行為之嚴重性、行為人所表現之危險性，及對於行為人未來行為之期待性相當。槍砲彈藥刀械管制條例第十九條第一項規定：「犯第七條、第八條、第十條、第十一條、第十二條第一項至第三項、第十三條第一項至第三項之罪，經判處有期徒刑者，應於刑之執行完畢或赦免後，令入勞動場所，強制工作，其期間為三年。」此項規定不問對行為人有無預防矯治其社會危險性之必要，一律宣付強制工作三年，限制其中不具社會危險性之受處分人之身體、自由部分，其所採措施與所欲達成預防矯治之目的及所需程度，不合憲法第二十三條所定之比例原則。犯上開條例第十九條所定之罪，不問對行為人有無預防矯治其社會危險性之必要，一律宣付強制工作三年之部分，與本解釋意旨不符，應自本解釋公

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

布之日起不予適用。犯該條例第十九條第一項所列舉之罪，依個案情節符合比例原則部分，固應適用該條例宣告保安處分；至不符合部分而應宣告保安處分者，則仍由法院斟酌刑法第九十條第一項規定之要件，依職權為之，於此，自無刑法第二條第二項之適用，亦即仍有從新從輕原則之適用。

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.

REASONING: 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 law 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.” This indicates that any measures restraining the people’s liberty shall be prescribed by statutes, and their enforcement shall be conducted by the judiciary, the police, or the court in accordance with the procedure prescribed by statutes. Statutes enacted by the legislative body must comply with the conditions set forth in Article 23 of the Consti-

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障，除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」係指限制人民身體自由之處置，須以法律定之，其執行亦應分別由司法、警察機關或法院依法定程序為之。而立法機關於制定法律時，其內容必須符合憲法第二十三條所定之要件，即須為防止妨礙他人自由，避免緊急危難，維持社會秩序或增進公共利益所必要。對於人身自由之處罰，有多種手段可供適用時，除應選擇其最易於回歸社會營正常生活者外，其處罰程度與所欲達到目的之間，並須具合理適當之關係，俾貫徹現代法治國家保障人身自由之基本原則。

tution, which are necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain the social order, or to promote the public welfare. Among many different ways and forms of criminal punishments, the legislature shall choose the ones that can best enable the persons to return to society and become productive members, and the relationship between the extent of punishment and its goals must be reasonable and proper, in order to enforce the fundamental principle in a modern state governed by the rule of law (Rechtsstaat) which protects physical freedom.

Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife 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 he has been pardoned.” Its purpose is to maintain the social order, and to protect people’s lives and

槍砲彈藥刀械管制條例第十九條第一項規定：「犯第七條、第八條、第十條、第十一條、第十二條第一項至第三項、第十三條第一項至第三項之罪，經判處有期徒刑者，應於刑之執行完畢或赦免後，令入勞動場所，強制工作，其期間為三年。」固在於維護社會秩序，保障人民之生命財產，然保安處分係對受處分人將來之危險性所為之處置，以達教化與治療之目的，為刑罰之補充制度。我國現行刑法採刑罰與保安處分之雙軌制，要在維持行為責任之刑

property. However, 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. The reasons for adopting the dual systems of criminal punishment and rehabilitative measures under the current Criminal Code are to keep the principle of no criminal liability without actus reus, to help persons to return to society and to rid them of their criminal propensity, in order to eliminate the roots of criminality and to prevent future crimes. In restraining people's rights, the rehabilitative measures are no different from punishment in that they isolate the persons from society and restrict their 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 (Verhältnismäßigkeitsprinzip). The measures imposed must be proportionate to the seriousness of the act, the person's criminal propensity, and the future expectation of the person. The labor program of the

罰原則下，為強化其協助行為人再社會化之功能，以及改善行為人潛在之危險性格，期能達成根治犯罪原因、預防犯罪之特別目的。保安處分之措施亦含社會隔離、拘束身體自由之性質，其限制人民之權利，實與刑罰同，本諸法治國家保障人權之原理及刑法之保護作用，其法律規定之內容，應受比例原則之規範，使保安處分之宣告，與行為人所為行為之嚴重性、行為人所表現之危險性，及對於行為人未來行為之期待性相當。保安處分中之強制工作，旨在對嚴重職業性犯罪及欠缺正確工作觀念或無正常工作因而犯罪者，強制其從事勞動，學習一技之長及正確之謀生觀念，使其日後重返社會，能適應社會生活。刑法第九十條第一項規定：「有犯罪之習慣或以犯罪為常業或因遊蕩或懶惰成習而犯罪者，得於刑之執行完畢或赦免後，令入勞動場所，強制工作。」竊盜犯贓物犯保安處分條例第三條第一項規定：「十八歲以上之竊盜犯、贓物犯，有左列情形之一者，得於刑之執行前，令入勞動場所強制工作：一、有犯罪之習慣者。二、以犯竊盜罪或贓物罪為常業者。」均係本此意旨而制定，而由法院視行為人之危險性格，決定應否交付強制工作，以達特別預防之目的。槍砲

rehabilitative measures aims at those who are hardened professional criminals without a proper concept of work, or those who commit crimes because they have no normal jobs. By way of compelling them to labor and to learn working skills and the proper living skills, the purpose of the labor program is to help them adjust more easily when they return to society. Article 90, Paragraph 1, of the Criminal Code provides: "A prisoner may be sent to a place of labor, and be compelled to labor after he has served his sentence or he has been pardoned if he is deemed likely to commit more crimes or is a professional or habitual criminal." Article 3, Paragraph 1, of the Act Governing the Rehabilitative Measures for Offenses of Caching and Receiving Stolen Property provides: "A person over 18 years old who has committed the offenses of larceny or receiving stolen property may be sent to a place of labor, and be compelled to labor before he serves his sentence if he meets any one of the following conditions: (1) he is deemed likely to commit more crimes, or (2) he is a professional criminal who deals in larceny or receives stolen property." Based

彈藥刀械管制條例第十九條第一項之規定，不問行為人有無預防矯治其社會危險性之必要，一律宣付強制工作三年，拘束其中不具社會危險性之受處分人之身體、自由部分，其所採措施與所欲達成預防矯治之目的及所需程度，不合憲法第二十三條所定之比例原則。犯上開條例第十九條所定之罪，不問對行為人有無預防矯治其社會危險性之必要，一律宣付強制工作三年之部分，與本解釋意旨不符，應自本解釋公布之日起不予適用。犯該條例第十九條第一項所列舉之罪，依個案情節符合比例原則部分，固應適用該條例宣告保安處分；至不符合部分而應宣告保安處分者，則仍由法院斟酌刑法第九十條第一項規定之要件，依職權為之，於此，自無刑法第二條第二項之適用，亦即仍有從新從輕原則之適用。有關機關應依本解釋意旨就槍砲彈藥刀械管制條例有關保安處分之規定通盤檢討修正，於該條例此部分修正公布施行後，審判上自無援用本解釋之必要，併此指明。

upon the above principles, both Articles provide that a court, in considering a person's criminal propensity, shall have the discretion to send him to the compulsory labor program for the purpose of detention. Article 19, Paragraph 1, 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 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 years of 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 cir-

cumstances. 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. Based on the essence of this Interpretation, the relevant authorities shall thoroughly re-examine and amend the relevant provisions of rehabilitative measures in the Act. We need to point out that after the promulgation of the amendment to the Act, trial courts shall not apply this Interpretation, as a matter of course.

Justice Tze-Chien Wang filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion in part.

本號解釋王大法官澤鑑提出部分不同意見書；劉大法官鐵錚提出一部不同意見書。