J. Y. Interpretation No.384（July 28, 1995）*

ISSUE: Articles 5, 6, 7, 12, and 21 of the Gangster Prevention Act authorize the police arbitrarily to classify a person as a gangster, to force him to appear before the police or arrest him, to adopt a secret witness system, and to impose a rehabilitative program upon him irrespective of due process of law. Do the said provisions constitute an infringement on the people's freedom and rights as guaranteed by the Constitution?

RELEVANT LAWS:

Articles 8, Paragraph 1, 16 and 23of the Constitution（憲法第八條第一項、第十六條、第二十三條）; Article 96 of the Criminal Code（刑法第九十六條）; Articles 2, 4, 5, 6, 7,12, 16 and 21 of the Gangster Prevention Act （檢肅流氓條例第二條、第四條、第五條、第六條、第七條、第十二條、第十六條、第二十一條）.

KEYWORDS:

physical freedom（人身自由）, in accordance with the procedure prescribed by law（符合法定程序）, arrest（逮捕）, detention（拘禁）, trial（審問）, punishment（處罰）, secret witness（秘密證人）, the right to confront with the witness（與證人對質之權利）,correction and training programs（告誡列冊輔導處分）, specific deterrence（拘禁）, administrative litigation（行政訴訟）. **

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* Translated by Jaw-Perng Wang.

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HOLDING: 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 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." The phrase "in accordance with the procedure prescribed by law" in the above Paragraph means that the procedure a governmental organ uses as a basis upon which to impose any measures restraining people's liberty, no matter whether their status is that of a criminal defendant or not, must be prescribed by law. The contents of the law must be proper in substance, and comply with the relevant conditions set up in Article 23 of the Constitution. Articles 6 and 7 of the Gangster Prevention Act (hereinafter the "Act") authorize the police to

解釋文：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。」其所稱「依法定程序」，係指凡限制人民身體自由之處置，不問其是否屬於刑事被告之身分，國家機關所依據之程序，須以法律規定，其內容更須實質正當，並符合憲法第二十三條所定相關之條件。檢肅流氓條例第六條及第七條授權警察機關得逕行強制人民到案，無須踐行必要之司法程序；第十二條關於秘密證人制度，剝奪被移送裁定人與證人對質詰問之權利，並妨礙法院發見真實；第二十一條規定使受刑之宣告及執行者，無論有無特別預防之必要，有再受感訓處分而喪失身體自由之虞，均逾越必要程度，欠缺實質正當，與首開憲法意旨不符。又同條例第五條關於警察機關認定為流氓並予告誡之處分，人民除向內政部警政署聲明異議外，不得提起訴願及行政訴訟，亦與憲法第十六條規定意旨相違。均應自本解釋公布之日起，至遲於中華民國八十五年十二月三十一日失其效力。

force people to appear before the police bureau without following any necessary judicial procedure. The secret witness provision of Article 12 of said Act deprives of the right of the accused to confront the witnesses, and hampers the court's truth-finding function. Article 21 of said Act, without considering the necessity of detention, allows the imposition of correction and training programs on a prisoner, even after he has served his criminal sentence, and, therefore, jeopardizes his liberty. All the above articles of said Act exceed the extent of necessity, lack substantive propriety, and are inconsistent with the essence of the above Article of the Constitution. Furthermore, Article 5 of said Act, regarding the police's decision to consider a person as a gangster and to issue him admonitions, contradicts Article 16 of the Constitution because he could only appeal the decision to the National Police Administration, Ministry of the Interior, but has no right to lodge administrative appeal and institute administrative litigation. All of the Act's above Articles shall become null and void no later than December 31, 1996 after the promulgation of this Interpretation.

REASONING: Full protection of physical freedom is the prerequisite condition for people to enjoy other freedoms and rights guaranteed by the Constitution and is an important fundamental right. Article 8 of the Constitution, therefore, specifically provides for the protection of physical freedom of the people. Its Paragraph 1 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 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. It indicates that people, no matter whether their status is that of a criminal defendant or not, are protected by the above provision from any measures restraining physical freedom, except as otherwise provided by the Constitution. Except in the case of flagrante delicto which

解釋理由書：人民身體自由享有充分保障，乃行使其憲法上所保障其他自由權利之前提，為重要之基本人權。故憲法第八條對人民身體自由之保障，特詳加規定。該條第一項規定：「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。」係指凡限制人民身體自由之處置，在一定限度內為憲法保留之範圍，不問是否屬於刑事被告身分，均受上開規定之保障。除現行犯之逮捕，由法律另定外，其他事項所定之程序，亦須以法律定之，且立法機關於制定法律時，其內容更須合於實質正當，並應符合憲法第二十三條所定之條件，此乃屬人身自由之制度性保障。舉凡憲法施行以來已存在之保障人身自由之各種建制及現代法治國家對於人身自由所普遍賦予之權利與保護，均包括在內，否則人身自由之保障，勢將徒託空言，而首開憲法規定，亦必無從貫徹。

shall be separately prescribed by law, all other procedures governing arrest, detention, or punishment shall be based on statutes. Furthermore, the law passed by the legislative body must be proper in substance and comply with the conditions set up in Article 23 of the Constitution. This is the way of systematic protection of physical freedom. After the enactment of the Constitution, the idea was included in all existing organizational systems which protect physical freedom in our nation, and also in countries with the rule of law which universally provides the endowment and protection of the right to physical freedom. If it were otherwise, the protection of physical freedom would exist only in the form of words, and the above constitutional provisions would never be enforced.

The above substantive due process of law covers substantive law as well as procedural law. In substantive law, it must comply with the principle of legality. In procedural law, examples are as follows: except in the case of flagrante delicto, the arrest of a suspect shall follow necessary

前述實質正當之法律程序，兼指實體法及程序法規定之內容，就實體法而言，如須遵守罪刑法定主義；就程序法而言，如犯罪嫌疑人除現行犯外，其逮捕應踐行必要之司法程序、被告自白須出於自由意志、犯罪事實應依證據認定、同一行為不得重覆處罰、當事人有

judicial process; the accused's confession shall be voluntary; a conviction shall be based upon evidence; no person shall be subject to punishment for the same offence twice; the parties have the right to confront and cross-examine their witnesses; the separation of the judiciary and prosecution; trials shall be public in principle; and the right to appeal the lower court's decision. Unless in the permissible exception that martial law is declared in accordance with the law, or when the state or the people are in a state of emergency, all statutory provisions are deemed to contradict the substantive due process of law if they are inconsistent with the above said principles. The previous form of the current Gangster Prevention Act (hereinafter the "Act") was enacted in the Period of Mobilization for the Suppression of the Communist Rebellion. Its value was in maintaining the social order. Although the acts enumerated in its Article 2 could be constitutionally prohibited by statutes, the contents of the statutes, as a matter of course, had to comply with substantive due process.

與證人對質或詰問證人之權利、審判與檢察之分離、審判過程以公開為原則及對裁判不服提供審級救濟等為其要者。除依法宣告戒嚴或國家、人民處於緊急危難之狀態，容許其有必要之例外情形外，各種法律之規定，倘與上述各項原則悖離，即應認為有違憲法上實質正當之法律程序。現行檢肅流氓條例之制定，其前身始於戒嚴及動員戡亂時期而延續至今，對於社會秩序之維護，固非全無意義，而該條例（指現行法，下同）第二條所列舉之行為，亦非全不得制定法律加以防制，但其內容應符合實質正當之法律程序，乃屬當然。

Article 4 of said Act, regarding listing a person as a gangster, admonishing him and subjecting him to reformatory measures, not only affects a person's reputation, but also might jeopardize his liberty by subjecting him to correction and training programs. It is of course an administrative act damaging a person's right and interests. Article 5 of said Act provides that, if he is not satisfied with the police decision listing him as a gangster, he may appeal the police decision, with a written statement of reasons, to the National Police Administration, Ministry of the Interior, within 10 days after he receives the notice listing him as a gangster. However, the decision of the National Police Administration, Ministry of the Interior, is final in that he has no right to appeal it to any authorities. It excludes the application of administrative litigation, and obviously contradicts Article 16 of the Constitution which guarantees the right to lodge administrative appeal and institute administrative litigation.

按同條例第四條對於列為流氓之告誡列冊輔導處分，非但影響人民之名譽，並有因此致受感訓處分而喪失其身體自由之虞，自屬損害人民權益之行政處分。惟依同條例第五條規定：經認定為流氓受告誡者，如有不服，得於收受告誡書之翌日起十日內，以書面敘述理由，經由原認定機關向內政部警政署聲明異議，對內政部警政署所為決定不服時，不得再聲明異議。排除行政爭訟程序之適用，顯然違反憲法第十六條保障人民訴願及訴訟之權。

Article 6 of the Act provides: "After a person is listed as a gangster and his

同條例第六條規定：「經認定為流氓而其情節重大者，直轄市警察分

situation is considered serious, the police bureau may subpoena him to appear without any prior notice. The police may arrest the person who was subpoenaed but failed to appear." Its Article 7 provides: "Within a year after a person is listed as a gangster and has been given such warning, the police bureau may subpoena him to appear if he still meets any condition as prescribed in any Subparagraph of Article 2. The police may arrest the person who was subpoenaed but failed to appear. For those who have committed the offenses, the police may arrest them without prior subpoenas." Both of the above articles authorize the police to arrest people without prior notice or warrants. Although a gangster might have committed criminal offenses, he might sometime fail to meet the elements of crimes. Regarding the arrest of a person who committed a criminal offense, the Code of Criminal Procedure provides specific formats and procedures for arrests with or without warrants. The above Articles of said Act do not distinguish whether a person has committed an offense, and allow the police to arrest a person without any judicial approval or

局、縣（市）警察局得不經告誡，逕行傳喚之；不服傳喚者，得強制其到案。」及第七條規定：「經認定為流氓於告誡後一年內，仍有第二條各款情形之一者，直轄市警察分局、縣（市）警察局得傳喚之；不服傳喚者，得強制其到案。對正在實施中者，得不經傳喚強制其到案。」授權警察機關可逕行強制人民到案，但流氓或為兼犯刑事法之犯罪人或僅為未達犯罪程度之人，而犯罪人之拘提逮捕，刑事訴訟法定有一定之程式及程序，上開條文不問其是否在實施犯罪行為中，均以逮捕現行犯相同之方式，無須具備司法機關簽發之任何文書，即強制其到案，已逾越必要程度，並有違憲法第八條第一項明白區分現行犯與非現行犯之逮捕應適用不同程序之規定意旨。

papers, as in the case of flagrante delicto. They have exceeded the extent of necessity, and have violated Article 8, Paragraph 1, of the Constitution which clearly distinguishes those who are flagrante delicto and those who are not, and demands application of different procedures for them.

Article 12, Paragraph 1, of the Act provides "In handling the case of gangsters, the police or the court shall examine a witness separately in secret if the accuser, victims, or witnesses ask that their names and identities remain confidential. In any notices or minutes, their names or identities shall be replaced by code numbers. Names or identities of secret witnesses shall not be revealed." Its Paragraph 2 provides "The accused and his retained lawyer may not request to confront or cross-examine secret witnesses." Without considering the circumstances of the case, the Act demands that courts examine a witness separately in secret as a secret witness, as well as preventing the accused and his lawyer from confronting or cross-examining secret witnesses, sim-

同條例第十二條第一項規定：「警察機關及法院受理流氓案件，如檢舉人、被害人或證人要求保密姓名、身分者，應以秘密證人之方式個別訊問之；其傳訊及筆錄、文書之製作，均以代號代替真實姓名、身分，不得洩漏秘密證人之姓名、身分」。第二項規定：「被移送裁定人及其選任之律師不得要求與秘密證人對質或詰問」，不問個別案情，僅以檢舉人、被害人或證人要求保密姓名、身分，即限制法院對證人應依秘密證人方式個別訊問，並剝奪被移送裁定人及其選任律師與秘密證人之對質或詰問，用以防衛其權利，俾使法院發見真實，有導致無充分證據即使被移送裁定人受感訓處分之虞，自非憲法之所許。

ply because the accuser, victims, or witnesses request that their names and identities remain confidential. It deprives of the right of the accused to defense, hampers the court's truth-finding function, and may force the accused to accept the correction and training programs without sufficient evidence, and is, of course, not permitted by the Constitution.

The Act's enforcement provision in its Article 21, regarding a person whose act meets both the Act and other criminal statutes, allows the imposition of correction and training programs on an accused and jeopardizes his liberty even after he has served his sentences for the same offense, without considering the necessity of detention. The Criminal Code already has relevant provisions (Article 96) regarding rehabilitative measures when a trial judge believes it is necessary for the convicted. The correction and training program is a measure outside the range of the rehabilitative measures provided in the Criminal Code or the Act Governing the Enforcement of Rehabilitative Measures. The liberty of a person on whom the correction

同條例第二十一條關於受感訓處分人其行為同時觸犯刑事法律者之執行規定，使受刑之宣告及執行之人，不問有無特別預防之必要，有再受感訓處分而喪失身體自由之危險。又同一行為觸犯刑事法者，依刑法之規定，刑事審判中認須施予保安處分者，於裁判時併宣告之（參照刑法第九十六條），已有保安處分之處置。感訓處分為刑法及保安處分執行法所定保安處分以外之處分，而受感訓處分人，因此項處分身體自由須受重大之限制，其期間又可長達三年，且依上開規定，其執行復以感訓處分為優先，易造成據以裁定感訓處分之行為事實，經警察機關以同時觸犯刑事法律，移送檢察機關，檢察官或法院依通常程序為偵查或審判，認不成立犯罪予以不起訴處分或諭知無罪，然裁定感

and training program is imposed will be substantially restrained, and the term of the program may be as long as up to three years. Under the Act, the correction and training program shall be enforced before any other correction announced under other statutes. The same accused's act might be the basis of the correction and training program, as well as the basis of offenses under other criminal codes. Based on the same fact, the police may send the case to the prosecutorial office. It is possible that prosecutors may issue a non-prosecutorial disposition or courts may render an acquittal judgment after the investigation or trial under the ordinary criminal procedure. However, the prosecutor's decision or court's judgment may come after the finality of the decision of the correction and training program and its enforcement. Although the Act has retrial provisions (Article 16, Paragraph 1, Subparagraph 7, of the Act), it could never compensate for the liberty the accused had already lost. All of the above provisions are contrary to the historically established principles that protect physical freedom as well as an accused criminal's

訓處分之裁定已經確定，受處分人亦已交付執行，雖有重新審理之規定（同條例第十六條第一項第七款），但其喪失之身體自由，已無從彌補。凡此均與保障人民身體自由、維護刑事被告利益久經樹立之制度，背道而馳。檢肅流氓條例上開規定，縱有防止妨害他人自由，維護社會秩序之用意，亦已逾越必要程度，有違實質正當，自亦為憲法所不許。

interests. Even though the above provisions of the Act may have the function of preventing infringement upon the freedoms of others or maintaining the social order, they exceed the extent of necessity, violate the substantive propriety, and are not permitted under the Constitution.

Accordingly, Article 5 of the Act contradicts Article 16 of the Constitution which protects the people's right to lodge administrative appeal and institute administrative litigation. Articles 6, 7, 12, and 21 conflict with Article 8, Paragraph 1, of the Constitution which protects the people's liberty. All the above Articles of the Act shall become null and void no later than December 31, 1996 after the promulgation of this Interpretation. During the above period, the relevant authorities shall thoroughly re-examine the Act in order to balance the protection of personal rights and the preservation of the social order.

Justice Sen-Yen Sun filed concurring opinion.

Justice Young-Mou Lin filed concurring opinion.

綜上所述，檢肅流氓條例第五條與憲法第十六條保障人民訴願及訴訟之權有違，第六條、第七條、第十二條及第二十一條則與憲法第八條第一項保障人民身體自由之意旨不符，均應自本解釋公布之日起，至遲於中華民國八十五年十二月三十一日失其效力。在此期間有關機關應本於保障個人權利及維護社會秩序之均衡觀點，對檢肅流氓條例通盤檢討。

本號解釋孫大法官森焱、林大法官永謀分別提出協同意見書。