

J. Y. Interpretation No.265 (October 5, 1990) *

ISSUE: Is the provision of the National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion, setting forth entry restrictions for those who have failed to reside in the free area of the country for a specified period after leaving the area under the Communists' control, consistent with the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution (憲法第二十三條) .

KEYWORDS:

freedom of residence and migration (居住遷徙自由), principle of proportionality (比例原則), restrictions on entry into the country (入境限制), the nation has suffered severe calamities (國家遭遇重大變故), exercise of administrative discretion (行政裁量權之行使) .**

HOLDING: The restrictions on entry into the country imposed by Article 3-II (ii) of the National Security Act for the Period of National Mobilization for Suppression of the Communist Rebellion were intended to maintain the country's

解釋文：動員戡亂時期國家安全法第三條第二項第二款關於入境限制之規定，乃為維持社會秩序所必要，與憲法並無牴觸。至該法施行細則第十二條第六款前段，關於未在自由地區居住一定期間，得不予許可入境之規定，係

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

then existing social order during the period for the suppression of the communist rebellion and are therefore not in conflict with the Constitution. As to the provision stating that: “A citizen may not be permitted to enter the country if the citizen has not resided in the free area for a certain period of time,” as set forth in the first part of Article 12 (vi) of the Enforcement Rules of the said Act, it is designed to provide a fact-finding guideline for the competent authority while exercising its administrative discretion according to the law mentioned above and thus is consistent with the purposes of the aforesaid Act to guarantee national security and safeguard social stability. However, the said Enforcement Rules should be reviewed and amended from time to time after taking into account the purposes of Article 3-II (ii) of the said Act so as to meet the needs as dictated by social developments.

REASONING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have freedom of residence and migration, is to protect the people’s freedom to choose and

對主管機關執行上述法律時，提供認定事實之準則，以為行使裁量權之參考，與該法確保國家安全、維護社會安定之立法意旨尚屬相符。惟上述細則應斟酌該法第三條第二項第二款規定之意旨，隨情勢發展之需要，檢討修正。

解釋理由書：人民有居住及遷徙之自由，固為憲法第十條所規定，但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者，仍得以法律限制之，此觀憲法第二

change their residence and to travel, including the right to exit or enter the country. In accordance with Article 23 of the Constitution, however, such fundamental right shall not be restricted by law except when it is necessary to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain the social order, or to advance the public interest. Article 1 of the National Security Act [Promulgated?] during the Period of National Mobilization for Suppression of the Communist Rebellion expressly provides that the Act was enacted for the purposes of guaranteeing national security and safeguarding social stability during the period of national mobilization for suppression of the communist rebellion. The provision of Article 3-II (ii) of the said Act that entry into and exit from the country may not be permitted if, judging from the facts, it is reasonably suspected that any person may pose a threat to national security or social stability, is a restriction imposed on the people's freedom of travel. As far as entry into the country is concerned, it is necessary to adopt such restriction of entry to maintain social or-

十三條規定甚明。動員戡亂時期國家安全法第一條明示該法係動員戡亂時期為確保國家安全、維護社會安定而制定。其中第三條第二項第二款關於有事實足認為有妨害國家安全或社會安定之重大嫌疑者，得不予許可入出境之規定，即係對於人民遷徙自由所為之限制。就入境之限制而言，當國家遭遇重大變故，社會秩序之維持與人民遷徙之自由發生衝突時，採取此種入境限制，既為維持社會秩序所必要，與憲法並無牴觸。

der when the nation has suffered severe calamities even if a conflict thus exists between the preservation of social order and the people's freedom to travel. As such, it is not in conflict with the Constitution.

As to the provision of the first half of Article 12 (vi) of the Enforcement Rules of the said Act as amended and issued by the Executive Yuan on November 18, 1988, stating that: "A citizen who has not resided in the free area continuously for five years (later amended to four years) after leaving the enemy-occupied area may not be allowed to enter the country," it is designed to provide a fact-finding guideline for the competent authority while exercising its administrative discretion according to the law mentioned above, which does not suggest that entry into the country will be flatly denied in the event of the aforesaid situation. Therefore, the relevant language of the said article prescribing, "...may not be allowed," instead of "...shall not be allowed," is consistent with the purposes of the aforesaid Act to guarantee national security and

至該法施行細則第十二條第六款前段在中華民國七十七年十一月十八日行政院修正發布前，關於「離開淪陷區後，未在自由地區連續住滿五年（已修正為四年）」者，得不予許可入境之規定，係對主管機關執行上述法律規定時，提供認定事實之一種準則，以為行使行政裁量權之參考，並非凡有此情形，一律不予許可入境。故其條文定為「得」不予許可，而非「應」不予許可，與該法確保國家安全、維護社會安定之立法意旨尚屬相符。惟上述細則應斟酌該法第三條第二項第二款規定之意旨，隨情勢發展之需要，檢討修正。

safeguard social stability. However, the said Enforcement Rules should be reviewed and amended from time to time after taking into account the purposes of Article 3-II (ii) of the said Act so as to meet the needs as dictated by social developments.