J.Y. Interpretation No. 577 (May 7, 2004)*

Compelled Speech Case

Issue

Is Article 8, Paragraph 1, of the Tobacco Hazards Prevention Act unconstitutional in mandating that tobacco product suppliers disclose on the containers the level of nicotine and tar contained in a tobacco product?

Holding

[1] Article 11 of the Constitution protects people's active freedom of expression as well as passive freedom not to express. The scope of such protection includes expressions of subjective opinions and statements of objective facts. Product labeling is a means to provide objective information about a product and therefore falls within the scope of the protection of free speech. However, the government may adopt reasonable and appropriate measures through legislation, which are necessary to advance important public interests.

[2] To improve the health of the people, the government is to promote comprehensive health services and devote attention to social welfare programs such as medical care. Article 8, Paragraph 1 of the Tobacco Hazards Prevention Act provides that the level of nicotine and tar contained in the tobacco products shall be indicated, in Chinese, on the tobacco product containers. Article 21 of the said Act imposes sanctions on the violative tobacco product suppliers. Such a legal obligation to disclose imposed upon the tobacco product suppliers constitutes a restriction on the freedom not to express by compelling them to

* Translation by Li-Chih LIN

disclose material product information. However, this restriction serves important public interests such as providing consumers with necessary product information and safeguarding the health of the people and does not exceed the degree of necessity, and therefore it is not repugnant to the protection of freedom of speech and the principle of proportionality set forth respectively in Articles 11 and 23 of the Constitution. Although requiring the tobacco product suppliers to disclose product information on tobacco containers constitutes a restriction on their property rights, such product labeling nevertheless is a social duty imposed upon the tobacco product suppliers because such labeling concerns the health of the people. Since the restriction is minor and within the tolerable scope of the social duty, it is consistent with the constitutional provision protecting the property rights of the people. The labeling obligation of the tobacco products, which applies only to the labeling that occurs after the implementation of the said provision, is not imposed retroactively under the time scope of the legal application. It cannot be deemed a violation of people's property rights because of retroactive application. Article 8, Paragraph 1 shall be observed together with Article 21 of the said Act, and the content of the said provisions is sufficiently clear to determine the objects falling within the scope of the regulations, their behaviors and the legal consequences of infringement. It thus does not constitute a violation of the principle of legal clarity in a rule-of-law nation. Besides, concerning various kinds of foods, tobacco products, and liquor products, these products shall not be compared on the same basis because each product may have a different impact on human body; it is within legislators' discretion to prioritize the order of regulation and regulate accordingly based on the nature of different products. It is therefore consistent with the equal protection of law guaranteed by Article 7 of the Constitution.

Reasoning

[1] Article 11 of the Constitution protects people's active freedom of expression as well as passive freedom not to express. The scope of such protection includes expressions of subjective opinions and statements of objective facts. Product labeling is a means to provide objective information about a product and therefore is to be deemed one kind of commercial speech which is helpful to consumers in making their rational economic choices. If a product's labeling is to promote lawful transactions and its content is not false or misleading, it has the same functions as other speech in providing information, forming public opinion and self-realization. Such product labeling shall fall within the scope of protection provided to freedom of speech outlined in Article 11 of the Constitution and recognized by J.Y. Interpretation No. 414. However, to provide consumers with truthful and complete information and to prevent any misleading information or deception caused by the content of product labeling or to advance other important public interests, the government may legislatively adopt measures which are substantially related to such objectives such as requiring product suppliers to provide material product information.

[2] Although administrative regulations often prescribe the elements of the governing acts and the violative legal consequences separately, they are to be observed jointly to determine the objects falling within the scope of the regulations, their behaviors and the legal consequences of their infringement. Article 8, Paragraph 1 of the Tobacco Hazards Prevention Act prescribes the elements of the governing acts while Article 21 of the same Act prescribes the objects falling within the scope of the regulations and the legal consequences of infringement. By observing both provisions, it can be sufficiently determined that the objects falling within the scope of the regulations are tobacco product manufacturers, importers and sellers who are obliged to label the amount of nicotine and tar in Chinese on tobacco containers. In case of violation, the

competent authority may impose an administrative fine at an amount of no less than TWD 100,000 but no more than TWD 300,000 on any of them with discretion and order them to recall all tobacco products and rectify the situation within a specified period. Whoever fails to comply with such order within the said period is to be ordered to cease manufacture or importation for six months to one year. All violative tobacco products is to be confiscated and destroyed. The prescription of the objects falling within the scope of the regulations, their behaviors and the legal consequences of infringement outlined in the Tobacco Hazards Prevention Act are definite and unequivocal, and thus do not constitute a violation of the principle of legal clarity in a rule-of-law nation.

[3] By referring to Article 157 of the Constitution and Article 10, Paragraph 8 of the Amendments to the Constitution, it is evident that the government is to promote comprehensive health services and devote attention to social welfare programs such as medical care in order to improve the health of the people. Article 8, Paragraph 1 of the Tobacco Hazards Prevention Act, which was promulgated on March 19, 1997, and went into force on September 19 of the same year, provides that the level of nicotine and tar contained in the tobacco products shall be indicated, in Chinese, on tobacco product containers. Article 21 of the same Act provides that whoever violates the provisions set forth in Article 7, Paragraph 1 and Article 8, Paragraph 1 of the said Act or engages in the prohibited acts prescribed in Article 7, Paragraph 2 of the said Act shall be subject to a fine at an amount of no less than TWD 100,000 but no more than TWD 300,000 and be notified to recall all tobacco products and rectify the situation within a specified period. Whoever fails to comply with such order within the said period shall be ordered to cease manufacture or importation for six months to one year. All violative tobacco products shall be confiscated and destroyed. The prescription set forth in these provisions is a legal duty imposed by the government on the tobacco product suppliers to mandate disclosure of

material objective information on the product label. Such a legal duty constitutes a restriction on the freedom of the tobacco product suppliers not to disclose information regarding specific products. However, this duty of disclosure helps consumers to be adequately informed of the content of tobacco products. Moreover, revealing the amount of each ingredient in the tobacco products will help consumers to be aware of and alert to the potential hazards caused by smoking. By doing so, consumers can make a rational and informed purchase, and it therefore substantially facilitates the accomplishment of the government objective to safeguard the health of the people. While holding all levels of government agencies and schools responsible for anti-smoking education may be a less restrictive means, such measure is less effective to achieve the government objective in comparison with the duty to disclose material product information imposed upon tobacco product suppliers. The imposition of the duty to disclose is therefore not incongruent with the principle of necessity. Furthermore, since the imposition of duty to disclose upon the tobacco product suppliers purports to advance the important public interests of providing consumers with necessary product information and safeguarding the health of the people, it does not compel them to provide personal information or to express a particular opinion nor requires them to disclose trade secrets. Merely requiring them to provide objective information about product ingredients which can be easily obtained therefore does not exceed what is necessary. In addition, considering the physical harm caused by addiction to tobacco products, and in order to make tobacco product suppliers strictly adhere to the duty of disclosure, the government may impose upon a violator a considerable fine under Article 21 of the Tobacco Hazards Prevention Act either with or without first requiring the violator to rectify within a specified time period. In comparison with a direct order to cease manufacture or importation of the tobacco products, the imposition upon a violator of a considerable fine is considered a relatively effective and lenient means. Moreover, requiring the

tobacco product manufacturers, importers, and sellers, rather than the entire tobacco industry, to provide material product information on the tobacco product containers is considered a reasonably necessary and proper means to achieve the purpose of tobacco hazard prevention. Although Article 21 of the Tobacco Hazards Prevention Act imposes limits on the tobacco product suppliers' freedom not to express, the means adopted by the government is substantially related to the ends, which constitute important public interests in safeguarding the health of the people and providing necessary trade information. The limitation is consistent with the requirement of the rule of proportionality in a rule-of-law state and has not exceeded the level of necessity in advancing public interests, and is thus congruent with Articles 11 and 23 of the Constitution.

[4] Although requiring the tobacco product suppliers to provide product information on the tobacco product containers constitutes a restriction on their property rights, such product labeling nevertheless is consistent with the principle of good faith dealing and transparency that are recognized in business transactions. Such duty of labeling concerns the health of the people and provides necessary information regarding the content of the product and is, therefore, a social duty arisen from the property right of the tobacco products. Since the restriction is minor and within a tolerable scope of the social duty, it is consistent with the constitutional provision protecting the property rights of the people. Besides, the newly effective law is in principle inapplicable to *ex ante* events, *i.e*., events that already occurred before the law. This is the *ex post facto* principle, which bans the retroactive application of law. The so-called "events" mean all sets of facts which constitute the statutory elements; the so-called "occurred" means all sets of legal facts must have been embodied in real life. The duty of disclosure and liability prescribed in Article 8, Paragraph 1 and Article 21 of the Tobacco Hazards Prevention Act are only applicable to tobacco

product labeling events that occurred after the promulgation and implementation of the said Act. Neither of the preceding provisions extends the duty of disclosure upon the tobacco product suppliers to the period before the enactment and implementation of the said Act. Since the Tobacco Hazards Prevention Act does not apply retroactively, it can hardly be claimed that the property right is infringed because of the retroactive application of law. With regard to a particular set of facts that occurred *ex ante* which constitutes a partial element of the newly effective law, such as the manufacturing time, importation time, or distribution time of the regulated tobacco products which shall be subjected to labeling duty, the legislators shall, under the premise of taking account of public interests, enact transitional clauses to make exemptions or to defer application of the new law, if special consideration is needed. However, to require those tobacco products that have already entered the distribution channel before the implementation of the said Act but not yet been sold to comply with the labeling requirement will cause unforeseeable detriment to the tobacco product suppliers' property rights. Thus, to protect the reliance interests of the people, the legislators were obligated to enact a transitional clause for the tobacco products mentioned above. Article 30 of the Tobacco Hazards Prevention Act provides that the said Act shall be implemented six months after its promulgation. This transitional clause gave the tobacco product suppliers enough time to prepare in advance for the tobacco products that entered the distribution channel before the implementation to fulfill the labeling duty, and therefore saved them from immediate legal detriment incurred by the change of law. The six months' transitional period, which constitutes no impediment to the achievement of the legislative objective to safeguard the health of the people, is congruent with the principle of reliance protection. Besides, concerning various kinds of foods, tobacco products, and liquor products, these products shall not be compared on the same basis because each product may have different impacts on the human body; it is within legislators' discretion to prioritize the order of regulation and

regulate accordingly based on the nature of different products. It is therefore consistent with the equal protection of law guaranteed by Article 7 of the Constitution.

Background Note by Hsiao-Wei KUAN

The petitioner of this case was the agent of a foreign tobacco corporation. It was punished in the amount of TWD 300,000 because three brands of cigarettes it imported failed to disclose the level of nicotine and tar on the cigarette containers. It petitioned for the review of the constitutionality of Article 8, Paragraph 1, of the Tobacco Hazards Prevention Act.

J.Y. Interpretation No. 577 recognized that product labeling, even though it may contain only a statement of facts, *i.e.*, the ingredients of product information, can also be protected by the Constitution as one a type of the commercial speech. The freedom of commercial speech was acknowledged for the first time in J.Y. Interpretation No. 414, issued on November 8, 1996, in which the Constitutional Court held drug advertisements to be a form of commercial speech protected by Articles 11 and 15 of the Constitution. While Interpretation No. 414 did not consider commercial speech to be protected as the same degree as other categories of speeches, J.Y. Interpretation No. 577 viewed commercial speech as worthy of equal protection. It explicitly stated that as long as a product's labeling is to promote a lawful transaction and its content is not false or misleading, it has the same functions as other types of speeches in providing information, forming public opinion and self-realization.

Moreover, J.Y. Interpretation No. 577 is also characterized as a significant interpretation by virtue of its recognition for the first time that Article 11 of the Constitution not only safeguards freedom of expression but also freedom not to express. The acknowledgment was later reaffirmed in J.Y. Interpretation No. 656, issued on April 3, 2009, in which the Constitutional Court held that a

court-ordered public apology touches upon the freedom to withhold expression entailed in the Article 11 of the Constitution. The Court opined that withholding expression involves the inner beliefs and values that concern morality, ethics and conscience, and is essential to spiritual activities and self-determination; for this reason, it is integral to individual autonomy and human dignity. The Court further sets the limits of this sort of court order; it stated that if an order for public apology has caused self-humiliation to the degree of infringement of human dignity, it then exceeds the scope of necessity to restore the reputation. Although both J.Y. Interpretation No. 577 and No. 656 did not declare the disputed provisions unconstitutional, they are equally valuable in as much as they affirm that people shall enjoy, in the Constitution, the freedom from the compelled speech in the Constitution.

J.Y. Interpretation No. 756 (December 1, 2017)*

Prisoners' Freedom of Secrecy of Correspondence and Freedom of Expression Case

Issue

1. Does Article 66 of the Prison Act violate the freedom of secrecy of correspondence protected under Article 12 of the Constitution?
2. Does Article 82, Subparagraphs 1, 2 and 7 of the Enforcement Rules of the Prison Act exceed the authorization of the enabling statute, namely the Prison Act?
3. Does Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act violate the *Gesetzesvorbehalt* principle in Article 23 and freedom of expression in Article 11 of the Constitution?

Holding

[1] Article 66 of the Prison Act provides, "Incoming and outgoing mail of inmates shall be subject to inspection and perusal by prison officials. If the content is found to pose a risk to prison discipline, the prison officer has the authority to order deletion of the designated passage upon exposition of reasons, before the letter may be mailed out of the prison. The prison officer has the authority to delete passages in an incoming letter found to pose a risk to prison discipline, before it is received by the inmate." The purpose of inspection of mail is to ensure there is no contraband attached. To the extent that the measures of inspection are reasonably connected with this purpose, the inspection clause of the statute in question does not contravene the freedom of secrecy of

* Translation by Jimmy Chia-Shin HSU

correspondence protected in Article 12 of the Constitution. Regarding the perusal of mail, the statute in question does not distinguishing between types of mail, nor does it take into account the circumstances of individual cases. It indiscriminately authorizes prison officers to read the content of the mail. It is a clear infringement of the freedom of secrecy of correspondence of both the inmate and the correspondent. It amounts to an excessive restriction of the fundamental right. The statute in question is hence inconsistent with the freedom of secrecy of correspondence protected in Article 12 of the Constitution. Deletion of the content of correspondence should be limited to the extent necessary to maintain prison discipline. A copy of the original correspondence in its entirety should be preserved and should be returned to the inmate upon release from prison, so as to be commensurate with the principle of proportionality. To the extent that the statute in question meets such a requirement, it is not inconsistent with the constitutional protection of freedom of secrecy of correspondence and freedom of expression.

[2] It is provided in Article 82, Subparagraphs 1, 2 and 7 of the Enforcement Rules of the Prison Act that "the phrase 'posing a risk to prison discipline' contained in Article 66 of the Prison Act refers to correspondence involving the following elements: 1. Statements that are obviously untrue, fraudulent, insulting, or threatening, and which pose a risk that others may be defrauded, distressed, or disturbed. 2. Statements that pose a threat to fair and proper administration of correctional measures…..7. Statements that violate Article 18, Paragraph 1, Subparagraphs 1 to 4, 6, 7, and 9 of the Enforcement Rules of the Prison Act." In those cases referred to in Article 82, Subparagraph 1 of the Enforcement Rules, where the inmate's correspondent is not an inmate, and in those cases referred to in Subparagraph 7 of the same Article, which concern the several Subparagraphs of Paragraph 1 of Article 18 of the Enforcement Rules, the aims to be achieved are not necessarily related to the maintenance of prison

discipline. Where the regulation is irrelevant to the maintenance of prison discipline, the Enforcement Rules in question exceed statutory authorization. They are hence inconsistent with the *Gesetzesvorbehalt* principle in Article 23 of the Constitution.

[3] Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act, which provides that "submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison" is in contravention of the *Gesetzesvorbehalt* principle in Article 23 of the Constitution. Such purposes as "appropriate theme" and "reputation of the prison" do not qualify as important public interests and are therefore inconsistent with the protection of freedom of expression guaranteed by Article 11 of the Constitution. As for the purpose of "discipline of the prison", the regulation in question does not contemplate less intrusive measures, and hence violates freedom of expression protected in Article 11 of the Constitution.

[4] The aforementioned provisions, which contravene the Constitution, shall cease to be effective no later than two years after the date of announcement of this Interpretation, with the exception that the restrictions concerning "appropriate theme" and "reputation of the prison" of Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act shall cease to be effective from the date of announcement of this Interpretation.

Reasoning

[1] Petitioner Ho-Shun CHIU was sentenced to death by a final and binding decision. During his time in prison, he applied to prison authorities for permission to mail personal memoirs to his friend for the purpose of future publication. After inspecting the content, the Taipei Detention Center, which is supervised by the Agency of Corrections of the Ministry of Justice, determined

that some parts jeopardized the reputation of the institution. The petitioner was asked to modify the content before reapplying for permission. The petitioner did not accept the decision. The Taipei Detention Center called a review board meeting to deliberate on his appeal. The board meeting upheld the original decision and required the petitioner to reexamine his own content before reapplying for permission. The petitioner filed a suit to the administrative court. His case was eventually rejected by the Supreme Administrative Court in Judgment 102-Pan-514 (2013) (hereinafter "Final Judgment"). The petitioner claims that the sources of law in the Final Judgment, which include Article 66 of the Prison Act (hereinafter "Disputed Provision I"), Article 82, Subparagraphs 1,2 and 7 of the Enforcement Rules of the Prison Act (hereinafter "Disputed Provision II"), and Article 81, Paragraph 3 of the Enforcement Rules of the Prison Act (hereinafter "Disputed Provision III"), are unconstitutional. He petitioned this Court for constitutional interpretation.

[2] Provisions I and III disputed in the petition were invoked and construed in the Final Judgment, and hence should be considered duly applied in the ruling. Though Disputed Provision II was not applied in the Final Judgment, because it is an exegetical provision of Disputed Provision I and should be seen as integral to it, this Court considers it a legitimate object of review. Therefore, the petition meets the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. This Court decides to admit the petition, for which this Interpretation is issued for the following reasons:

[3] 1. Concerning Disputed Provision I, which authorizes prison officers to inspect, peruse, and delete the content of mail sent to or received by inmates

[4] Article 12 of the Constitution provides, "The people shall have the freedom of secrecy of correspondence." The purpose of this fundamental right is to protect the people's right to choose whether, with whom, when, how, and what to communicate without arbitrary interference by the State or others. This

is one of the concrete modes of the right to privacy protected by the Constitution. It is a fundamental right essential for maintaining human dignity, individual autonomy and sound development of personality. Furthermore, this right is necessary to safeguard the personal intimate sphere of life from arbitrary invasion by the State or others, and it is necessary for upholding autonomous control of personal information (*see* J.Y. Interpretation No. 631). Moreover, Article 11 of the Constitution guarantees freedom of speech and other forms of expression, on the grounds that freedom of expression underpins self-realization, exchange of ideas, pursuit of truth, realizing the people's right to know, formation of the public will and facilitating all reasonable functions of political and social activities. It is a mechanism indispensable for the sound functioning of a democratic pluralistic society (*see* J.Y. Interpretation Nos. 509, 644, 678 and 734).

[5] The purpose of incarceration is to facilitate reform and rehabilitation (*see* Article 1 of Prison Act). It does not aim at total deprivation of rights and liberties.[Note] Except for the restriction of liberty of person and other incidentally restricted liberties, such as freedom of residence and migration, inmates enjoy constitutional rights not essentially different from what is guaranteed to other people. The inmate's fundamental rights such as freedom of secrecy of correspondence and freedom of expression are protected by the Constitution. Except for measures necessary to achieve the purposes of incarceration (including the maintenance of order and security of the prison, the enforcement of proper corrective treatment and the prevention of inmates' involvement in unlawful activities), inmates' fundamental rights should not be restricted. The same applies to death row inmates during the period of their imprisonment.

[6] Disputed Provision I provides that "incoming and outgoing mail of inmates shall be subject to inspection and perusal by prison officials. If the content is found to pose a risk to prison discipline, the prison officer has the authority to

order deletion of the designated passage upon exposition of reasons, before the letter may mailed out of the prison. The prison officer has the authority to delete passages in incoming mail found to pose a risk to prison discipline, before it is received by the inmate." The inspection and perusal clauses constitute restrictions of the secrecy of correspondence of the inmate and his/her correspondent. The purpose of inspection is for the prison officers to learn the content of the mail (including packages), in order to detect contraband. This does not necessarily intrude into the content of the correspondence. To the extent that the measures of inspection are reasonably connected to such a purpose (for example, checking the exterior of the object or examining it with instruments after unpacking the mail), the inspection part of Dispute Provision I does not exceed the requirement of necessity of Article 23 of the Constitution, and hence is not inconsistent with the guarantee of secrecy of correspondence of Article 12 of the Constitution.

[7] The perusal part of Disputed Provision I that authorizes prison officers to read the incoming and outgoing letters of inmates compromises the confidentiality of the content of correspondence. This restriction touches upon the core of the constitutional protection of secrecy of correspondence. The purpose of this restriction is legitimate, only insofar as it serves a penal function. However, the provision does not distinguish between types of correspondence (for example, whether it is between the inmate and relevant governmental authorities or his/her attorney), nor does it take into account circumstances of individual cases (for example, an inmate's behavioral performance during the prison term), and it indiscriminately authorizes prison officers to read the content of correspondence. It amounts to a clear infringement of the freedom of secrecy of correspondence of both the inmate and his/her correspondent. It is therefore an excessive restriction of such freedom. The provision in question is inconsistent with the proportionality principle of Article 23 of the Constitution

and contravenes the constitutional protection of secrecy of correspondence.

[8] The latter part of Disputed Provision I provides, "…If the content is found to pose a risk to prison discipline, the prison officer has the authority to order deletion of the designated passage upon exposition of reasons, before the letter may be mailed out of the prison. Similarly, the prison officer has the authority to delete passages in incoming mail found to pose a risk to prison discipline, before it is received by the inmate." Such a measure restricts not only the freedom of secrecy of correspondence but also the freedom of expression of inmates and their correspondents. Insofar as the provision in question serves to maintain prison discipline, such a regulative purpose can be deemed legitimate. The deletion, however, should be limited to what is necessary to maintain prison discipline. A copy of the original correspondence in its entirety should be preserved, and should be returned to the inmate upon release from prison, so as to be commensurate with the principle of proportionality. To the extent that the provision in question meets such a requirement, it is not inconsistent with the constitutional protection of secrecy of correspondence and freedom of expression.

[9] 2. Concerning Disputed Provision II, which offers exposition of the phrase "posing a risk to prison discipline" contained in the enabling statute.

[10] When administrative agencies are authorized by statute to issue supplemental regulations, such regulations should be consistent with the legislative intent and must not exceed the scope of power granted by the enabling statute, in order to be constitutionally permissible (*see* J.Y. Interpretation No. 568). In cases in which the enabling statute offers general authorization for administrative agencies to promulgate rules of enforcement, whether such rules exceed the authorization depends on whether the rules can be construed to rest within the parameters of the textual meaning of the enabling statute (*see* J.Y. Interpretation No. 710). Disputed Provision I permits prison

officers to delete the relevant passages of the correspondence only when it is necessary to maintain prison discipline. Article 93-1 of the Prison Act provides, "The rules of enforcement of this Act shall be promulgated by the Ministry of Justice." Disputed Provision II, promulgated under the authorization of Article 93-1 of Prison Act, provides, "The phrase 'posing a risk to prison discipline' contained in Article 66 of the Prison Act refers to correspondence with the following elements: 1. Statements that are obviously untrue, fraudulent, insulting, or threatening, and which pose a risk that others may be defrauded, distressed, or disturbed. 2. Statements that pose a threat to fair and proper administration of correctional measures…..7. Statements that violate Article 18, Paragraph 1, Subparagraphs 1 to 4, 6, 7, and 9, of the Enforcement Rules of the Prison Act." In those cases referred to in Article 82, Subparagraph 1 of the Enforcement Rules, where the inmate's correspondent is not an inmate, and in those cases referred to in Subparagraph 7 of the same Article, which invokes the several Subparagraphs of Paragraph 1 of Article 18 of the Enforcement Rules, the aims to be achieved are not necessarily related to the maintenance of prison discipline. Where the regulation is irrelevant to the maintenance of prison discipline, the Enforcement Rules in question exceed statutory authorization. They are hence inconsistent with the *Gesetzesvorbehalt* principle in Article 23 of the Constitution. If the agency in charge considers the phrase "posing a risk to prison discipline" insufficient for its penal purpose, it should amend the statute for further specification.

[11] 3. Concerning the part of Disputed Provision III, which restricts publication of inmates' writings

[12] Any restriction placed on the people's constitutionally protected fundamental rights shall be substantiated by statutes, or regulations concretely and specifically enabled by statutes, so as to be commensurate with the *Gesetzesvorbehalt* principle of Article 23 of the Constitution. Regarding

secondary matters concerning details and technicalities of law enforcement, competent authorities may promulgate necessary regulations (*see* J.Y. Interpretation No. 443). Disputed Provision III provides, "Submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison." This regulation constitutes a concrete restriction of inmates' constitutionally protected freedom of expression. It is not a secondary matter of technicality or detail. Since the Prison Act does not concretely and specifically authorize the executive agency to make such restrictions, it clearly violates the *Gesetzesvorbehalt* principle of Article 23 of the Constitution.

[13] Furthermore, freedom of expression is a significant fundamental right guaranteed by the Constitution. It upholds human dignity, individual autonomy, and sound development of personality. In principle, prior restraint by the State is presumed unconstitutional (*see* J.Y. Interpretation No. 744). Even though prior restraint as applied to inmates' speech is in principle not unconstitutional insofar as it serves the purpose of prison management, in view of the serious restrictions imposed on, and interference with, freedom of speech by prior restraint, the purpose of such restrictions must serve significant public interests, and the measures should be substantially connected to those purposes. In Disputed Provision III, the restriction concerning "appropriate theme" involves regulation of viewpoint, which, together with the restriction concerning "reputation of the prison", fails to serve significant public interests, and both are inconsistent with the freedom of expression guaranteed by Article 11 of the Constitution. Prison discipline, by contrast, is a significant public interest. After reading the content of the inmate's essays, if the prison officer finds that the content poses concrete dangers to prison order and security (for example, by escape or riots), it is only reasonable that the prison authorities may take precautionary or regulatory measures to address these dangers. However, the prison authorities should use

caution to ensure that the damage inflicted upon freedom of expression does not outweigh the benefits gained by the restrictive measures. The authorities should also carefully search for alternative measures that are less intrusive to freedom of expression, and should allow sufficient opportunities for the inmate to submit the essays in the future (for example, preserving the original copy for future submission, or permitting submission after modification of content). The prison authorities should not comprehensively prevent inmates from submitting their essays to newspapers or magazines, on the pretext of maintaining prison discipline. To the extent that it exceeds constitutional parameters, the part of Disputed Provision III which provides that "submission of essays written by inmates to newspapers or magazines shall be permitted, provided that the themes in those essays are appropriate and inoffensive to the discipline and reputation of the prison" violates the freedom of expression guaranteed in Article 11 of the Constitution.

[14] Those parts of Disputed Provisions I, II and III which are declared unconstitutional shall cease to be effective no later than two years after the date of announcement of this Interpretation, with the exception that the restrictions concerning "appropriate theme" and "reputation of the prison" of Disputed Provision III shall cease to be effective from the date of announcement of this Interpretation.

[15] 4. Petitions dismissed or handled separately

[16] The petitioner petitioned for constitutional Interpretation of the complete text of Article 82 of the Enforcement Rules of the Prison Act. Except for Disputed Provision II, which is related to the case at issue and thus should be admitted, the other subparagraphs are not related to the case and fail to meet the requirement of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. They are hereby dismissed pursuant to Paragraph 3 of the same Article. As for the part of the petition concerning constitutional

interpretation of Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of the Enforcement Rules of the Prison Act, this Court has already announced Interpretation No. 755. These matters are hereby explicated.

Note: See Article 5 of the Basic Principles for the Treatment of Prisoners, passed by the General Assembly of the United Nations, Resolution A/RES/45/111 on December 14, 1990, which provides, "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

Background Note by Szu-Chen KUO

On December 1, 2017, the Constitutional Court announced two Interpretations, J.Y. Interpretations Nos. 755 and No. 756, with the former concerning inmates' right to judicial remedy and the latter inmates' freedoms of secrecy of correspondence and expression. These two Interpretations are milestones in the Constitutional Court's history both in terms of the protection of inmates' human rights and breakthroughs of the doctrine of special relationship of subordination. Inmates and the State were believed to be in a special relationship of subordination. According to the doctrine, inmates did not enjoy the same full rights as other citizens and were prohibited from filing a suit against the State. J.Y. Interpretations No. 755 and 756 are the first two cases in which the Constitutional Court has ever confirmed that inmates, except for the restriction of personal liberty of person and other incidentally restricted liberties, enjoy constitutional rights guaranteed to other people.

Despite the fact that the Constitutional Court found that inmates enjoy the freedom of secrecy of correspondence and freedom of expression as others do, it adopted a less stringent standard of review in this Interpretation. In examining the constitutionality of mail inspection, the Constitutional Court used rational basis review, requiring that measures of inspection be reasonably related to legitimate purposes. In reviewing the provision that allows the prison to decide whether inmates may submit essays to newspapers or magazines, the Constitutional Court, though citing that prior restraint by the State is presumed unconstitutional, in fact applied intermediate scrutiny to the prior restraint of inmates' correspondence. Whether the Constitutional Court will apply less stringent scrutiny in every inmate case is yet to be determined.

J.Y. Interpretation No. 617 (October 26, 2006)*

Criminal Offence of Disseminating Obscene Material Case

Issue

Is Article 235 of the Criminal Code unconstitutional?

Holding

[1] Article 11 of the Constitution guarantees the people's freedoms of speech and publication for the purposes of ensuring the free flow of opinions and giving the people the opportunities to acquire sufficient information and to attain self-fulfillment. Whether it is for profit or not, the expression of sexually explicit language and the circulation of sexually explicit material should also be subject to constitutional protection of the freedom of speech and publication. Nevertheless, the freedom of speech and publication is not an absolute right under the Constitution, but instead should be subject to a different scope of protection and reasonable restraints based on the nature of the speech and publication. To the extent that Article 23 of the Constitution is complied with, the State may impose adequate restrictions by enacting clear and unambiguous laws.

[2] In order to maintain sexual morality and social decency, the constitutional interpreters should, in principle, give due respect to the lawmakers in respect to the latter's judgment on the common values held by the majority of the society when the legislative organ designs a law to regulate the subject. However, in order to implement the intent of Article 11 of the Constitution guaranteeing the people's freedom of speech and publication, a minority sexual group's sense of

* Translation by Vincent C. KUAN

sexual morality and its cognition of social decency, which are embodied in the circulation of sexually explicit language or material, should nonetheless be protected except where it is necessary to maintain the common sexual values and mores of the majority of the society by imposing restrictions through the enactment of laws.

[3] The distribution, broadcast, sale, and public display of obscene material or objects, or otherwise enabling others to read, view or hear the same as provided under Article 235, Paragraph 1 of the Criminal Code should be so interpreted as to refer to such act where any obscene material or objects whose content includes violence, sexual abuse, bestiality etc. but is lacking in artistic, medical or educational value is disseminated, or where no adequate protective and isolating measure is adopted before any other obscene material or object is disseminated to the general public that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive. Likewise, the manufacture or possession of obscene material or objects with the intent to distribute, broadcast or sell as provided in Paragraph 2 of said article merely refers to such act where any obscene material whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is manufactured or possessed with the intent to disseminate same, or where any other obscene material or object that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive is manufactured or possessed, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public such material or object. As for the provision that such acts as manufacture and possession, which are in themselves preparations to distribution, broadcast and sale, are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the dissemination of

sexual material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph 3 of said article, which provides that the objects and matters to which obscene words, pictures or images are affixed shall be confiscated regardless of whether they belong to the offender, the application thereof is also limited to those objects and matters to which obscene material in violation of the two aforesaid provisions is affixed. In light of the rationale of this Interpretation, the foregoing provisions do not impose excessive restrictions on or discrimination against the expression of sexually explicit language and the circulation of sexually explicit material, and, as such, are reasonable restraints on the people's freedom of speech and publication, which is consistent with the principle of proportionality embodied in Article 23 of the Constitution. Therefore, there is no violation of the guarantee of the people's freedoms of speech and freedom of publication as provided in Article 11 of the Constitution.

[4] Although the term "obscene" as used in the context of obscene material or objects in Article 235 of the Criminal Code is an indeterminate legal concept, it should be limited to something that, by objective standards, can stimulate or satisfy a prurient interest, whose contents are associated with the portrayal and discussion of the sexual organs, sexual behaviors and sexual cultures, and that may generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency (*see* J.Y. Interpretation No. 407). Since the meaning of the term is neither incomprehensible to the general public nor unforeseeable to those who are subject to regulation and, as it may be made clear through judicial review, there should be no violation of the principle of the void-for-vagueness doctrine.

Reasoning

[1] Article 11 of the Constitution guarantees the people's freedom of speech and publication for the purposes of ensuring the free flow of opinions and giving

the people opportunities to acquire sufficient information and to attain self-fulfillment. Whether it is for profit or not, the expression of sexually explicit language and the circulation of sexually explicit material should also be subject to the constitutional protection of the freedom of speech and publication. Nevertheless, the freedom of speech and publication is not an absolute right under the Constitution but, instead, should be subject to a different scope of protection and reasonable restraints based on the nature thereof. To the extent that Article 23 of the Constitution is complied with, the State may impose adequate restrictions by enacting clear and unambiguous laws.

[2] Men and women live together in a society. The ways they express their views on sex in speech, writing and culture have their respective historical precedents and cultural differences, which existed before the Constitution and the laws were formulated and have gradually developed into the sexual ideologies and behaviors generally accepted by the majority of society and thus represent social decency by objective standards. The concept of social decency constantly changes as the society develops and social customs are transformed. Since, however, it essentially embraces the sexual ideologies and behaviors generally accepted by the majority of the society, it should be up to the elected body of representatives to decide whether social decency remains a commonly accepted value of the society and thus part of the social order before it is given any adequate democratic legitimacy. If the legislative organ enacts a law for the purpose of maintaining a sense of sexual morality between men and women and also of social decency, the constitutional interpreters should, in principle, give due respect to the judgment on the common values held by the majority of the society. Nevertheless, depending on the various sexual cognitions of members who hear or read any sexually explicit language or material, it may generate different effects on different individuals. An individual social group's distinctive cultural cognition and physical and mental development may give rise to a

distinctive reaction to various types of sexually explicit language and materials. Therefore, in order to implement the intent of Article 11 of the Constitution in guaranteeing the people's freedom of speech and publication, a sexual minority group's sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit language or materials should nonetheless be protected except where it is necessary to maintain the common sexual values and mores of the majority of the society by imposing restrictions through the enactment of laws or regulations as mandated by law.

[3] Any depiction or publication of, or relating to, sex is considered sexually explicit language or material. Obscene language or an obscene publication is something that, by objective standards, can stimulate or satisfy a prurient interest and generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency. To distinguish obscene language or an obscene publication from legitimate artistic, medical or educational language or publications, one must examine the features and aims of the respective language or publications at issue as a whole and render a judgment according to the contemporary social conventions. The foregoing has been made clear by J.Y. Interpretation No. 407 of this Court.

[4] Article 235 of the Criminal Code provides, "A person who distributes, broadcasts or sells material containing obscene language, or obscene pictures, sounds, images or other objects, or publicly displays or otherwise enables others to read, view or hear the same shall be punished with imprisonment for not more than two years, short-term imprisonment, and/or a fine of not more than thirty thousand yuan." (Paragraph 1) "The foregoing punishment shall also apply to a person who manufactures or possesses the kind of material containing language, pictures, sounds, images referred to in the preceding paragraph and the objects to which they are affixed or other matters with the intent to distribute, broadcast or sell same." (Paragraph 2) "The objects and matters to which the words,

pictures or images referred to in the two preceding paragraphs are affixed shall be confiscated regardless of whether they belong to the offender." (Paragraph 3) Therefore, if any sexually explicit material, upon being read, viewed or heard, or any sexually explicit object upon being viewed as the case may be, can, by objective standards, generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency, it then poses a clear danger to the equal and harmonious sexual values and mores of the society. Any act that infringes upon such common values and mores of the society is an act that violates the social order as protected by the Constitution. Thus, the lawmakers have a legitimate purpose to regulate such behaviors. (*see* United States Code, Title 18, Part I, Chapter 71, Section 1460; *see* also Article 175 of the Criminal Code of Japan) Moreover, as it breaches the sexual values and mores of the society and is thus ethically culpable, it should be considered a reasonable means to declare by way of criminal punishment that the Constitution shall safeguard the equal and harmonious sexual values and mores so as to implement the constitutional objective to preserve the social order. Furthermore, in order to protect a sexual minority group's sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit language or material, criminal punishment should be imposed only to the extent necessary to maintain the common sexual values and mores of the majority of the society. As such, the distribution, broadcast, sale, public display of obscene material or objects or otherwise enabling others to read, view or hear the same as provided under Paragraph 1 of the aforesaid article should be interpreted so as to refer to such act where any obscene material or object whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is disseminated, or where no adequate protective and isolating measure (*e.g.*, no covering, warning, or limiting to places designated by law or regulation) is adopted before disseminating to the general

public any other obscene material or object that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive. Likewise, the manufacture or possession of obscene material with the intent to distribute, broadcast or sell as provided in Paragraph 2 of said article merely refers to such act where any obscene material or object whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is manufactured or possessed with the intent to disseminate same, or where any other obscene material or object that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive is manufactured or possessed, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public such material or object. As for the provision that such acts as manufacture and possession, which are in themselves preparations to distribution, broadcast and sale, are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the dissemination of sexual material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph 3 of said article, which provides that the objects and matters to which obscene words, pictures or images are affixed shall be confiscated regardless of whether they belong to the offender, the application thereof is also limited to those objects and matters to which obscene material in violation of the two aforesaid provisions is affixed. In light of the rationale of this Interpretation, the foregoing provisions do not impose excessive restrictions on or discrimination against the expression of sexually explicit language and the circulation of sexually explicit material, and, as such, are reasonable restraints on the people's freedom of speech and publication, which is consistent with the principle of proportionality embodied in Article 23 of the Constitution. Therefore, there is no violation of the guarantee of the

people's freedoms of speech and publication as provided in Article 11 of the Constitution. As to the issue of whether any expression of sexually explicit language or circulation of sexual material is harmful to the sexual ideologies or sexual morality generally accepted by the majority of the society, the answer may differ as the society develops and social customs are transformed. At any given trial, a judge should, based on the intent of this Interpretation, consider the relevant facts of the case at issue and decide whether any obscenity exists and whether or not it is punishable. Additionally, it should be pointed out that Articles 27 and 28 of the Child and Juvenile Sexual Transaction Prevention Act are special provisions in the context of Article 235 of the Criminal Code and, as such, the application of said provisions should not be affected by this Interpretation.

[5] Where the lawmakers adopt an indeterminate legal concept to seek general application of the norm, there should be no violation of the void-for-vagueness doctrine so long as the meaning of the term is not incomprehensible to the general public and the relevant facts of a given case connoted by the term are not unforeseeable to those who are subject to regulation after the legislative purposes and the regulatory legal system as a whole have been considered, which may be made clear through judicial review. This Court has consistently elaborated on the foregoing in its earlier interpretations, including J.Y. Interpretations Nos. 432, 521, 594 and 602. Thus, although the term "obscene" as used in the context of obscene material or objects in Article 235 of the Criminal Code is an indeterminate legal concept, it should be limited to something that, by objective standards, can stimulate or satisfy a prurient interest, whose contents are associated with the portrayal and discussion of sexual organs, sexual behaviors and sexual cultures, and that may generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency (*see* J.Y. Interpretation No. 407). Since the meaning of the term is neither incomprehensible to the general public nor unforeseeable

to those who are subject to regulation and, as it may be made clear through judicial review, there should be no violation of the principle of the void-for-vagueness doctrine.

[6] Finally, with regard to the claim of petitioner LAI that the final judgment, the Taiwan High Court Criminal Judgment 94-Shang-Yi-1567 (2005), violates the constitutional safeguard of the freedom of speech and the freedom of development of the individual personality, it is not subject to constitutional review under the current legal system. This part of the petition is thus inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and, under Paragraph 3 of said article, shall be dismissed.

Background Note by Ya-Wen YANG

The two petitioners of J.Y. Interpretation No. 617 were both bookstore owners who were convicted of the offence under Article 235 of the Criminal Code ("Article 235") and sentenced to fifty days of short-term imprisonment. One of the petitioners, HSIEH, was prosecuted for displaying, selling and possessing adult comics and novels. The other petitioner, J.J. LAI, is an LGBT+ rights activist who founded Gin Gin, the first LGBT+ bookstore in Taiwan. Gin Gin imported gay magazines from Hong Kong. The Keelung Customs Office confiscated the magazines for gay-sex contents therein. The police then raided the store, seizing several hundred copies of magazines. In both petitioners' cases, the judges cited the test for obscenity established in J.Y. Interpretation No. 407 to determine whether the books and magazines at issue constituted obscene objects under Article 235. In both cases, protective and isolating measures (*e.g.*, plastic film seal, R-rated labels and warnings for sexually explicit contents) had been adopted before the books or magazines were displayed and sold to the general public. Yet, neither of the courts found adopting such measures a relevant defense.

HSIEH and LAI argued in the petitions that, *inter alia*, Article 235 should have been found to be void for vagueness. They believed that the provision failed to constitute the least restrictive alternative to regulate sexually explicit material, and hence violated Articles 11 and 23 of the Constitution, infringing upon the freedom of speech. LAI further contended that heightened scrutiny should be adopted in cases involving sexually explicit material relating to the LGBT+ people because the material plays a critical role in shaping their self-identity and subculture. All sexually explicit material and objects displayed and sold in Gin Gin are deliberately chosen in view of the strategic positioning of the store in the LGBT+ social movement. Displaying and selling gay magazines thus represented high-valued political speech in the context of advocacy of rights for the sexual minority group.

The Constitutional Court, importantly for the first time, explicitly recognizes that expression and circulation of sexually explicit material are protected by the freedom of speech and publication. However, the Court does not review the case with heightened scrutiny for sexual expression related to the LGBT+ community, as LAI urged. Instead, it undertakes a rational basis review regarding regulations on obscenity, following J.Y. Interpretation No. 407. It finds maintaining the mainstream idea of sexual morality and social decency, which is likely heterosexual and cisgender, a legitimate ground to regulate sexually explicit material and is ready to be deferential to the legislature's judgment in this regard. This approach is strongly criticized as inherently discriminatory against sexual minorities in the dissenting opinion of Justice Yu-Hsiu HSU.

While holding Article 235 to be a reasonable means to the legitimate interest of maintaining social order, the Constitutional Court nevertheless narrows the scope of punishable offenses under Article 235. It distinguishes obscene material into two categories: one being subject to a total ban, and the other that is publishable if adequate protective and isolating measures are

adopted before dissemination. hardcore and non-hardcore, Justice LIN Tzu-Yi, in his dissenting opinion, calls the first category "hardcore" and the second "non-hardcore." While disseminating the former is always punishable, the latter can be disseminated without violating Article 235, provided that appropriate protective and isolating measures are taken. Accordingly, the petitioners of this Interpretation should have been exempted from the criminal responsibility of Article 235 since such measures were in place. However, the Constitutional Court's approach to constitutionalize Article 235 with a narrower reading means that the petitioners regrettably could not enjoy the "petitioner's bonus," *i.e.*, access to an extraordinary judicial remedy (retrial of an already-finalized court case). The dissenting Justices HSU and LIN, on the other hand, do not find narrowing the law a desirable approach, arguing that Article 235 is vague and disproportionate and thus should be invalidated rather than constitutionalized.

J.Y. Interpretation No. 617 is the second time that the Court dealt with the issue of constitutional protection for sexual expression. The first case, J.Y. Interpretation No. 407 (issued on July 15, 1996), remains highly relevant here. The Interpretation was made in an era when censorship for publications remained in Taiwan. Article 32 of the Publication Act placed a ban on any publication that violated Article 235 of the Criminal Code. The Information Office, namely the authority in charge of the Publication Act, issued an interpretive administrative directive in 1992 ("Directive"), stipulating the criteria for obscene publications. According to the Directive, publications containing pictures of breasts, buttocks, or genitals, not for academic research or artistic exhibition, were obscene.

The petitioner, CHEN, published the Mandarin Chinese version of two sex guides containing nudity, "Making Love" and "Sensual Massage," originally published by the UK publishers Hamlyn and DK, respectively. The Taipei City Government, however, taking exposed breasts, buttocks, or genitals to be *ipso facto* obscene according to the Directive, banned the books. CHEN sought to

overturn the ban in the court of law, but the Supreme Administrative Court ruled against him. He then filed a petition to the Constitutional Court, contending that the Directive imposed restrictions not prescribed by law, thereby violating Article 23 of the Constitution and infringing the freedom of publication enshrined in Article 11 of the Constitution.

Notice that the petitioner did not directly challenge the constitutionality of the censorship and its legal basis, Article 32 of the Publication Act. J.Y. Interpretation No. 407, therefore, does not review Article 32. It appears to not consider the censorship particularly problematic, stating "anyone who enjoys the freedom of publication must be self-disciplined, undertake the associated social responsibility and refrain from abusing the freedom." Therefore, in spite of the constitutional safeguard of the freedom of publication, the state may regulate publications that undermine social mores, social harmony or public order, including obscene publications.

Significantly, J.Y. Interpretation No. 407 sets up the test for obscenity, arguably under the influence of the Miller test in U.S. constitutional law: "Obscene language or an obscene publication is something that, by objective standards, can stimulate or satisfy a prurient interest, generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency." As shown in J.Y. Interpretation No. 617, the test has become the prevailing standard for the legal concept of obscenity ever since, in the contexts of both constitutional and criminal law.

J.Y. Interpretation No. 407 takes the Directive to be merely illustrating examples of obscenity, rather than outlawing any text or picture involving sex or nudity. It is indicated that the Directive provided further criteria as to what could be considered as "appealing to the prurient interest," such as sufficient to arouse [erotic desire], intentional exposure [of breasts, buttocks, or genitals], over-detailed depiction [of sexual conducts], etc. Therefore, the Directive did not

impose stricter restrictions on the freedom of publication than the Publication Act and not violate the *Gesetzesvorbehalt* principle.

The Constitutional Court, however, does reinforce the idea that the criteria of obscenity should be updated as the social mores shift, and that judges should decide independently as to whether the case at hand qualifies as obscenity. A similar dictum about the task of judges in deciding punishable obscenity can also be seen in J.Y. Interpretation No. 617. This denotes the division of labor between ordinary courts and the Constitutional Court and hints that ordinary courts have an active role to play in honoring the freedom of speech and publication. The censorship underlying the Directive was finally repealed as the Publication Act ceased to be effective on January 25, 1999.

Soon after J.Y. Interpretation No. 617, the Constitutional Court considered regulations on solicitation for prostitution in J.Y. Interpretation No. 623 (issued on January 26, 2007). Article 29 of the Child and Juvenile Sexual Transaction Prevention Act ("Article 29") made spreading via advertisement, computer network, etc. the information which may induce a person to engage in an unlawful sexual transaction an offense punishable by imprisonment up to five years and a fine up to TWD 1,000,000. Notably, Article 29 is wide in its coverage. It punished solicitation information of any kind, for people of any age, regardless of whether there were minors involved. Also, the liability was triggered once the information was disseminated, regardless of whether a sexual transaction occurred in actuality. In situations involving only adults, the provision might appear harsh if compared with the legal consequence of adult prostitution. At the time of this case, selling sex was a petty offense incurring a penalty of short-term imprisonment up to three days, or a fine up to TWD 3,000 whereas buying sex was not punishable at all, pursuant to Article 80 of the Social Order Maintenance Act.

Five petitioners challenged Article 29 for, *inter alia*, being overbroad and

off-balance, thereby contradicting Articles 23 and 11 of the Constitution. Four of them were charged with the offense under Article 29 in various scenarios. Petitioner HSIAO (a juvenile) and KAO were arrested for posting messages allegedly seeking *enjo kōsai* (compensated dating) on a gay dating and adult site respectively. Petitioner CHIANG was arrested for being hired to attach flyers, reading "sexy babies" and a phone number, on people's car windows. Petitioner WANG, a manager of an erotic "skincare" shop, was found liable for giving out business cards of the shop that read "passionate, romantic, pretty girls..." Finally, Judge Ming-Huang HO of the Taiwan Kaohsiung Juvenile Court filed a petition during the trial of juvenile cases. He pointed out the phenomenon that the police relied on the cyber sting operations to lure unsuspecting Internet users, many of whom were minors, into conversations about commercial sex and then made the arrests. The problematic practices, ironically, rendered minors more vulnerable before the law.

J.Y. Interpretation No. 623 categorizes solicitation for prostitution as commercial speech. Commercial speech concerning a lawful business is protected by the freedom of speech, with the proviso that the content is neither false nor misleading. Yet, since prostitution is not legal, solicitation for this unlawful business hence may be reasonably restricted to achieve the public interest. Accordingly, Article 29 is upheld as a reasonable and necessary means for the significant purpose of protecting minors from sexual exploitation, notwithstanding its extensive scope and severe consequence. The law is a reasonable means because, the Court explains, once information of solicitation is widely distributed, even if the solicitation does not pertain to or is not addressed to minors, there still exists the danger that minors may be exposed to the information and seduced into the sex business. Article 29 penalizes such endangerment of minors to eliminate the hazard of sex exploitation.

However, similar to J.Y. Interpretation 617, the Court proceeds to limit the

scope of Article 29. Referring to the legislative aim of minor protection, the Court takes Article 29 to mean that disseminating information of solicitation is not punishable if the defendant can prove that (1) the distributed information "neither contains child or juvenile sexual transaction nor is intended to induce children or juveniles to engage in sexual transaction"; and that (2) necessary precautionary measures have been taken to ensure the information is only accessible to adults. By way of this purposive restriction, the Court lessens the limiting impact that Article 29 inflicts on the freedom of speech. Nevertheless, both Justice Tzong-Li HSU and Justice Yu-Hsiu HSU criticize in their opinions dissenting in part that the narrower reading runs counter to the legislature's intent and wrongly shifts the burden of proving one's innocence to the defendant. Justice Tzi-Yi LIN further criticizes that Article 29 remains a vague and disproportionate means to the aim of protecting minors, despite the narrower reading of the majority opinion.

In 2015, Article 29 was later overhauled to become Article 40 of the Child and Juvenile Sexual Exploitation Prevention Act. The amended provision incorporates the restrictive legal reading of the Constitutional Court and decreases the penalty of the offense.

In short, the three cases in this vein, J.Y. Interpretations Nos. 407, 617 and 623, share commonalities in the approach of review. While it is confirmed that expression related to sex is protected by freedom of speech and publication, the Court displays reluctance to override the legislature's judgments when obscenity and minor protection are involved. It takes the standard of rational basis review and relies on the approach of restrictive interpretation to negotiate the constitutional tension caused by the broad legislation. The tendency to constitutionalize the regulations through reading them narrowly, rather than invalidate them for being broad or vague, deprives petitioners the benefit of seeking further remedies, even though their arguments appear to be substantively

accepted by the Constitutional Court. It is yet to be observed whether the Court will take a stricter standard for sexual expression in other contexts so that the doctrine that sexual expression is constitutionally safeguarded will have real bite.

J.Y. Interpretation No. 509 (July 7, 2000)*

The Defamation Case

Issue

Are the defamation clauses in the Criminal Code of the Republic of China constitutional?

Holding

Freedom of speech is one of the people's core fundamental rights, which is expressly enshrined in Article 11 of the Constitution of the Republic of China. The State should protect it as much as possible to realize its functions, such as self-fulfillment, communication, pursuing truth, and monitoring all kinds of governmental and societal activities. Depending on the means of communication, however, freedom of speech is subject to reasonable statutory restraints in order to protect personal reputation, privacy, and to safeguard the public interest. Article 310, Paragraphs 1 and 2 of the Criminal Code, which criminalize defamation to protect individual legal interests, are necessary to prevent infringement of others' freedoms and rights and therefore are consistent with Article 23 of the Constitution. The purpose of the first sentence of Paragraph 3 of the same Article, which provides that "A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation", is to protect truthful speech and limit the reach of the government's penal power. It does not suggest that the perpetrator must prove the truthfulness of the statement to be free from criminal liability. To the extent that the perpetrator fails to demonstrate that

* Translation by Joe Y. C. WU

the defamatory statement is true, as long as the perpetrator has reasonable grounds to believe that the statement was true based on the evidence he submits, the perpetrator cannot be held liable for defamation. This provision does not exempt a public or private prosecutor from carrying the burden of proof under criminal procedure to show that the perpetrator has the requisite mens rea to damage another person's reputation; nor does it exempt the court from its obligation of discovering the truth. Accordingly, Article 310, Paragraph 3 of the Criminal Code does not violate freedom of speech as protected in the Constitution.

Reasoning

[1] Article 11 of the Constitution stipulates that people's freedom of speech should be protected. Due to the fact that freedom of speech is a necessary mechanism for the development of a democratic diverse society because it contributes to self-fulfillment, communication, pursuing truth, satisfying people's right to know, forging consensus, and participating in political and social activities, the State should protect it as much as possible. Depending on the means of communication, however, freedom of speech is subject to suitable restraints in order to protect other fundamental rights, such as personal reputation and privacy, and to safeguard the public interest. As to whether the approach should adopt civil remedies or criminal punishments, or both, any restraints should comprehensively take the following elements into account: citizens' law-abiding habits, respect for others' rights, the function of civil remedies, and media workers' professionalism and discipline. In our State, it cannot be said that criminalization of defamation is unconstitutional based on the abovementioned factors. Furthermore, if the law allows anyone to avoid a penalty for defamation by offering monetary compensation, it would be tantamount to issuing them a license to defame, which is obviously

not in line with the constitutional protection of the people's fundamental rights. Article 310, Paragraph 1 provides "A person who points out or disseminates a fact which will injure the reputation of another for purpose that it be communicated to the public commits the offense of slander and shall be sentenced to imprisonment for not more than one year, short-term imprisonment, or a fine of not more than five hundred yuan." Paragraph 2 of the same Article stipulates that "A person who by circulating a writing or drawing commits an offense specified in the preceding paragraph shall be sentenced to imprisonment for not more than two years, short-term imprisonment, or a fine of not more than one thousand yuan." By distinguishing libel from slander and imposing different penalties, these two provisions are necessary to prevent violation of others' freedoms and rights and therefore are consistent with the proportionality principle in Article 23 of the Constitution.

[2] The first sentence of Article 310, Paragraph 3 of the Criminal Code provides "A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern." It means that the perpetrator who originates or circulates a defamatory statement may not be found guilty so long as the statement is true. It does not suggest that the perpetrator has to prove the statement is true. To the extent that the perpetrator fails to demonstrate that the defamatory statement is true, as long as the perpetrator has reasonable grounds to believe that the statement was true based on the evidence he submits, the perpetrator cannot be held liable for defamation. This provision does not exempt a public or private prosecutor from carrying the burden of proof under criminal procedure to show that the perpetrator has the requisite mens rea to damage another person's reputation; nor does it exempt the court from its obligation of discovering the truth. Accordingly, Article 310,

Paragraph 3 of the Criminal Code does not violate freedom of speech as protected in the Constitution.

[3] Article 311 of the Criminal Code provides "A person who makes a statement with bona-fide intent under one of the following circumstances shall not be punished: 1. Self-defense, self-justification, or the protection of legal interest 2. A report made by a public official in his or her official capacity 3. Fair comment on a fact subject to public criticism 4. Fair reporting on the proceedings of a national or local assembly, court, or a public meeting." This article specifies affirmative legal defenses against defamation to protect freedom of speech with goodwill. It does not raise any issue of constitutionality. Whether these affirmative defenses can be proved is the duty of presiding courts and is beyond the scope of this Interpretation.

Background Note by Chien-Chih LIN

The Petitioners, Mr. HUANG and Mr. LIN, were the chief editor and a reporter of a magazine respectively. In a news report, they claimed that a minister spent government funds needlessly and attacked his character. The minister accused them of defamation, and eventually both petitioners were convicted of defamation by the Taiwan High Court. After exhausting all available legal remedies, the two petitioned this Court, contending that Articles 310 and 311 of the Criminal Code violated the freedom of the press and their right to work.

In 1998, the Judicial Reform Foundation in Taiwan conducted a survey on the performance of judges, and the result was available to the public. Six judges scored less than 60 in this survey and believed their reputations were damaged. Therefore, they accused the President and the Chief Executive Officer of the Judicial Reform Foundation of defamation. The Petitioner,

Judge Chen of Taiwan Taipei District Court, argued that Articles 310 and 311 of the Criminal Code were repugnant to Articles 8, 11, 22, and 23 of the Constitution and petitioned this Court.

This Interpretation is important because it involves the balance between freedom of speech and personal reputation. In this case, the Court ostensibly upheld the provisions in the Criminal Code, but essentially narrowed the scope of defamation. This is evident from its interpretation of the first sentence of Article 310, Paragraph 3 of the Criminal Code, which provided "A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation…" The Court maintained that the perpetrator need not prove that the defamatory statement is true so long as he can reasonably believe it is, based on the evidence he collects. In other words, the Court adopted a broad interpretation to make a perpetrator less likely to be convicted of defamation.

J.Y. Interpretation No. 760 (January 26, 2018)*

Disparate Impact Discrimination in Police Recruitment Case

Issue

Does Article 11, Paragraph 2 of the Police Personnel Management Act constitute disparate impact discrimination in the qualification for assignments of regular trainees who have passed the Grade Three Special Examination for Police Personnel?

Holding

[1] Article 11, Paragraph 2 of the Police Personnel Management Act does not specify the institutes responsible for examination and training. In practice it allows the National Police Agency of the Ministry of the Interior to categorically send those qualified examinees of the written exam of the Grade Three Special Examination for Police Personnel, who do not have a degree from the police education system, to the Taiwan Police College for pre-job training so as to complete the whole process of examination. This practice resulted in the inability of persons without a degree from the police education system who qualified before 2011 to fully meet the qualification for assignments to positions ranked Police Inspector Grade Three or above. This has caused them to suffer systematic disparate treatment with regard to their right to take public examinations and hold public offices. Therefore, the practice, as outlined above, does not conform to the sense of Article 7 of the Constitution, which guarantees the right to equality.

[2] The Executive Yuan should collaborate with the Examination Yuan and, within six months of the publication of this Interpretation, according to this

* Translation and Note by Hsiu-Yu FAN

Interpretation, take appropriate measures to eliminate the disadvantageous disparate treatment suffered by the petitioners.

Reasoning

[1] The Petitioner Ching-Chang LIN et al. (hereinafter "Petitioner No. 1"), represented thirteen persons who were qualified examinees in the written exams of the Grade Three Special Examination for Police Personnel (hereafter "Police Grade-Three Special Exam") between 2002 and 2004 and, according to the training program for qualified examinees of special examinations for police personnel of the respective years, were sent by the National Police Agency of the Ministry of the Interior (the agency commissioned to provide the training for qualified examinees, hereafter "NPA") to the Taiwan Police College (originally the Taiwan Police Academy before the institutional upgrade in 1988, hereafter "Police College") to receive their training. After they completed the program with a qualifying score, they were then assigned by the NPA to serve as police officers in different police departments. Petitioner No. 1 alleged that, according to Article 11, Paragraph 2 of the Police Personnel Management Act (hereafter "provision at issue,") the qualification for assignments to a position as sub-lieutenants included not only a qualification in the police personnel exam, but also a degree from a police university or the completion of training therein. As they were only trained in the Police College after they had passed the police personnel exam, they were unable to meet the qualifications for assignments for positions as sub-lieutenants, whereas the other qualified examinees via exactly same exam with a degree from the Central Police University (originally the Central Police College before the renaming in 1995, hereafter "CPU") were all categorically assigned to the positions as sub-lieutenants. This appears to indicate inequality in assignment and promotion. Petitioner No. 1 further applied to be trained for more than four months at the CPU, invoking the Examination Yuan Administrative Appeal Decision Kao-Tai-Su-Jue-143 of August 17, 2009, as precedent, but the

application was rejected. The petitioner disagreed with the rejection at issue and filed an administrative appeal first and then an action before the administrative court, which was subsequently dismissed as meritless and finalized by the Supreme Administrative Court Judgment 102-Pan-156 (2013) (hereafter "Final Judgment No. 1").

[2] Petitioner Shih-Feng HUANG et al., represented four persons (hereafter "Petitioner No. 2") who were qualified examinees on the written exam of the 2005, 2009, and 2010 Police Grade Three Special Exams and, according to the training program for qualified examinees of special examinations for police personnel of the respective year, were also sent by the NPA to the Police College to receive their training. After they completed the program with a qualifying score, they were then assigned by the NPA to serve as police officers in different police departments. After being sent by the Ministry of the Interior in December 2011 to receive four months of special training at the CPU and having obtained a qualifying score, Petitioner No. 2 then applied in the same month to the Ministry of Interior, invoking the aforementioned Administrative Appeal Decision, to be reassigned to positions as sub-lieutenants as Police Inspectors Grade Four or as sub-lieutenants of the Ninth Level or its equivalent, but all were rejected. Petitioner No. 2 disagreed with the rejections and separately requested a review. Their cases were separately dismissed in respective reviews by the Civil Service Protection and Training Commission and were consolidated to one action before the administrative court, which action was subsequently dismissed as meritless and finalized by the Supreme Administrative Court Judgment 102-Pan-38 (2013) (hereafter "Final Judgment No. 2").

[3] Individually questioning the constitutionality of the provision at issue as applied in the Final Judgments No. 1 and No. 2, Petitioners No. 1 and No. 2 petitioned this court to interpret the Constitution. In the case of the petition of Petitioner No. 1, the provision at issue was indeed applied in Final Judgment No.

1; in the case of the petition of Petitioner No. 2, the provision at issue was cited and commented on in Final Judgment No. 2 and so may be considered as being applied by the Judgment. Therefore, the petitions of both Petitioners No. 1 and No. 2 comply with the requirements set forth in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and should be admitted. We hereby issue this Interpretation based on the following reasons:

[4] Article 18 of the Constitution provides that people have the right to take public examinations and hold public office. This is to guarantee that people may be qualified to hold public office through open and competitive examinations as pursuant to laws and regulations, so as to further secure their right to participate in the governance of the state. The right to take public examinations and hold public office is the right to political participation in a broad sense. People should have the right and opportunity to participate in public offices under equal conditions. In order to realize this constitutional commitment, the state should set in place an objective and fair system of public examinations and guarantee the overall fairness of the results of examinations, which guarantee includes the rights to participate equally in competitive examinations and to receive the training required by the examination, so as to gain the qualifications for specific ranks and for specific positions, and to be promoted based on laws and regulations, and to receive the protected status, salary and pension derived therefrom (see Interpretations Nos. 429, 575, 605, 611, 682, and 715). The police personnel are personnel who have completed the examination and training process lawfully, who have been assigned ranks and positions and who perform policing duties according to the Police Act and other relevant laws and regulations. They are obviously public officials covered by Article 18 of the Constitution. Although the personnel system of the police has adopted a dual-track system of ranks and positions, in which ranks are secured but positions can be reassigned (*see* Article 4 of the Police Personnel Management Act), the qualifications for specific ranks

and for specific positions —gained by people who have participated in the same single written exam of the examination for police personnel and completed the training with a qualifying score— should still conform to the sense of Article 7 of the Constitution, which guarantees the right to equality.

[5] The main purpose of Article 7 of the Constitution, which guarantees the people the right to equality, is to prevent the legislature from arbitrarily imposing unreasonable differential treatment on the people. To judge whether a rule conforms to the requirement of equal protection depends on whether the purpose of the differential treatment is constitutional and on whether between the classification and the achievement of the purpose there is any degree of connection (*see* our Interpretations Nos. 682, 694, and 701). Considering that the right to take public examinations and to hold public office is the right to political participation in a broad sense, which involves the people's participation in the state's formation of decisions and performance of public duties and is thus closely related to the shaping of civic life and order, whatever differential treatment is to be imposed on this right should be in principle subject to a more stringent review. Not only is the purpose to pursue important public interests, but also there must be a substantial connection between the adopted differential treatment and the achievement of the purpose, so as to conform to the constitutional guarantee of the right to equality.

[6] According to Article 12, Paragraph 1, Subparagraph 3 of the Police Personnel Management Act, a qualified examinee of the written exam of the Police Grade Three Special Exam, after completing his or her training with a qualifying score, obtains the qualification for the rank of Police Inspector Grade Four. The provision at issue reads: "The assignment of police officers, in addition to the qualifications described in the preceding paragraph, requires that any person to be assigned to a position ranked Police Inspector Grade Three or above shall have graduated from or have completed training at the Central Police

University or Central Police College. Any person to be appointed to a position ranked Grade Four of the Police Inspector or below shall have graduated from or have completed training at the Central Police University, the Central Police College, the Taiwan Police College or the Taiwan Police Academy." This allows a CPU or Central Police College graduate, upon qualifying in the Police Grade Three Special Exam, to immediately obtain the qualification for assignments for some positions ranked Police Inspector Grade Three or above. Qualified examinees of the Police Grade Three Special Exam without such a degree from the CPU or the Central Police College would need to complete their training at the CPU or the Central Police College and obtain a qualifying score (*see* Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act) before they may obtain the qualification for assignments to some positions ranked Police Inspector Grade Three or above (such as sub-lieutenant ranked Grade Four of the Police Inspector, *see* the Rank and Position Schedule for Police Officers B: the Rank and Position Schedule for Local Police and Positions in the Fire Department and School-the Ninth, attached). In other words, although all the qualified examinees of the Police Grade Three Special Exam obtain the qualification for the rank of Grade Four of the Police Inspector, and in theory the positions they can be assigned to should include, in the case of Taipei and Kaohsiung City Police Departments for example (*see* B: the Rank and Position Schedule for Local Police and Positions in the Fire Department and Schools-Schedule 9e), police officer, sergeant, sergeant for policing affairs, sub-lieutenant, section assistant, inspector, and division assistant, yet, in reality only those who have graduated from the CPU or the Central Police College can be assigned to any of the aforementioned positions ranked Grade Four of the Police Inspector at their first assignment, while others who have not graduated from the CPU or the Central Police College or received any training therefrom, as they do not meet the qualification specified in the First Sentence of the provision at issue, cannot be assigned as sub-lieutenants, section assistants, inspectors, or division

assistants, which posts are all ranked Police Inspector Grade Four.

[7] First, a literal reading of the provision at issue still allows non-CPU or Central Police College graduates to be assigned as sub-lieutenants after being trained at the CPU or the Central Police College, so the provision at issue may not be simply regarded as permitting differential treatment against non-CPU or Central Police College graduates. Nonetheless, when published on January 17, 1976, the provision at issue was to distinguish the qualification for assignments for lieutenants (exclusively limited to CPU graduates in principle) from that for police officers (exclusively limited to Police College graduates in principle). After the Police Grade Three Special Exam was opened to regular trainees with no degree from the police education system (hereafter "regular trainees"), the provision at issue has not yet been revised accordingly. Second, all the regular trainees who qualified in a Police Grade Three Special Exam before 2011 were categorically sent to the Police College to receive their training, so they were unable to have the opportunity to be sent to the CPU for training. During this period, the Control Yuan proposed corrective measures to the NPA, demanding that the NPA send regular trainees who qualified in a Police Grade Three Special Exam to the CPU receive their training. However, for reasons of administrative consistency, the NPA still continued to send them to the Police College for training. Furthermore, the Administrative Appeal Committee of the Examination Yuan made the aforementioned Administrative Appeal Decision in 2009, ordering the agency of the initial administrative act to send regular trainees who had qualified in a Police Grade Three Special Exam to the CPU, and filed an administrative appeal requesting that this should be for more than four months. However, after they had completed the training with a qualifying score, the NPA still refused to assign them to any position as Police Inspector Grade Three or above (including that of sub-lieutenant), insisting that the special training they received was not the continuing education or advanced education as specified in

the Police Education Act, and also not the training specified in Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act. In sum, even though the provision at issue does not expressly differentiate between CPU graduates and regular trainees, its use over several years has created a legal result that is continuously beneficial to CPU or Central Police College graduates and continuously detrimental to regular trainees as regards assignment and subsequent promotion for persons who qualified in the Police Grade Three Special Exam before 2011. Therefore, the provision at issue, which uses the distinction between those with a CPU or Central Police College degree or qualifying training and those without as the classification to decide whether or not the qualification for assignments for a position ranked Police Inspector Grade Three or above has been met, constitutes differential treatment of regular trainees and must be scrutinized under the principle of equality.

[8] After the police personnel examination was made open to regular trainees, the state should have provided to all the qualified examinees of the same examination the training required by the assignable positions so that they could complete the examination, such that they could obtain the same qualifications for rank and assignment. Only this would have satisfied the constitutional guarantee that the people should be able to participate in public office under equal conditions. As regular trainees who had qualified in a pre-2011 Police Grade Three Special Exam obtained the qualification for the rank of Police Inspector Grade Four in exactly the same way as CPU or Central Police College graduates did, so too they should have had the same opportunities for assignment and promotion. Although the provision at issue refers to "training completed with a qualifying score" as the alternative to a CPU or Central Police College degree, it does not specify the institutes responsible for examination and training. Thus, in practice, this allowed the NPA to categorically send regular trainees who qualified in the written exam of the Police Grade Three Special Exam to receive personnel training for qualified

examinees at the Police College, and further not only precluded regular trainees who qualified in the same exam from being assigned to any position ranked Police Inspector Grade Four such as sub-lieutenants at their first assignment, but also compelled them to undergo an additional screening process and qualifying training at the CPU before receiving promotion.

[9] It is found that the NPA maintained the above-mentioned training and measures due to the following three considerations: the preservation of the development and education system of the police, the limited training capacity of the CPU, and the limited number of positions available for sub-lieutenants (*see* p.5 of the attached opinion in the NPA's letter replying to this Yuan: National Police Agency Letter Jing-Shu-Jiao-1050184012 of February 3, 2017). It is considered that the preservation of the development and education system of the police and the establishment of the CPU and the Police College are to cultivate police personnel equipped with the knowledge of the police profession in a modern society. However, graduation from the CPU or the Police College is not the only way to acquire the knowledge and skills necessary for the police profession. As the qualifying training from the CPU or the Central Police College also satisfied the requirement for the qualification for positions ranked Police Inspector Grade Three or above, the aforementioned regular trainees who qualified via the written exam should not be excluded from receiving sufficient training at the CPU so that they may qualify for the position as sub-lieutenants. Second, it is also considered that the limits on training capacity were only a matter of administrative cost, which is hardly an important public interest. The limited number of available positions like that of sub-lieutenant, which determines that only some of the qualified examinees to be assigned to the position as sub-lieutenants, is an inevitable reality and not a blameworthy consideration. However, the rightful solution is to recruit the better candidates among the qualified examinees so as to adhere to the principles of fair competition and hiring for talent.

As such, to categorically send all the regular trainees who qualified via a Police Grade-Three Special Exam to receive their training at the Police College is hardly a means substantially connected to the achievement of the purpose of hiring the best talent.

[10] In sum, the provision at issue fails to clearly specify the institutes responsible for examination and training, so in practice it has allowed the NPA to categorically send regular trainees who qualified via the written exam of the Police Grade Three Special Exam to receive personnel training for qualified examinees all at the Police College, so as to complete their examination (*see* Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act for reference). This practice has resulted in the inability of persons without a degree from the police education system who qualified before 2011 in the aforementioned exams to obtain the qualification for assignments for the positions ranked Police Inspector Grade Three or above. This has caused them to suffer systematic disparate treatment with regard to their right to take public examinations and hold public office. Therefore, the practice, as outlined above, does not conform to the spirit of Article 7 of the Constitution, which guarantees the right to equality. The Executive Yuan should collaborate with the Examination Yuan, and within six months of the publication of this Interpretation, according to this Interpretation, take appropriate measures to eliminate the disadvantageous disparate treatment suffered by Petitioners Nos.1 and 2, such as sending them to complete the necessary training at the CPU so as to obtain the qualifications for assignments to all the positions ranked Police Inspector Grade Four after they have completed the training with a qualifying score.

[11] Petitioner No.1 in their petition questioned the constitutionality of the training program for qualified examinees of special examinations for police personnel for the respective years between 2002 and 2004. Petitioner No. 2 in

their petition questioned the constitutionality of Article 4 of the Police Personnel Management Act, the Secretary-General of the Examination Yuan Letter Kao-Yi-Zu-Yi-0980009689 of December 7, 2009, and the Rank and Position Schedule for Police Officers. It is found that the aforementioned training program was an administrative act regulating particular individuals who qualified in the aforementioned written exam and that the aforementioned letter is not a regulation. None of these matters are eligible objects to support a petition for interpretation to this Yuan. As Article 4 of the Police Personnel Management Act was not applied in Final Judgment No. 2, it cannot be used to support a petition for interpretation. As to the constitutionality of the Rank and Position Schedule for Police Officers, it is hard to ascertain which part the Petitioners believe to have contradicted the Constitution. Therefore, the abovementioned parts in the petitions of petitioners Nos.1 and 2 do not conform to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and are hereby denied according to Paragraph 3 of the same Article.

Background Note by the Translator

Petitioner Ching-Chang LIN et al., representing thirteen persons (hereinafter "Petitioner No. 1") were qualified examinees of the 2002 to 2004 Grade Three Special Examination for Police Personnel (hereinafter "Police Grade Three Special Exam.") Petitioner Shih-Feng HUANG et al. representing four persons (hereinafter "Petitioner No. 2") were qualified examinees of the 2005, 2009, and 2010 Police Grade-Three Special Exams. According to the training programs designed by the National Police Agency of the Ministry of the Interior (the agency commissioned to provide training for qualified examinees, hereafter "NPA") in the respective years, Petitioners No. 1 and No. 2, were respectively sent to the Taiwan Police College, rather than the Central Police University (hereafter the "CPU,"), to receive their training. According to Article 11,

Paragraph 2 of the Police Personnel Management Act ("the provision at issue,"), only CPU graduates or CPU trainees were qualified to be assigned as sub-lieutenants. Petitioner No. 1 therefore further applied to be trained for more than four months at the CPU, but their applications were all rejected. Petitioner No. 2 et al., after being sent by the Ministry of the Interior in December 2011 to receive four months of special training at the CPU, applied in the same month to the Ministry of Interior to be reassigned to positions as sub-lieutenants ranked Police Inspector Grade Four or as sub-lieutenant or its equivalent, but all were rejected. After exhausting the remedies provided, on April 9, 2014, Petitioners No. 1 and No. 2 respectively petitioned this Court to interpret the Constitution, questioning the constitutionality of the provision at issue as applied in the final judgment of the court of last resort.

Until a two-track examination and recruitment system was put into place in 2011, there had been only one system of examination designed for the recruitment of police officers of different ranks. Under this system, any examinee passing the Police Grade Three Special Exam became a qualified candidate for the post of sub-lieutenant. However, the NPA, responsible for administering the provision at issue, had for years prevented non-CPU-graduates from receiving the required training at CPU, so non-CPU-graduates were practically deprived of the opportunities to be assigned as sub-lieutenants inasmuch as they never completed the training required by law. With no classification based on educational background, the provision at issue was neutral on its face.

J.Y. Interpretation No. 760 is considered as marking a new direction in the Constitutional Court's jurisprudence on the issue of equal protection. In the past, the Constitutional Court rarely considered the issue of equal protection with no *de jure* discrimination present. In J.Y. Interpretation No. 760, the Constitutional Court for the first time regards the disparate impact found in an administrative agency's perpetual administration of a statute as unpermitted systematic

discrimination. While recognizing the competitive nature of sub-lieutenant recruitment and the CPU's limited training capacity, and without further questioning the NPA's true intent in preventing non-CPU-graduates from receiving the required training, the Constitutional Court takes the unfailing rejections of the Petitioners' requests as *de facto* discrimination. In reviewing this *de facto* discrimination, because the Petitioners' constitutional rights to hold public office are negatively affected, the Constitutional Court adopts a heightened scrutiny under which the discrimination is deemed constitutional only if it pursues important public interests and a substantial nexus is found between the discrimination and the important public interests being pursued. However, the Constitutional Court does not clearly express under what circumstances (*e.g.*, the number of instances or the length or frequency of a perpetual practice) individual administrative decisions would be regarded as a pattern of discrimination. It remains to be further noticed how future cases of *de facto* discrimination or disparate impact will be decided by the Constitutional Court in the future.

J.Y. Interpretation No. 618 (November 3, 2006)*

Exclusion of Mainland Chinese Migrants from Civil Service Case

Issue

Are the provisions in Article 21, Paragraph 2, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area unconstitutional?

Holding

[1] Article 7 of the Constitution provides that all citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law. Thus, the people, who have the right to take public examinations and hold public office under Article 18 thereof, shall also be equal under the law in this regard. The concept of "equal" as expressed thereunder shall refer to substantive equality. In light of the value system of the Constitution, the legislative branch may certainly consider the differences in the nature of the various matters subject to regulation and accordingly adopt rational differential treatment among people. The foregoing has been made clear in the reasoning of J.Y. Interpretation No. 205 rendered by this Court. Furthermore, the restrictions imposed by law on the fundamental rights of the people based on any rational differential treatment should also satisfy the test of the principle of proportionality under Article 23 of the Constitution. Article 10 of the Amendments to the Constitution as promulgated on May 1, 1991 (as amended and renumbered as Article 11 on July 21, 1997) provides, "The rights and obligations between the people of the Chinese mainland area and those of the

* Translation by Vincent C. KUAN

free area, and the disposition of other related affairs, may be specified by *sui generis* law." The Act Governing Relations between People of the Taiwan Area and Mainland Area (hereinafter referred to as the "Cross-Strait Relations Act") is the *sui generis* law enacted to regulate the rights and obligations between the people of the Chinese mainland area and those of the free area, as well as the disposition of other related affairs, prior to the nation's reunification.

[2] Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may serve as a public functionary unless he or she has had a household registration in the Taiwan Area for at least ten years. The said provision is an extraordinary one with reasonable and justifiable objectives in that a public functionary, once appointed and employed by the State, shall be entrusted with official duties by the State under public law and owe a duty of loyalty to the State, that the public functionary shall not only obey the laws and orders but also take every action and adopt every policy possible that he or she considers to be in the best interests of the State by keeping in mind the overall interests of the State, since the exercise of his or her official duties will involve the public authorities of the State; and, further, that the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy must be ensured and preserved in light of the status quo of two separate and antagonistic entities which are on opposite sides of the Strait and the significant differences in essence between the two sides in respect to the political, economic and social systems. Given the fact that a person who came from the Mainland Area but has had a household registration in the Taiwan Area for less than ten years may not be as familiar with the constitutional structure of a free democracy as the people of the Taiwan Area, it is not unreasonable to treat such a person differently from the people of the

Taiwan Area with respect to the qualifications to serve as a governmental employee, which is not in conflict with the equality principle as embodied in Article 7 of the Constitution, nor contrary to the intent of Article 10 of the Additional Articles of the Constitution. In addition, the said provision, which requires a person who originally came from the Mainland Area to have had a household registration for at least ten years before he or she may be eligible to hold a public office, is based on the concerns that those who originally came from the Mainland Area may have a different view as to the constitutional structure of a free democracy and may need some time to adapt to and settle into the Taiwan society. Moreover, it also may take time for the Taiwanese people to place their trust in a person who came from the Mainland Area if and when he or she serves as a public functionary. Therefore, the ten-year period as specified by the provision at issue is nonetheless a necessary and reasonable means. No manifest and gross flaw is found in the legislators' considered judgments in that regard. Hence there is no violation of the principle of proportionality under Article 23 of the Constitution.

Reasoning

[1] The subject matter of this petition for interpretation is the Cross-Strait Relations Act. The petition is for Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, to be declared unconstitutional. Article 21, Paragraph 1, First Sentence of said Act provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may register as a candidate for any public office, serve in any military, governmental or educational organization or state enterprise, or organize any political party unless he or she has had a household registration in the Taiwan Area for at least ten years. It should be noted, however, that the

outcome of the judgment giving rise to this matter merely concerns the part of the said provision in respect of governmental service, so this Court, having examined the intent of J.Y. Interpretations Nos. 371, 572, and 590, will limit its constitutional review of the matter to the said part of the provision without touching upon the other parts thereof.

[2] Article 7 of the Constitution provides that all citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law. Thus, the people, who shall have the right to take public examinations and hold public office under Article 18 thereof, shall be equal under the law. The concept of "equal" as expressed thereunder shall refer to substantive equality. In light of the value system of the Constitution, the legislative branch may certainly consider differences in the nature of the various matters subject to regulation and accordingly adopt rational differential treatment among people. The foregoing has been made clear in the reasoning of J.Y. Interpretation No. 205 rendered by this Court. Furthermore, the restrictions imposed by law on the fundamental rights of the people based on any rational differential treatment should also satisfy the test of the principle of proportionality under Article 23 of the Constitution. Nevertheless, dealing with cross-Strait affairs requires considerations and judgments on numerous factors relating to politics, economics, and society. The constitutional interpreters, who are in charge of the judicial review of the law, should rightfully defer to the decisions made by the legislative branch, which represents the diverse opinions of the people and has ample information on hand in that regard, unless there has been a manifest and gross flaw in the decision-making of the legislative branch.

[3] Article 10 of the Additional Articles of the Constitution as promulgated on May 1, 1991 (subsequently amended and renumbered as Article 11 on July 21, 1997) provides, "The rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related

affairs may be specified by *sui generis* law." The Act Governing Relations between People of the Taiwan Area and Mainland Area as promulgated on July 31, 1992, is the *sui generis* law enacted pursuant to the intent of the said article of the Amendments to the Constitution to regulate the rights and obligations between the people of the Chinese mainland area and those of the free area, as well as the disposition of other related affairs, prior to the nation's reunification. Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may serve as a public functionary unless he or she has had a household registration in the Taiwan Area for at least ten years (as was provided in Article 21 of said Act as enacted and promulgated on July 31, 1992). The said provision is an extraordinary one with reasonable and justifiable objectives in that a public functionary, once appointed and employed by the State, shall be entrusted with official duties by the State under public law and shall owe a duty of loyalty to the State, that the public functionary shall not only obey the laws and orders but also take every action and adopt every policy possible that he or she considers to be in the best interests of the State by keeping in mind the overall interests of the State, since the exercise of his or her official duties will involve the public authorities of the State; and, further, that the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy, must be ensured and preserved in light of the status quo of two separate and antagonistic entities which are on opposite sides of the Strait and significant differences in essence between the two sides in respect to the political, economic, and social systems. Given the fact that a person who came from the Mainland Area but has had a household registration in the Taiwan Area for less than ten years may not be as familiar with the constitutional structure of a free democracy as the Taiwanese people, it is not

unreasonable to treat such a person differently from the people of the Taiwan Area with respect to the qualifications to serve as a governmental employee, which is not in conflict with the equality principle as embodied in Article 7 of the Constitution, nor contrary to the intent of Article 10 of the Additional Articles of the Constitution. In addition, the said provision, which requires a person who originally came from the Mainland Area to have had a household registration for at least ten years before he or she may be eligible to hold a public office, is based on the concerns that those who originally came from the Mainland Area may have a different view as to the constitutional structure of a free democracy and may need some time to adapt to and settle into the Taiwan society. Moreover, it may also take a while for the Taiwanese people to place their trust in a person who came from the Mainland Area if and when he or she serves as a public functionary. If the review is conducted on a case-by-case basis, it would be difficult to examine an individual's subjective intentions and character, as well as his or her level of identification with the preservation of the constitutional structure of a free democracy. Besides, it would also needlessly increase the administrative costs to a prohibitive level with hardly any hope of accuracy or fairness. Therefore, the ten-year period as specified by the provision at issue is nonetheless a necessary and reasonable means. As to cross-Strait affairs, in considering which types of public functionaries and public offices may affect the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy, the constitutional interpreters should defer to the decisions made by the legislative body in that regard. Although the law at issue does not differentiate between the types of offices and thus impose different restrictions, we find no manifest and gross flaw therein. Hence, there is no violation of the principle of proportionality under Article 23 of the Constitution.

[4] Where a petition is made by a judge of any of the various levels of courts to

this Court in regard to the constitutionality of a law, J.Y. Interpretation No. 371 should govern. As for the formality of a petition, the said Interpretation has made it clear that Article 8, Paragraph 1 of the Constitutional Court Procedure Act should apply. This petition for constitutional interpretation has been filed pursuant to the intent of J.Y. Interpretation No. 371 (*see* II (iv) on p. 3 of the Petition). As such, Article 252 of the Administrative Court Procedure Act is not the law which is applicable to the original case for which the petitioning court rendered its judgment, nor is it the law to be applied by this Court in rendering an interpretation. Therefore, as far as the said provision is concerned, the petition in regard to the constitutionality thereof should be dismissed based on the intent of J.Y. Interpretations Nos. 371, 572, and 590.

Background Note by Hsiu-Yu FAN

The plaintiff of the original case, [redacted]-Mei HSIEH ("HSIEH"), had originally been a resident of mainland China and subsequently married a Taiwan citizen in 1990. HSIEH was first admitted to reside in Taiwan in 1996 and then granted permanent residency with household registration in 1998. HSIEH further passed the Elementary Civil Service Examination, finished the required training, and received from the Examination Yuan a certificate of qualification to work in the civil service in 2001. However, when in 2002 HSIEH applied to the Taipei City Government for a post open to applicants holding the same certificate of qualification, the City rejected her application for the reason that she had not maintained her household registration for longer than ten years, as required by Article 21, Paragraph 2, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area ("the provision at issue.") HSIEH then first filed an administrative appeal and later an action before the Taipei High Administrative Court. Assured that the provision at issue and Article 252 of the Administrative Court Procedure Act, which provides that only the Supreme

Administrative Court may petition to the Constitutional Court for an interpretation, were both in conflict with the Constitution, the Taipei High Administrative Court petitioned to the Constitutional Court for an interpretation based on J.Y. Interpretation No. 371.

J.Y. Interpretation No. 618 is the first time the Constitutional Court reviewed the constitutionality of a discriminatory law based on national origin, or to be precise, jurisdictional origin, as mainland China, albeit actually occupied and governed by the People's Republic of China, is still nominally part of the Republic of China under the Constitution. Under the Constitution, nominally, a mainland immigrant is inherently a citizen of the Republic of China. A distinction in the qualification required for the civil service was drawn by the provision at issue between an ordinary Taiwanese permanent resident/citizen and a mainland immigrant who had not maintained his or her permanent residency in Taiwan for more than ten years. To review this discriminatory law, the Constitutional Court adopted a lenient rational basis review and held the provision at issue to be constitutional in light of its purpose to safeguard the free democratic constitutional order in the Taiwan Area. As the Court found no manifest and gross flaw in the legislature's decision-making, it deferred to this legislative decision, which does not consider individual differences in the identification with a free democracy or the nature of different positions in the civil service.

J.Y. Interpretation No. 649 (October 31, 2008)*

Preferential Treatment of Vision-Impaired Individuals Case

Issue

Is it constitutional for the Physically and Mentally Disabled Citizens Protection Act to restrict the practice of massage business to vision-impaired individuals only?

Holding

The first sentence of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that "those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business." (The name of the Act was changed to Physically and Mentally Disabled Citizens' Rights Protection Act on July 11, 2007, and the above quoted "those who are not vision-impaired as defined by this Act" has been amended to "those whose vision is not functionally impaired" and reassigned as Article 46, Paragraph 1 with the same regulatory meaning.) Such provision does not conform to the right of equal protection as stipulated in Article 7, right to work as stipulated in Article 15, and the principle of proportionality as stipulated in Article 23 of the Constitution, and shall be invalid no later than three years after the issuance of this Interpretation.

Reasoning

[1] The first sentence of Article 37, Paragraph 1 of the Physically and Mentally

* Translation by Andy Y. SUN

Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that "those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business." (The name of the Act was changed to Physically and Mentally Disabled Citizens' Rights Protection Act on July 11, 2007, and the above quoted "those who are not vision-impaired as defined by this Act" has been amended to "those whose vision is not functionally impaired" and reassigned as the first sentence of Article 46, Paragraph 1 with the same regulatory meaning.) As a preferential treatment to protect the right to work of vision-impaired individuals, and, conversely, a prohibition against non-vision impaired individuals in regard to the freedom to choose their occupation, this provision must conform to the right of equal protection as stipulated in Article 7, right to work as stipulated in Article 15, and the principle of proportionality as stipulated in Article 23 of the Constitution.

[2] Vision impairment is a physical condition beyond any human control. The disputed statutory provision, which establishes discriminatory treatment in regard to a category of who may engage in massage business, has a profound impact on the majority of population who are not vision-impaired. While the legislators have taken into consideration the limited occupation and career options available to the vision-impaired in light of the many obstacles they need to overcome, such as their growth, movement, learning and education, as well as the vulnerability of their social status, together with the reality that vision-impaired individuals have traditionally been dependent upon the massage business for their livelihood, such legislation, in order to achieve an important public interest and comply with the right of equal protection, should nevertheless adopt a measure not excessively restrictive of the rights of those who are not vision-impaired and ensure that the protective measures for the vision-impaired have a substantial nexus with the objectives they intend to accomplish. The constitutional provisions concerning fundamental rights have emphatically

focused on the protection of the socially disadvantaged. Article 155 of the Constitution states, "… [t]o the aged and the infirm who are unable to earn a living, and to victims of unusual calamities, the State shall provide appropriate assistance and relief." Article 10, Paragraph 7 of the Additional Articles of the Constitution states, "[t]he State shall guarantee availability of insurance, medical care, obstacle-free environments, education and training, as well as support and assistance in everyday life for physically and mentally handicapped persons, and shall also assist them to attain independence and to develop [their] potential…" These provisions have clearly demonstrated the principle of assisting the disadvantaged. As a result, there is a significant public interest in protecting the right to work for the vision-impaired, and the objectives for preferential or discriminatory treatment are justified under the relevant provisions of the Constitution.

[3] When the Handicapped Welfare Act was enacted and promulgated in 1980, there were few career options available for vision-impaired individuals. The prohibition against non-vision impaired individuals engaging in the massage business was beneficial for the vision-impaired willing to engage in such business, and the reality was that a high percentage of the vision-impaired chose massage business as their livelihood. However, the nature of massage and the skills required for those intending to engage in the massage business suggest that the business is not limited to the vision-impaired only. With the expansion of the market for massage careers and service consumption, the disputed provision has become excessively restrictive to non-vision impaired individuals, which include other physically or mentally disabled who are not vision-impaired but who do not otherwise enjoy the preference of occupation reservation. With the knowledge and capability of [many] vision-impaired having been enhanced gradually, and their selectable occupation categories increasing by the day, the statutory provision in question tends to make the governing authority overlook

the fact that the talents of the vision-impaired are not limited to the massage business alone. But, nearly thirty years after the statute's promulgation and in light of the availability of diverse occupations nowadays, the socioeconomic conditions of the vision-impaired have yet to see any significant improvement. Since there is hardly a substantial nexus between the objectives and the means, [the provision] contradicts the meaning and purpose of Article 7 of the Constitution on the right of equal protection.

[4] The citizens' right to work must be protected under Article 15 of the Constitution, and J.Y. Interpretations Nos. 404, 510, 584, 612, 634, and 637 further illustrate the freedom to engage in employment and to choose an occupation. The Constitution has set forth different standards of permissibility, based on different content, as to restrictions on the freedom to choose an occupation. The legislators, in pursuance of the general public interest, may impose proper restrictions on the methods, time and location in regard to which an occupation may be carried out. Yet on the freedom to choose an occupation, if [the restrictions] concern the subjective condition needed, which means professional capability or license to perform the specific occupation, and such capability or [license] status can be gained through training and development, such as knowledge, degree or physical capability, no restrictions may be permitted without justification of important public interest. The objective condition needed for people to choose an occupation means those restrictions on the pursuance of an occupation that cannot be achieved by individual efforts, such as monopoly of certain sectors. Such restrictions may be justified only with the showing of an extraordinarily significant public interest. Irrespective of the condition under which the restrictions were imposed, the means adopted must not violate the principle of proportionality.

[5] The disputed provision that prohibits non-vision impaired individuals from engaging in the massage business amounts to a restriction on the objective

conditions concerning the freedom to choose an occupation. Since that provision was designed to protect the employment opportunities of the vision-impaired, taking into consideration the purpose of the second sentence of Article 155 of the Constitution and Article 10, Paragraph 7 of the Additional Articles of the Constitution, it concerns an extraordinarily significant public interest, and the objective [of the statutory provision] is proper. Yet in light of the social development, expansion of need in the massage occupation, as well as the provision regarding the broad hand skills required for the massage business, including, among other things, "effleuraging, kneading, chiropractics, pounding, stroking, hand arcuation, movement and other special hand skill" (*see* Article 4 of the Regulations Governing the Qualifications and Management of the Vision-Impaired Engaged in Massage Occupation, repealed on March 5, 2008, and Article 4, Subparagraph 1 of the current Regulations Governing the Qualifications and Management of Vision Functionally-Impaired Engaged in Massage and Physical Therapy Massage Occupation), the prohibition in the disputed provision against the non-vision impaired does not have a clearly defined scope and has resulted in inconsistent enforcement standards, thereby greatly increasing the possibility of violations by non-vision impaired individuals engaged in similar work or business. This can be seen in many cases pending before the Administrative Courts at all levels. Given that anyone interested in the massage business should have been eligible to engage in the occupation after receiving corresponding training and qualification review, by only permitting the vision-impaired to conduct such business, non-vision impaired are forced to transfer to other occupations or lose their jobs, hence preventing the formation of a diversely competitive environment conducive to consumers' choices. This is not in parity with the interest to protect the right to work of the vision-impaired. Consequently, the restriction in the disputed provision is not in conformity with the principle of proportionality under Article 23 of the Constitution and

contravenes the protection of the right to work as stipulated in Article 15 of the Constitution.

[6] It is a compelling public interest to protect the right to work of the vision-impaired. The governing authority shall adopt multiple, concrete measures to provide training and guidance for occupations deemed suitable for the vision-impaired, and to set aside appropriate employment opportunities for them. In addition, [the governing authority] should provide adequate management on the massage occupation and related matters, take into consideration the interests of both vision-impaired and non-vision impaired individuals, consumers and suppliers, as well as the balance between the protection of the disadvantaged and market mechanism, so that the employment opportunities for the vision-impaired and other physically or mentally disabled [individuals] and the objectives of the Constitution to assist the disadvantaged in independent development, and the principle and spirit of substantive equality can be fulfilled. Since all of these measures require delicate planning and execution, the disputed provision shall be invalid no later than three years after the promulgation of this Interpretation.

Background Note by Vincent C. KUAN

One of the petitioners operated a barber shop and hired the other two petitioners, who were non-vision impaired, to engage in massage services on the premises, which was uncovered by the police, with relevant information being sent to the Department of Social Welfare, Taipei City Government.

The said Department found the aforesaid behavior in violation of the first sentence of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, which provides, “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business” and imposed pecuniary fines on the petitioners in accordance with Article 65,

Paragraphs 1 and 2 of said Act. The petitioners brought administrative lawsuits separately, and final judgments against them were rendered. Hence, the matter was brought before the Constitutional Court, which found the provision in question contrary to the constitutionally guaranteed right of equal protection, right to work, and the principle of proportionality.

Nevertheless, an earlier interpretation rendered by the Constitutional Court, *i.e.*, J.Y. Interpretation No. 626, dealt with a similar case. The petitioner participated in the 2002 Graduate School Admission Examinations for Master's Programs administered by the Central Police University (hereinafter referred to as "CPU"). The examination was divided into two parts: the First Exam, which is a written examination, and Second Exam, which includes oral and physical examinations. Despite passing the First Exam, the petitioner was diagnosed to be green-blind and hence was physically disqualified by the CPU, thereby denying the petitioner's enrollment according to Point 7 (ii) and Point 8 (ii) of the Central Police University General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs. Having exhausted all administrative relief available, the petitioner brought the matter to the Constitutional Court on the grounds that the regulations at issue were in conflict with the principle of legal reservation and infringed upon his right to education and right of equal protection as guaranteed by the Constitution.

Unlike its finding in the 2008 case, J.Y. Interpretation No. 649, the Constitutional Court upheld the constitutionality of the disputed provisions, holding that the purposes of said provisions were to train professional police talents who are equipped with both theoretical knowledge and real-world techniques and to attain effective use of educational resources, thus improving the quality of police administration and fostering the development of a rule-of-law nation; that, as such, the purposes are important public interests; and that such provisions and the purposes thereof are substantially related and thus not in

conflict with Articles 7 and 159 of the Constitution.

J.Y. Interpretation No. 666 (November 6, 2009)*

Sexual Transaction Punishment Case

Issue

Is Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which imposes a fine on those who provide sexual services for financial gain, unconstitutional?

Holding

Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which stipulates that the action of any individual who engages in sexual transactions or cohabitation for financial gain is punishable by detention for no more than three days or by a fine of up to TWD 30,000, violates the principle of equality prescribed in Article 7 of the Constitution, and shall become null and void not later than two years from the date of announcement of this Interpretation.

Reasoning

[1] The principle of equality prescribed in Article 7 of the Constitution does not refer to a concept of absolute and mechanical equality in form. Rather, it guarantees substantive equality in legal status for all people, which requires matters that are the same in nature to be treated the same and not be subject to arbitrary different treatment without justification. When a law imposes administrative penalties to carry out certain legislative purposes so that the choice of target for punishment results in different treatment, such different treatment

* Translation and Note by Li-Ju LEE

needs to have substantive nexus with the very legislative purpose in order to avoid violating the principle of equality.

[2] Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act (hereinafter "the provision at issue") provides that the action of any individual who engages in sexual transactions or cohabitation with intent for financial gain is punishable by detention for no more than three days or by a fine up to TWD 30,000. Its legislative purpose is to protect public health and maintain social morality (*see* the Legislative Yuan Gazette 80 (22):107). According to this provision, for those who engage in sexual transactions, only the party with intent for financial gain is subject to penalties, but not the other party who provides the consideration.

[3] How to regulate sexual transactions and whether any penalty is warranted are matters of legislative discretion. The Social Order Maintenance Act employs administrative penalties as the regulatory means. The provision at issue explicitly prohibits sexual transactions and punishes only the party with intent for financial gain, but not the other party who provides the consideration. With the subjective intent for financial gain as the standard to impose penalties, the provision at issue has subjected parties in a sexual transaction to different treatments. Considering that the legislative purpose of the provision at issue is to protect public health and maintain social morality, and that sexual transactions can only be consummated through joint actions between one party with intent for financial gain and another party providing consideration, even though the former is more likely to be a repeated actor with wide-ranging and uncertain sex partners, such a difference in facts and experiences does not alter the nature of sexual transactions as joint actions, and is thus not sufficient to justify different treatments. The two parties should be assessed equivalently in law. Moreover, the provision at issue does not hold the party providing consideration culpable and yet punishes the party with intent for financial gain in sexual transactions. In light of the fact that those who

provide sexual services are mostly women, the provision in practice is tantamount to punishing only women participating in sexual transactions, in particular the socially and economically disadvantaged ones being compelled to engage in sexual transactions, who after being thus punished would have their hardship further exacerbated. The provision at issue, adopting subjective intent for financial gain as the standard for different treatment in the imposition of penalties, does not have an apparent substantive nexus with the legislative purpose stated above and therefore violates the principle of equality prescribed in Article 7 of the Constitution.

[4] In order to achieve the legislative purpose of protecting public health and maintaining social morality, government agencies may implement various kinds of management or counseling measures for those who engage in sexual transactions with intent for financial gain, such as physical examination or safe sex awareness campaigns; or provide job training, career counseling or other educational measures to enhance their ability to work and economic conditions so they do not have to depend on sexual transactions to make a living; or adopt other effective management measures. In addition to providing all possible assistance to socially and economically disadvantaged people, in order to prevent sexual transactions from having a negative impact on rights and interests of third parties or infringing on other important public interests, the State may, when legal restrictions on sexual transactions are necessary, enact statutes or authorize administrative regulations to provide reasonable and precise regulatory or punishment rules. Since this requires substantial time for careful planning, the provision at issue shall become null and void not later than two years from the date of announcement of this Interpretation.

Background Note by the Translator

In 2009, Yi-Lan Summary Court Judge Jun-Ting LIN, the presiding judge

over seven sexual transaction cases involving the Social Order Maintenance Act, issued preliminary decisions to halt the proceedings and filed a petition to the Constitutional Court arguing that Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which stipulates that any individual who engages in sexual transactions or cohabitation with intent for financial gain is punishable by detention for no more than three days or by a fine up to TWD 30,000, violated Articles 7 and 23 of the Constitution. Another petition making the same claim was filed by Judge Yang Kun-Chao, who was the presiding judge over two sexual transaction cases involving the Social Order Maintenance Act in Lotung Summary Court.

J.Y. Interpretation No. 666 adds a new dimension to the Constitutional Court's jurisprudence on gender equality. Unlike the statutes previously struck down for their explicit discrimination against women, the Social Order Maintenance Act does not single out a specific sex for punishment. Rather, it imposes penalties on those who provide sexual services for profit, but not those who pay for them. The Court nevertheless recognizes the fact that in practice it is mostly women, especially socially and economically disadvantaged ones, who are punished, as the petitioners' cases demonstrate.

Although the Court recognizes gender discrimination in practice or in effect in this case, it is not clear if the constitutional principle of equality would be extended to protect people against so-called "*de facto* discrimination" or "indirect discrimination" in other contexts involving gender or other protected characteristics such as race, religion, class or party affiliation. J.Y. Interpretation No. 666 represents an important first step toward acknowledging various types of discrimination manifested in the interaction between law and society, and materializing the principle of "substantive equality" championed by the Court.

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

The Constitutionality of the *Liumang* (Hoodlums) Act Case

Issue

The Act for Eliminating *Liumang* (Hoodlums) allows the police to force people to appear before the police and allows the court to use the testimony of secret witnesses, who are not confronted and examined by the transferred people, as evidence. Are these rules constitutional?

Holding

[1] Article 8, Paragraph 1 of the Constitution reads:

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute. No person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by statute. Any arrest, detention, trial, or punishment not conducted in accordance with the procedure prescribed by statute may be rejected.

Regarding so-called "the procedure prescribed by statute", it means that all the decisions made by the government to restrain personal liberty and security of the people must be prescribed by law, no matter whether the people are criminal defendants or not. In addition, the restraints should be subject to substantive due

* Translation and Note by Kai-Ping SU

process review and in line with the relevant conditions provided in Article 23 of the Constitution. Article 6 and Article 7 of the Act for Eliminating *Liumang* (Hoodlums) (hereinafter referred to as "the Act") authorize the police to force people to appear before the police, without following necessary judicial process. Article 12, regarding secret witnesses, deprives the rights of the transferred person to confront and to examine witnesses, and obstruct discovery of truth in court. Article 21, without considering the necessity of specific deterrence, imposes the sanction of reformatory training on people who were already sentenced or punished, which jeopardizes their right to personal liberty and security. All of the above provisions of the Act exceed the necessary level, fail the substantive due process requirement, and contradict the intent of the aforementioned Articles of the Constitution. Furthermore, Article 5 of the Act also contradicts the intent of Article 16 of the Constitution, because this Article provides that the people determined to be *liumang* and therefore warned by the police can only file a motion of objection to the National Police Agency, Ministry of the Interior, and they are not allowed to file an administrative appeal or litigation against the police decision. All these articles of the Act mentioned above shall become null and void once this Interpretation is announced and no later than December 31st, 1996.

Reasoning

[1] The people's right to personal liberty and security is an important and fundamental human right, and fully safeguarding this right is a prerequisite to exercising other freedoms protected by the Constitution. Article 8 of the Constitution, therefore, has specific and detailed provisions about the protection of the people's right to personal liberty and security. Paragraph 1 of this Article reads:

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person

> shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute. No person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by statute. Any arrest, detention, trial, or punishment not conducted in accordance with the procedure prescribed by statute may be rejected.

It indicates that the people, whether they are criminal defendants or not, are protected by the above provision from any measures restraining the people's right to personal liberty and security, except as otherwise provided for in the Constitution. Except for cases of *in flagrante delicto* which shall be separately prescribed for by law, all other procedures related to protection of the people's right to personal liberty and security shall also be based on law. At the same time, those laws passed by the legislative body must be subject to substantive due process review and in line with the conditions set up in Article 23 of the Constitution. These are the mechanisms for institutional protection of liberty and security of person, which include all kinds of institutions guaranteeing liberty and security of person in our country since the Constitution has taken effect, as well as include the rights and protections of liberty and security of person generally granted by modern rule-of-law countries. Otherwise, the protection of liberty and security of person would be nothing but empty talk, and the above provisions of the Constitution would never be implemented.

[2] The above substantive due process of law covers both substantive law as well as procedural law. In substantive law, for instance, it must comply with the principle of *nulla poena sine lege* (no punishment without a law authorizing it). In procedural law, major processes include: except for *in flagrante delicto*, that the arrest of a suspect shall follow required judicial process; the confession of the accused shall be made voluntarily; a conviction shall be based upon evidence; no

person shall be punished for the same offence more than once; the parties have the right to confront and to examine witnesses; distinction between trial and prosecution; trials shall be made in public in principle; and the right to appeal against lower court decisions. Except for situations that martial law is declared, or that the country or the people are in a state of emergency, any statutory provisions departing from the aforementioned principles are deemed violations of the substantive due process of law. The predecessor of the current Act was enacted in the Period of Mobilization for the Suppression of the Communist Rebellion, and this regulation of the Act has lasted since then. The Act has had the value of maintenance of social order. When statues are made to prevent behavior, as enumerated in Article 2 of the Act, the content of these statutes, as a matter of course, has to be in accordance with the substantive due process of law.

[3] Article 4 of the Act, regarding the sanctions of warning and listing people who are determined to be *liumang*, not only affects the reputations of the people involved, but may lead to the imposition of reformatory training on the people and therefore jeopardize their liberty and security of person. It is definitely an administrative act damaging the rights and interests of the people. Article 5 of the Act provides that, if a person who is determined to be a *liumang* and warned by the police accordingly does not accept these sanctions, the person may file a motion of objection, with a written statement of reasons and within ten days of receiving the written warning, to the National Police Agency, Ministry of the Interior. However, the decision of the National Police Agency, Ministry of the Interior, is final and the person can appeal no more. This Article excludes the application of administrative litigation, and therefore it obviously contradicts Article 16 of the Constitution, which guarantees the right to administrative appeals and judicial remedy.

[4] Article 6 of the Act reads:

> Once a person is determined to be a serious *liumang*, the city or county police departments may summon the person to appear before the police without any prior warning. If the person summoned fails to appear, the police may force the person to appear before them.

Its Article 7 reads:

> Within a year of a person having been determined to be a *liumang* and given such warning, if the person still meets any condition as prescribed in any Subparagraphs of Article 2, the city or county police departments may summon the person to appear. If the person summoned fails to appear, the police may force the person to appear before them. For those who are carrying out the *liumang* acts, they can be forced to appear without a prior summons.

The above articles authorize the police to force people to appear before them. Nonetheless, a *liumang* may be an offender who also commits criminal offenses, or someone whose acts are not sufficiently serious to be considered criminal offenses. As for criminal offenders, the Code of Criminal Procedure provides specific formats and procedures for their arrest and detention. The above Articles of the Act do not distinguish whether or not a person is committing a crime and generally allows the police to force people, without any judicial approval, to appear, similar to *in flagrante delicto*. These articles have exceeded the necessary level and violated the intent of Article 8, Paragraph 1 of the Constitution, which clearly distinguishes the procedures applied to people who are caught *in flagrante* and the procedures applied to those who are not.

[5] Article 12, Paragraph 1 of the Act reads:

> While handling *liumang* cases, the police and the court shall separately examine the reporter, the victim, or the witness as if they are a secret witness, if these people request that their names and identities remain confidential. In any notices, transcripts, and documents, their names or identities shall be replaced by code names. Names or identities of secret witnesses shall not be disclosed.

Its Paragraph 2 reads:

> The transferred person and his lawyer may not request to confront or to examine secret witnesses.

Without considering the circumstances of the case, these provisions demand that the court separately examines witnesses as secret witnesses and prevent the transferred person and his lawyer from confronting or examining secret witnesses, simply because the reporter, the victim, or the witness request that their names and identities remain confidential. These provisions deprive the right of the transferred person to his defense, obstruct discovery of truth in court, and may impose reformatory training on the transferred person without sufficient evidence, which are, of course, not permitted by the Constitution.

[6] Article 21 of the Act regards the implementation rules in a situation where a person receiving the sanction of reformatory training violates both the Act and criminal laws. Without considering the necessity of specific deterrence, this Article further imposes reformatory training on the people who were already sentenced or punished, which may again endanger their liberty and security of person. In addition, as provided in Article 96 of the Criminal Code, the Criminal Code already has rehabilitative provisions and measures for acts violating both the Act and criminal laws, when the court considers it necessary. The sanction of

reformatory training is a sanction in addition to the rehabilitative measures provided in the Criminal Code and the Act Governing the Enforcement of Rehabilitative Measures. When reformatory training is imposed, the liberty and security of person of the transferred person is substantially restrained for as long as up to three years. Furthermore, pursuant to the Act, reformatory training shall be enforced prior to any other similar rehabilitative measures provided in other statutes. As a result, it is not unusual that the transferred person, who is not prosecuted by the prosecutor or convicted by the court in a regular criminal proceeding, has to receive reformatory training. Although the transferred person may file a motion of reconsideration of reformatory training when he is not prosecuted or not convicted, as provided in Article 16, Paragraph 1, Subparagraph 7 of the Act, his liberty and security of person has been jeopardized permanently. All these provisions above are contrary to the historically established principles that protect liberty and security of person of the people as well as interests of the criminal defendant. Even though the above provisions of the Act may intend to prevent infringement upon the freedoms of others or to maintain social order, they exceed the necessary level, violate substantive due process, and therefore shall not be permitted under the Constitution.

[7] Accordingly, Article 5 of the Act violates Article 16 of the Constitution which protects the rights to administrative appeals and judicial remedy of the people; Articles 6, 7, 12, and 21 contradict the intent of Article 8, Paragraph 1 of the Constitution which protects liberty and security of person of the people. These Articles of the Act shall become null and void, once this Interpretation is announced and no later than December 31st, 1996, by which date the authorities concerned shall thoroughly re-examine the Act from a perspective which can balance the protection of personal rights and the maintenance of social order.

Background Note by the Translator

Petitioners of this Interpretation included inmates receiving the sanction of reformatory training, and judges trying *liumang* cases. Several inmates receiving the sanction of reformatory training petitioned for constitutional interpretation in February, April, and July of 1995, respectively, after exhaustion of all legal remedies. They argued that the following provisions authorizing the government agencies to impose the sanctions of reformatory training were unconstitutional, because these provisions contradicted Articles 8, 10, 15, 16, 23 of the Constitution. The provisions they challenged were Articles 2, 4, 5, 6, 7, 11 (Section 1), 12, 13 (Section 2), 16, 19 (the fore of Section 1), and 21 of the Act, as well as Articles 11, 18, and 36 of the Implementing Rules for the Act for Eliminating *Liumang*.

At the same time, three judges trying *liumang* cases also petitioned for constitutional interpretation in July, 1995. These judges considered that the provisions of the Act, which were to have been applied to their *liumang* cases, contradicted Articles 7, 8, and 16 of the Constitution. Therefore, these judges ruled to suspend the pending procedures and petitioned for constitutional interpretation. The Constitutional Court decided to combine and hear all of these cases together.

This Interpretation was the very first time that the Constitutional Court found articles of the *liumang* Act unconstitutional. Before the entire Act was abolished by the Legislature in 2009, different parts of the Act had been found unconstitutional for three times, respectively in J.Y. Interpretations Nos. 384, 523, and 636. The historical process of dealing with the constitutionality of the *liumang* Act in the Constitutional Court has been an important course of human rights development in Taiwan.

Before Interpretation No. 384, the Constitutional Court had touched upon the constitutionality of a punishment of similar nature - compulsory correction or re-education provided for in the Act Governing the Punishment of Police Offences (hereinafter “the Act”). The petitioner of Interpretation No. 384 was

imposed a sanction of compulsory correction by the police department in 1985. In 1989, after exhaustion of all legal remedies, the petitioner petitioned the Constitutional Court for an Interpretation of Article 28 of the Act, which provision, he argued, was against the intent of Article 8, Paragraph 1 of the Constitution.

The Constitutional Court found:

> The detention and forced labor imposed by police departments under the Act are punishments imposed on liberty and security of person of the people. To be consistent with the intent of Article 8, Paragraph 1 of the Constitution, the authority which may impose these punishments shall be changed, as soon as possible, from the police to a court following legal procedure. This issue was already addressed by this Constitutional Court in Interpretation No. 166, on November 7th, 1980.
>
> The sanction of "[being] sent to a certain place for correction or living skills training", provided in Article 28 of the Act, is also a restraint on liberty and security of person of the people. This sanction is also inconsistent with the intent of Article 8, Paragraph 1 of the Constitution, because it can be imposed by police departments. The determination process of this sanction shall be made by a court in accordance with the procedure prescribed by statute, as the determination process of detention and forced labor shall. The rules regarding determination processes of detention and forced labor, which were interpreted in Interpretation No.166, as well as the rule of the sanction above, should be null and void no later than July 1st, 1991, by when the related statues should be amended.
>
> This Interpretation is a supplement to an earlier decision of the

Constitutional Court, *i.e.*, Interpretation No. 166. The petitioner of Interpretation No. 166 was the Control Yuan, one of the five branches of the Government and an investigatory agency that monitors the other branches of government. The Control Yuan argued that the Act Governing the Punishment of Police Offences permitting the police to impose sanctions of administrative detention and forced labor upon offenders contradicted Article 8 of the Constitution.

In this Interpretation No. 166, the Constitutional Court ruled that administrative detention and forced labor are related to liberty and security of person of the people and should be decided only by a court based on legal procedure, as provided in Article 8, Paragraph 1 of the Constitution.

J.Y. Interpretations Nos. 166 and 251 are predecessors of the Interpretation 384, in terms of the interpretation of Article 8, Paragraph 1 of the Constitution. This Paragraph reads (excerpt):

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute.

In all the three Interpretations, the Constitutional Court repetitively announced that so-called "the procedure prescribed by statute" means that all the decisions made by the government to restrain personal liberty and security of the people must be prescribed by law, no matter whether the people are named criminal defendants, *liumang* (as in J.Y. Interpretation No. 384), or offenders of "police offenses" (as in J.Y. Interpretations Nos. 166 and 251).

J.Y. Interpretation No. 636 (February 1, 2008)*

The Constitutionality of the *Liumang* (Hoodlums) Act Case (The Third Case on the Same Act)

Issue

Do Articles 2, 6, 10, 12, 14, 15, and 21 of the Act for Eliminating *Liumang* (Hoodlums), and even this Act as a whole, conflict with relevant principles of the Constitution?

Holding

[1] The provision of Article 2, Subparagraph 3 of the Act for Eliminating *Liumang* (Hoodlums) (hereinafter referred to as "the Act") regarding the acts of "committing blackmail and extortion, forcing business transactions, and manipulating matters behind the scenes to accomplish the foregoing"; the provision of Subparagraph 4 of the same Article regarding the acts of "managing or controlling professional gambling establishments, establishing brothels without authorization, inducing or forcing decent women to work as prostitutes, working as bodyguards for gambling establishments or brothels, or relying on superior force to demand debt repayment"; and the provision of Article 6, Paragraph 1, regarding "serious circumstances" do not violate the void-for-vagueness doctrine. As for the provisions of Article 2, Subparagraph 3, regarding the acts of "occupying territory," "eating and drinking without paying," and "coercing and causing trouble", while they might not be difficult for the regulated people to understand, there are still aspects of these provisions that are insufficiently clear. Therefore, the authorities concerned shall review and revise

* Translation and Note by Kai-Ping SU

these provisions by taking into account factors such as the changing patterns of society. Further, the provision of Article 2, Subparagraph 3, regarding the act of "tyrannizing good and honest people" and the provisions of Article 2, Subparagraph 5, regarding "people who are habitually morally corrupt" as well as "people who habitually wander around and act like rascals" are inconsistent with the void-for-vagueness doctrine.

[2] Regarding the determination of *liumang* under Article 2 of the Act, in accordance with due process of law, the reported person shall have the right to appear and be heard during the determination procedure. In the case that a person determined as a *liumang* appears voluntarily before the police pursuant to a lawful notice, the person shall not be compelled to be transferred to the court with his case, if doing so is against the wishes of the person.

[3] Article 12, Paragraph 1 of the Act restricts the transferred person's rights to confront and to examine witnesses and to access court files, without taking into consideration whether, in view of the individual circumstances of the case, other less intrusive measures are sufficient to protect witnesses' safety and the voluntariness of their testimonies. This provision is clearly an excessive restriction on the transferred person's right to defend himself in a legal action and is inconsistent with the principle of proportionality under Article 23 of the Constitution. This provision further violates the principle of due process of law under Article 8 of the Constitution and the right to judicial remedy under Article 16 of the Constitution.

[4] The provision regarding the mutual set-off of time in Article 21, Paragraph 1 of the Act does not conflict with the principle of proportionality under Article 23 of the Constitution. The proviso of Article 13, Paragraph 2 of the Act, which provides that court rulings need not specify the term of reformatory training, leads to concerns that the person receiving reformatory training might be

excessively deprived of personal liberty and security. The authorities concerned shall re-examine and revise this proviso.

[5] The provisions of Article 2, Subparagraph 3, regarding "tyrannizing good and honest people," Subparagraph 5 of the same Article regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals," and Article 12, Paragraph 1, regarding excessive restraints on the rights of the transferred person to confront and to examine witnesses as well as to access court files are inconsistent with relevant principles of the Constitution. These provisions shall become null and void no later than one year after the date of announcement of this Interpretation.

Reasoning

[1] Personal liberty and security of the people is an important fundamental human right. Fully safeguarding this right is a prerequisite for the people to exercise other freedoms protected by the Constitution. Article 8 of the Constitution, therefore, includes a specific and detailed provision about protection of personal liberty and security of the people. Paragraph 1 of this Article reads:

> The people's right to personal liberty and security shall be guaranteed. Except in case of *flagrante delicto* as provided by statute, no person shall be arrested or detained otherwise than by a judicial or a police authority in accordance with the procedure prescribed by statute. No person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by statute. Any arrest, detention, trial, or punishment not conducted in accordance with the procedure prescribed by statute may be rejected.

Considering the intent of this clause, in exercising the state's power to restrict personal liberty and security of the people, the State must abide by legal procedures and, within certain limits, act in accordance with constitutional parameters. Regarding so-called "the procedure prescribed by statute", pursuant to past Interpretations of this Court, all the restraints imposed to restrict personal liberty and security to a certain place which are tantamount to a form of criminal punishment that deprives a person of personal liberty and security—irrespective of the name used for the restraint—these restraints must have a statutory foundation and also implement the procedures of due process of law. These procedures shall also be of the same type as used in meeting due process requirements when restricting personal liberty and security of a criminal defendant. Interpretations No. 384 and No. 567 of this Court used the same principles as above to review the provisions of the Act that concern the sanction of reformatory training, and the same principles were also used to review the sanction of "control and training" under the Disciplinary Measures for the Prevention of Repeat Offenses by Communist Spies during the Period of Communist Rebellion.

[2] In accordance with the principle of rule of law, when statutes are used to restrict rights of the people, the constitutive elements of statutes shall conform to the void-for-vagueness doctrine, which enables the regulated people to foresee the legal consequences of their behavior, in order that the prior notice function of the law is ensured. This further creates clear standards for enforcing the law so as to ensure that the statutory purpose can be achieved. Pursuant to the past Interpretations of this Court, the concepts used in a statute do not violate the void-for-vagueness doctrine if their meanings are not difficult for the regulated people to understand through the text of the statute and legislative purpose, and further if the meanings can be confirmed through judicial review (*see* J.Y. Interpretations Nos. 432, 491, 521, 594, 602, 617, 623 for reference). In addition, according to

Article 8 of the Constitution, the State's power to restrict personal liberty and security of the people is, within certain limits, reserved in the Constitution. If a statutory provision creates a severe restraint on personal liberty and security of the people that is tantamount to criminal punishment, whether the elements of this statute conform to the void-for-vagueness doctrine shall be subject to stricter scrutiny.

[3] Article 2 of the Act explicitly provides the definition of "*liumang*". Subparagraph 3 therein describes the "*liumang*" acts of "occupying territory, committing blackmail and extortion, forcing business transactions, eating and drinking without paying, coercing and causing trouble, or manipulating matters behind the scenes to accomplish the foregoing." Based on ordinary people's experience of daily life and understanding of language, as well as the practice of judicial review, the acts of "committing blackmail and extortion" and "forcing business transactions" are sufficient to be understood as using fraud, intimidation, violence, threats, or similar acts to mislead or suppress a victim's free will and cause the victim to surrender money or property or to complete certain business transactions. The act of "manipulating matters behind the scenes to accomplish the foregoing" is sufficient to be understood as substantive control of other people's formation of ideas, decisions to act, and implementation of acts. The meanings of the above constitutive elements of *liumang* acts are foreseeable by the regulated people and can further be confirmed through judicial review. The above elements thus do not violate the void-for-vagueness doctrine. As for "occupying territory," judging by its context, "occupying" is no doubt sufficient to be understood as the act of excluding other people's lawful rights and monopolizing certain interests. "Territory" could refer to a certain physical space or be understood as possessing specific business interests or other unlawful interests. Regarding "eating and drinking without paying," it could be understood as refusing to pay the bill after eating and drinking in order to gain unlawful

money or property. "Coercing" in "coercing and causing trouble," is sufficient to be understood as using violence, threatening, intimidation, or similar acts. Ordinary people can understand these kinds of *liumang* acts based on their experience of daily life and understanding of language, and judicial review can confirm the constitutive elements of these *liumang* acts. However, how to define the concrete form and content of the act of monopolizing by excluding other people, whether the territory is limited to a certain physical space, whether other consuming activities in addition to eating and drinking are also included within the scope of "eating and drinking without paying," and what actually are the acts that constitute "causing trouble" are all insufficiently clear. Therefore, the authorities concerned shall evaluate the possibility of concretely describing the constitutive elements of these statutes by taking into account factors such as the changing patterns of society.

[4] Article 2, Subparagraph 4 of the Act describes the *liumang* acts as "managing or controlling professional gambling establishments, establishing brothels without authorization, inducing or forcing decent women to work as prostitutes, working as bodyguards for gambling establishments or brothels, or relying on superior force to demand debt repayment." "Managing or controlling professional gambling establishments" refers to the acts of providing places for gambling and gathering people together to gamble with the intention of making a profit. "Establishing brothels without authorization" is sufficient to be understood as acting without permission as an intermediary for sexual transactions and exploiting the earnings. "Working as bodyguards for gambling establishments or brothels" refers to assisting with the management and control of gambling establishments and with the management of brothels. "Relying on superior force to demand debt repayment" refers to demanding debt payment from others by violence, threatening, or similar means. "Inducing decent women to work as prostitutes" refers to causing a woman to have the intention to trade

sex for money by means other than violence or threatening. "Forcing decent women to work as prostitutes" refers to causing a woman to trade sex for money by violence, threatening, or similar means. All of the above constitutive elements of *liumang* acts are acts of economic exploitation that are commonly seen in society. Ordinary people can foresee the types of acts and the scope of their applications based on their experience of daily life as well as understanding of language, and they can also be confirmed through judicial review. The above requirements constituting the definition of *liumang* thus do not violate the void-for-vagueness doctrine.

[5] The provision of Article 2, Subparagraph 3, regarding "tyrannizing good and honest people" and the provisions of Subparagraph 5 of the same Article regarding "people who are habitually morally corrupt" and "people who habitually wander around and act like rascals" all describe the risk of a person's potential to endanger society. These types of acts covered by the above provisions are excessively vague such that ordinary people, based on their experience of daily life and understanding of language, cannot foresee what acts are really covered, nor can these listed acts be confirmed through judicial review. In practice, these provisions would normally have to be merged with other factors such as acts of violence, threatening, intimidation, or similar acts, or merged with provisions in other subparagraphs of the same Article. The acts covered by the above basic constitutive elements are not clear. Although Subparagraph 5 further reads:

> If there are sufficient facts to consider that the actor habitually undermines social order or endangers the life, body, freedom, or property of others, the scope of the overall elements of the offenses is still not sufficiently concrete and clear. Accordingly, the above provisions of "tyrannizing good and honest people" and "people who

> are habitually morally corrupt" and "people who habitually wander around and act like rascals" are inconsistent with the void-for-vagueness doctrine.

[6] Article 6, Paragraph 1 of the Act reads:

> When a person is determined to be a *liumang* and the circumstances are serious, the police precinct of the directly governed municipality or police department of the county (city), with the consent of the directly supervising police authorities, may summon the person to appear for questioning without prior warning. If the summoned person does not appear after receiving lawful notice and does not have proper grounds for failing to appear, then the police may apply to the court for an arrest warrant. However, if the facts are sufficient to lead the police to believe that the person is a flight risk and there are exigent circumstances, then the police may arrest him without a warrant.

According to the common societal conception, when determining the so-called "serious circumstances", there still shall be taken into consideration the means used to carry out the *liumang* acts, the number of victims, the degree of harm, and the degree to which social order was undermined when examining the totality of the circumstances to determine whether the circumstances are serious. This provision does not contradict the void-for-vagueness doctrine.

[7] Article 2 of the Act reads:

> The police precinct of the directly governed municipality or police department of the county (city) shall provide concrete facts and

> evidence and, after examining the case with other concerned public security units, report the case to the directly supervising police authorities for reexamination and determination.

The preliminary examination as to whether a person is a *liumang* by the police precinct of the directly governed municipality or police department of the county (city) is conducted by the Examination Group for Eliminating *Liumang*, which is a committee composed of the precinct chief for the directly governed municipality—or police department of the county (city) for all other localities—as well as responsible senior officials from the local branches of the Investigation Bureau and Military Police Command (*see* Article 6 of the Implementing Rules for the Act for reference). The reexamination and determination procedures of the police departments of the directly governed municipalities and the National Police Agency, the Ministry of Interior are conducted by the Committee for the Deliberation of and Objections to *Liumang* Cases, which is composed of police, prosecutors, legal specialists, and impartial members of society (*see* Article 7, Paragraph 2 of the Implementing Rules for the Act for reference). The above provisions seek to ensure that the reported people obtain a fair result of examination, through a committee composed of diverse members.

[8] Although a diverse formation of the committee is conducive to promoting the objectivity of the committee's examination, the reported person must have an opportunity for defense in order to protect his right to defense. The reported person must have the right to be heard during the proceedings, in addition to the right to obtain relief after receiving an unfavorable decision. In order to comply with due process of law, the law shall grant the reported person the right to be heard during the examination committee's proceedings to determine whether the person is a *liumang*.

[9] The beginning part of Article 6, Paragraph 1 of the Act provides that when

a person is determined to be a serious *liumang*, if the person summoned by the police does not comply after having received lawful notice and does not have proper grounds for failing to appear, the police may apply to the court for an arrest warrant. If a person is arrested under a warrant issued by the court, he shall be transferred to the court for hearing after his arrest (*see* Article 9, Paragraph 1 of the Act for reference). If a person voluntarily appears and is questioned by the police, but he is not willing to be transferred to the court, the police may not compel the person to be transferred to the court. Doing otherwise would violate due process of law. The procedures provided in the beginning part of Article 7, Paragraph 1 of the Act shall, as a matter of course, be interpreted in the same manner.

[10] Article 12, Paragraph 1 of the Act reads:

> In order to protect reporters, victims, and witnesses under this Act, the court and the police department may, when necessary, separately summon them in private, and further use code names in place of their real names and identities when making the transcript and documents. When the facts are sufficient to believe that a reporter, victim, or witness may be threatened with violence, coercion, intimidation, or other retaliatory acts, the court may refuse to allow the transferred person and his lawyer to confront and to examine the reporter, victim, or witness, either based on the request of the reporter, victim, or witness or *ex officio*. The court may further refuse to allow the lawyer of the transferred person to view, copy, or photograph documents that might disclose the real names and identities of reporters, victims, or witnesses. The court may further request the police department to take necessary protective measures before or after the court questions the

> reporter, victim, or witness. However, the judge shall inform the transferred person the gist of the transcripts and documents that are admissible as evidence and give the transferred person an opportunity to state his opinion.

This Article allows the court to deprive the transferred person and his lawyer of the rights to confront and to examine witnesses as well as the right to access relevant materials in the case file that could identify witnesses, either based on the request of these witnesses or *ex officio*, when the facts are sufficient to believe that the reporter, victim, or witness might suffer violence, coercion, intimidation, or other retaliatory acts.

[11] The purpose of the criminal defendant's right to examine witnesses is to guarantee his right to sufficient defense in a legal action, which right is protected by the principle of due process of law under Article 8, Paragraph 1 of the Constitution and within the protection scope of the right to judicial remedy under Article 16 of the Constitution (*see* J.Y. Interpretation No. 582 for reference). A person (including the reporter and the victim) is obligated to serve as a witness in the criminal proceedings against another person, except as otherwise provided by law. A witness shall fulfill his obligations to appear in court, to sign an affidavit to tell the truth, to be questioned, confronted, and examined, and to speak the truth (*see* Article 166, Paragraph 1; Article 166-6, Paragraph 1; Articles 168, 169, and 176-1; Article 184, Paragraph 2; and Articles 187 to 189 of the Code of Criminal Procedure for reference). The sanction of reformatory training, which may be imposed on the transferred person in the *liumang* elimination proceeding, is a severe restraint on personal liberty and security. The right of the transferred person to confront and to examine witnesses shall receive the same constitutional protections as those granted to criminal defendants. Accordingly, a person is obligated to serve as a witness in the *liumang* elimination proceeding

against another person and may not refuse to be confronted or examined by the transferred person or his defense lawyer. Nonetheless, to protect witnesses from endangering their lives, bodies, freedom, or property as a result of being confronted and examined, the transferred person's and his defense lawyer's right to confront and to examine witnesses may be restricted by concrete and clear statutory provisions. Any such restrictions must comply with the requirements of Article 23 of the Constitution.

[12] Article 12, Paragraph 1 of the Act simply provides in general terms:

> The facts are sufficient to believe that a reporter, victim, or witness is threatened with violence, coercion, intimidation, or other retaliatory acts.

This provision fails to take into consideration whether, in view of the individual circumstances of the case, other less intrusive measures are sufficient to protect the witness's safety and the voluntariness of his testimony, such as wearing a mask, altering the person's voice or appearance, using a video transmission, or using other appropriate means of separation when witnesses are confronted and examined (*see* Article 11, Paragraph 4 of the Witness Protection Act for reference). The above provision immediately deprives the transferred person of his right to confront and to examine witnesses as well as to access court files, which is clearly an excessive restriction on the transferred person's right to defense in a legal action and does not conform with the essence of the principle of proportionality under Article 23 of the Constitution. Therefore, this provision violates the guarantees of the principle of due process of law under Article 8 of the Constitution and the right to judicial remedy under Article 16 of the Constitution.

[13] Article 21, Paragraph 1 of the Act reads:

> If the *liumang* act for which the person is committed to reformatory training also violates criminal laws and becomes the basis for a criminal conviction, time spent serving fixed-term imprisonment, detention, or rehabilitation measures and time spent in reformatory training shall be mutually set off on a one-day-for-one-day basis.

That is, if a *liumang* act also violates criminal laws, the person who committed the act may be subject to the sanction of reformatory training in addition to receiving criminal punishments and rehabilitation measures based on the same facts. The Act therefore provides that time spent serving criminal punishments or rehabilitation measures under criminal laws shall be mutually set-off from time spent in the sanction of reformatory training. The purpose is to ensure that a person's constitutionally protected right to personal liberty and security will not be excessively restricted due to different legal proceedings. However, Article 13, Paragraph 2 of the Act reads:

> If the court decides to impose the sanction of reformatory training, it shall deliver a written decision of its ruling to impose reformatory training but need not specify the term thereof.

Article 19, Paragraph 1 reads:

> The term of reformatory training is set at more than one year and less than three years. After completion of one year, if the executing authorities consider that it is unnecessary to continue reformatory training, they may report, with facts and evidence, to the original

ruling court for its permission and exempt the person from further reformatory training.

When criminal punishment or rehabilitation measures have already been carried out for more than three years, then there is no need to commence the sanction of reformatory training because of the mutual set-off provision. This situation does not raise doubts regarding excessive restrictions on personal liberty and security of the people. However, when criminal punishment or rehabilitation measures have been carried out for less than three years, the amount of time that can be deducted from the upcoming time in reformatory training cannot be calculated, because the term of reformatory training has not been declared. If the aforementioned Article 19 is interpreted as meaning that reformatory training shall then be enforced for a minimum of one year, personal liberty and security of the person subject to reformatory training may be excessively restricted. Accordingly, the aforementioned proviso of Article 13, Paragraph 2 might lead to excessive restriction of personal liberty and security of a person receiving the sanction of reformatory training. The authorities concerned shall re-examine and revise the provision.

[14] In light of the fact that amending the law requires a certain period of time and a series of proceedings—and so that the authorities concerned can conduct a comprehensive review of the Act by taking into consideration both the need to protect people's rights and the need to maintain social order—those parts of the following provisions that are inconsistent with relevant principles of the Constitution shall become null and void no later than one year after the date of announcement of this Interpretation: Article 2, Subparagraph 3, regarding the act of "tyrannizing good and honest people," Subparagraph 5 of the same Article regarding "people who are habitually morally corrupt" as well as "people who habitually wander around and act like rascals," and Article 12, Paragraph 1,

which excessively restricts the transferred person's right to confront and to examine witnesses as well as to access court files.

[15] As for the petitioners' petition that the provisions of Subparagraph 1 of Article 2, and Articles 10, 14, and 15 of the Act are unconstitutional, this Court considers that the constitutionality of these provisions does not influence the results of the court's ruling, as these provisions are not the legal provisions that the judges in these cases at hand shall apply. In addition, the petitioners allege that Subparagraph 2 of Article 2, the proviso of Paragraph 1 of Article 6, the proviso of Paragraph 1 of Article 7, and Articles 9, 11, 22, and 23 of the Act are unconstitutional, and further question the constitutionality of the Act as a whole. This Court considers that the grounds raised by the petitioners in support of the unconstitutionality of the foregoing provisions are insufficient to constitute concrete reasons for an objective belief that these provisions and the Act as a whole are unconstitutional. These two parts of the petition do not meet the requirements set forth in J.Y. Interpretations Nos. 371 and 572 of this Court and are therefore dismissed.

Background Note by the Translator

Petitioners of Interpretation No. 636 were two judges who tried *liumang* cases. One of the judges considered that Articles 2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the Act for Eliminating *Liumang* (Hoodlums) were unconstitutional, and that the Act as a whole contradicted the principle of proportionality under Article 23 of the Constitution. The other judge considered that the following provisions of the Act had strong value judgment and, therefore, caused legal uncertainty: the provision of Article 2, Subparagraph 3 regarding the act of "coercing and causing trouble" and the act of "tyrannizing good and honest people" as well as the provision of Article 2, Subparagraph 5 regarding "people who are habitually morally corrupt" and "people who habitually wander

around and act like rascals". Accordingly, the judge considered that these provisions of the Act contradicted the principle of Article 8 of the Constitution.

This Interpretation is important in that it resulted in the abolition of the Act for Eliminating *Liumang* (Hoodlums) on January 21st, 2009. Although it did not find the entire Act unconstitutional, the Constitutional Court deemed almost all the major articles of the Act unconstitutional in this Interpretation, which made the Legislature eventually decide to abolish the entire Act. According to legal scholars such as Jerome A. Cohen and Margaret K. Lewis, the abolition of the Act had an impact on the abolition of the "re-education through labor" in China in 2013.

There is another J.Y. Interpretation No. 523 that also touched upon the constitutionality of the same Act on *liumang*. In Interpretation No. 523, petitioners were transferred to the court to determine whether they were "serious *liumang*". During the determination process, petitioners were confined by the court, and the periods of their confinement were further extended for one month by the court, pursuant to Article 11, Paragraph 1 of the Act, "The court may confine the transferred person for up to a month. If necessary, the court may extend, only once, the period of confinement for another one month." Petitioners argued that Article 11, Paragraph 1 of the Act contradicted the principle of Article 8 of the Constitution.

The Constitutional Court considered that the confinement provided for in the aforementioned provision was a compulsory measure to keep the transferred people in a certain place so that the legal proceedings of *liumang* cases could proceed smoothly. However, the confinement constituted a serious restraint on the personal liberty and security of the transferred people. Since the Act did not explicitly provide the conditions under which the court could impose a confinement on the transferred people, the Constitutional Court considered that

the aforementioned provision exceeded the necessary level of restraint on personal liberty and security of the people. It was inconsistent with the intent of Articles 8 and 23 of the Constitution. Accordingly, Article 11, Paragraph 1 of the Act was rendered null and void.

The Act for Eliminating *Liumang* (Hoodlums) had been announced partly unconstitutional by the Constitutional Court for three times, before the Act was completely abolished by the Legislature in 2009. The first time was J.Y. Interpretation No. 384, which announced five articles of the Act unconstitutional in 1995. The Constitutional Court revisited the constitutionality of the Act again in J.Y. Interpretation No. 523.

J.Y. Interpretation No. 392 (December 22, 1995)*

The Prosecutor's Power to Detain Suspects without Warrant Case

Issue

Are the provisions granting prosecutors the power of detention in the Code of Criminal Procedure and the provisions regulating the writ of habeas corpus in the Habeas Corpus Act repugnant to the Constitution?

Holding

[1] Judicial power includes the power to commence criminal procedures—judicial proceeding to try criminal cases—with the purpose of carrying out the penal power of the State. A criminal trial begins with an indictment after investigations and ends with the execution of punishment after a judgment has become final. This procedure is therefore closely intertwined with trial and punishment, that is, the investigation, indictment, trial and execution all belong to the process of criminal justice. During this process, the prosecutorial organ, which investigates, indicts and executes punishment on behalf of the State, is to be regarded as "judicial" in a broad sense, because its function is to carry out its duty within the criminal justice system. Accordingly, the term "judicial organ" provided in Article 8, Paragraph 1 of the Constitution includes not only the judicial organ prescribed in Article 77 of the Constitution but also the prosecutorial organ.

[2] The term "trial" in Article 8, Paragraphs 1 and 2 of the Constitution refers to trial by a court. Since it cannot be conducted by those without the power to adjudicate, the term "court" in these two paragraphs refers to a tribunal composed

* Translation at Note by Chien-Chih LIN

of a judge or a panel of judges with the power to adjudicate. According to Article 8, Paragraph 2 of the Constitution, when a person is arrested or detained, the organ making the arrest or detention shall, within twenty-four hours, turn the person over to a competent court for trial. Hence, Article 101 and Article 102, Paragraph 3, which apply *mutatis mutandis* to Article 71, Paragraph 4 and Article 120 of the Code of Criminal Procedure are unconstitutional on the grounds that they empower a prosecutor to detain the accused. Additionally, Article 105, Paragraph 3, which empowers a prosecutor to grant a request for detention submitted by the chief officer of the detention house, and Article 121, Paragraph 1 and Article 259, Paragraph 1 of the same Code, which empower a prosecutor to withdraw, suspend, resume, continue detention or take any other measures in conjunction with a detention, are all inconsistent with the spirit of Article 8, Paragraph 2 of the Constitution.

[3] Article 8, Paragraph 2 of the Constitution merely prescribes that "[w]hen a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and a designated relative or friend, of the grounds for the arrest or detention, and shall, within 24 hours, turn the person over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial." It is not predicated on the condition of "unlawful arrest or detention." Therefore, Article 1 of the Habeas Corpus Act, which stipulates that "when a person is arrested or detained unlawfully by an organ other than a court, the said person, or any other person, may petition the District Court or High Court that has jurisdiction *ratione loci* for the place of the arrest or detention for habeas corpus", is incompatible with the said Article 8 of the Constitution because of the extra requirement that the arrest or detention be "unlawful."

[4] The abovementioned provisions of the Code of Criminal Procedure and the

Habeas Corpus Act shall be held unconstitutional and void within two years from the date of promulgation of this Interpretation. The Judicial Yuan Letter Yuan-Je No. 4034 shall be modified accordingly. As to the 24-hour requirement stated in the "turn over within 24 hours" clause of Article 8, Paragraph 2 of the Constitution, this refers to the objectively feasible time for investigation. J.Y. Interpretation No. 130 shall still be binding. It should also be pointed out that the 24-hour time limit shall exclude delays due to any other legal causes that are constitutionally permissible.

Reasoning

[1] This case has been brought before this Court on the following grounds: First, the Petitioner, the Legislative Yuan, while performing its duty to revise the Code of Criminal Procedure, petitioned this Court and questioned whether the prosecutorial organ is included in the meaning of "judicial organ" provided in Article 8, Paragraph 1 of the Constitution. Second, the Petitioner, Hsu Shin-Lian, claimed that his constitutional rights had been unlawfully infringed upon by the statute relied thereupon by the court of last resort in its final judgment and petitioned this Court after exhausting all available remedies. Third, the Petitioners, Chang Chun-Shong et al., 52 MPs, *ex officio*, questioned the meaning of a constitutional provision and petitioned this Court based on Article 5, Paragraph 1 of the Constitutional Court Procedure Act. And fourth, the Petitioner, Judge Su-Ta Kau of the Taichung District Court, *ex officio*, petitioned this Court based on J.Y. Interpretation No. 371. The Justices granted review of these petitions and consolidated them into one case. In accordance with Article 13, Paragraph 1 of the Constitutional Court Procedure Act, this Court held two oral argument sessions on October 19, 1995, and November 2, 1995, respectively, and notified the petitioners and the responding government agency, the Ministry of Justice, of their obligations to present their cases. Moreover, judges, legal scholars, and

lawyers were also invited to present their *amicus curiae* briefs before this Court.

[2] The Petitioners' arguments can be summarized as follows: (1) In light of textual and systematic interpretations, the definitions of "judicial organ" in Article 8, Paragraph 1 of the Constitution and Article 77 of the Constitution should be identical, meaning "those governmental organs having charge of civil, criminal and administrative cases, and over cases concerning disciplinary measures against public functionaries, and that are administered and supervised by the Judicial Yuan as the highest organ." From the perspectives of the separation of powers and institutional functions, the judicial power is an adjudicative power, which is just, passive, impartial and independent—in stark contrast with the prosecutorial power that is public-interest oriented, active, has party litigant status and is subject to superiors. J.Y. Interpretation No. 13, which declared that "the guarantee of tenured prosecutors, according to Article 82 of the Constitution and Article 40, Paragraph 2 of the Court Organization Act, apart from their transfer, is the same as that of tenured judges" simply suggests that the level of job protection for prosecutors in the Court Organization Act is on par with that of judges. It cannot alter the fact that prosecutors belong to the executive branch in the Constitution. (2) According to Article 8, Paragraph 1 of the Constitution: "No person shall be tried or punished otherwise than by a law court in accordance with the procedures prescribed by law." Therefore, the "law court" mentioned in the Constitution shall refer specifically to the courts empowered "to try and punish", and, according to Article 77 of the Constitution, the organs having the power "to try and punish" are limited only to courts possessing the power to adjudicate. Since prosecutors do not possess the power to "try and punish", they are not the "law court" specified in the Constitution. And since the "court" designated in the second sentence of Article 8, Paragraph 2 of the Constitution means a court with the power to issue a writ of habeas corpus and to adjudicate, it does not include the prosecutor. Consequently, the "court" designated in the first sentence of the same

Article and Paragraph shall be interpreted similarly: that is, both exclude prosecutors. (3) Based on the protection of the right to institute legal proceedings, it is evident that the judicial organ in the first sentence of the same Article and Paragraph does not include the prosecutor's office. If we analyze the meaning of "procedure prescribed by law" in Article 8, Paragraph 1 of the Constitution through the lens of "the doctrine of equal status of the litigants", we find that were we to permit the prosecutor, a party litigant that represents the state, to hold the power of detention, that would neither be in harmony with "the doctrine of equal status of the litigants" nor the substantive meaning of "due process of law". To enhance the public's confidence in prosecution, therefore, prosecutors should be excluded from the "judicial organ" to conform to the due process of law of the Constitution. (4) The legislative history of Article 8 of the Constitution shows that each draft of the Constitution allocated the power of detention exclusively to the law court in charge of trial. By prescribing an "unlawful" arrest or detention as the precondition for issuing writs, Article 1 of the Habeas Corpus Act has imposed an additional requirement that is not required by Article 8, Paragraph 2 of the Constitution. This in fact means that even those lawfully arrested or detained will be entitled to petition for a writ of Habeas Corpus. The current wording could easily create the misconception that the power to determine "unlawfulness" has been granted to an organ other than a court (such as a prosecutor). This is tantamount to denying the people's right to the writs, defying the noble intention of the Constitution to protect physical freedom and conflicting with the spirit of Article 8, Paragraph 2 of the Constitution. (5) According to the first sentence of Article 8, Paragraph 1, Article 8, Paragraph 2 and Article 8, Paragraph 3 of the Constitution, "Personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. … When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in

writing inform the said person, and a designated relative or friend, of the ground for the arrest or detention, and shall, within 24 hours, turn the person over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial. The court shall not reject the petition mentioned in the preceding Paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for surrender of the said person for trial." From the abovementioned provisions, it can be inferred that no organ other than a court can detain a person for more than 24 hours. Therefore, Article 108 of the Code of Criminal Procedure, which grants prosecutors the power to detain persons and restrict physical freedom for more than two months without transferring the case to court for trial, is unconstitutional.

[3] The Responding government agency's replies were as follows: (1) The definition of judicial power should take into account purpose and function, in addition to its structural form. Therefore, in addition to the power to adjudicate, judicial power should also include at the least the power to interpret, the power to discipline public functionaries and the power to prosecute. Conventional wisdom has held that the judicial organ includes the prosecutor's office. J.Y. Interpretations Nos. 13, 325, and 384 affirmed, either directly or indirectly, that the prosecutorial organ belongs to the judiciary. Although the prosecutor's office is now subject to the supervision of the Ministry of Justice, the Court Organization Act has stipulated that the Minister of Justice shall only have the power of administrative supervision, not the power to interfere with individual cases, with an eye to strengthening the independence of prosecutors. The Ministry cannot affect the independence of a prosecutor in a particular case. (2) The theoretical basis of a five-power constitution is different from that of a conventional three-power constitution, discarding the idea of checks and balances and emphasizing

instead mutual respect and cooperation. Even if one denies that a prosecutor is a judge, and therefore that the prosecutor's detention power would not be consistent with the Western standard of separation of powers, this is not a constitutional issue, but a matter of legislative policy-making. A prosecutor should have the power to detain an accused so long as legal procedures are followed. (3) In view of historical background, the "court" as stated in the first sentence of Article 8, Paragraph 2 of the Constitution should be interpreted broadly to include prosecutor's offices, because prosecutors were affiliated with the judiciary at the time of constitutional enactment, and most arrests were made by police. Moreover, prosecutors' offices have been affiliated with courthouses since 1927. This institutional framework has never been changed, notwithstanding the fact that the Court Organization Act has been enacted and then revised many times. It is therefore beyond doubt that the abovementioned "court" should include prosecutor's office. (4) Although "punishment" is a prerogative of the court, the term "trial" should also refer to interrogations made by the prosecutor in the investigative stage. Otherwise, how could a trial precede an indictment? By the same token, the term "investigation" herein should refer to "indictment". (5) In light of the history of constitutional evolution, the Provisional Constitution for the Period of Political Tutelage used the word "tribunal", while the Double Five Constitutional Draft and the current Constitution both chose the word "court" instead of "tribunal". This suggests that the term "court" should be interpreted broadly. (6) The nature of Article 8, Paragraph 2 of the Constitution, which aims for prompt transfer of the detained, was modeled on foreign legislation, taking into account Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on September 3, 1953, Article 9 of the United Nations' International Covenant on Civil and Political Rights, which entered into force on March 23, 1976, and Article 7 of the American Convention on Human Rights, which entered into force on July 18, 1978. All these require that any persons arrested or detained on suspicion of

having committed a criminal offence be surrendered to a judge or an official exercising judicial power prescribed by law. Apparently, the abovementioned international conventions and treaties have determined that the organ accepting the surrender of a detainee shall not be limited to a judge; only the organ issuing a writ of habeas corpus shall be limited to a court in a narrow sense. (7) The prosecutors of our state form the major investigative body and represent the public interest. Their goals are not limited to pursuing the conviction of defendants. This makes them different from prosecutors with pure prosecuting duties in other states. In this sense, they are pre-trial judges and should be equipped with the power of detention. (8) "Unlawful arrest and detention" in Article 1 of the Habeas Corpus Act refers to situations where an organ without the power to arrest and detain makes an arrest or detention, or where an organ with the power to arrest and detain makes an arrest or detention exceeding the 24-hour limit. It does not violate the second sentence of Article 8, Paragraph 2 of the Constitution, nor does it impose extra restrictions. Moreover, it is not unusual to see a word with different meanings. Therefore, the "court" referred to in the first sentence of the said Paragraph may have a slightly different meaning from the "court" in the second sentence. (9) Constitutional interpretation must be both "reasonable" and "feasible." Confining the meaning of "court" in Article 8, Paragraph 2 of the Constitution to a court in a narrow sense means that arrested criminal suspects must be transferred to a judge within 24 hours. This would require the prosecutor and the police to share their 24 hours jointly, a time limit that is too short to be either reasonable or feasible, compared with the laws in other States.

[4] After considering the arguments made by the Petitioners, the Responding government agency, and the *amicus curiae* briefs presented by the representatives of judges, legal scholars, and lawyers, this Court renders this Interpretation as follows:

[5] The notion of "judicial power" is relative to legislation and administration (and relative to examination and control as well in our five-power constitutional framework). Conceptually, this is a legal term with multiple meanings, including a substantive judicial power as opposed to a formal one and a judicial power in a narrow sense as opposed to one in a broad sense. The substantive judicial power includes both declarations made by the State for resolution of a controversy (*i.e*., a trial), as well as any state function auxiliary to this trial power (*i.e.,* judicial administration). The formal judicial power extends further to include any state function provided by law to the judicial department. For example, the notary public by nature is not within the domain of judicial power; however, it has been annexed to the judicial department to fulfill its function. Judicial power in a narrow sense is the conventional meaning of judicial power, referring only to the state function in civil and criminal trials. The capacity to carry out this function is normally called judicial power or adjudicative power, and is also called trial power because it refers to the trial competency in civil and criminal cases. In our State, however, other adjudicative functions, such as administrative litigation, disciplinary measures against public functionaries, judicial interpretation and trial for dissolution of unconstitutional political parties, should also be included. That is to say, any state functions implicating judicial independence are within this meaning of judiciary. Therefore, the position and duty of the Judicial Yuan prescribed in Chapter VII of the Constitution, *i.e.,* Article 77, in which the Judicial Yuan shall be the highest "judicial organ" of the State, Article 78, which stipulates judicial interpretation, and Article 4, Paragraph 2 of the Constitutional Amendment, which regulates trials for dissolution of unconstitutional political parties, shall all be considered as judicial power in a narrow sense. As to those state functions that aim to fulfill the function of the judiciary in a narrow sense (*i.e.,* state functions of a judicial nature), they belong to the judicial power in a broad sense.

[6] A court, which is an organ responsible for adjudication, can be defined either broadly or narrowly. Narrowly defined, a court refers to an organ, composed of an individual judge or a panel of judges, exercising the power to adjudicate. This is the meaning of a court in procedural law. Broadly defined, a court refers to an organ with its personnel and facilities set up by the State to facilitate adjudication. This is the meaning of a court in organizational law. In principle, therefore, a narrowly-defined court is limited to the organ possessing the power to try cases (adjudicative power). Hence, only the institution exercising this narrowly-defined judicial power independently is entitled to be regarded as a court, and only those who adjudicate in such a court are judges. Therefore, a court in a narrow sense comprises judges only. Those who are in a broadly-defined court are not judges if they do not exercise the power to adjudicate, and their institutions are not narrowly-defined courts. As a corollary, in terms of trial procedure, a narrowly-defined court is equivalent to a judge: both refer to the body that exercises the power to adjudicate and the two terms can be used interchangeably. Consequently, if a statutory provision uses the term "a judge" in the context of adjudication, it is equivalent to "a court," except for those involving personal status (*e.g.,* judgeship, job security, and recusal of judges, etc.).

[7] In our country, the prosecutors, who are the main actors in investigations, prosecute criminal cases, entreat courts to apply law properly, and supervise the proper execution of judgments. Moreover, they also shoulder many responsibilities and competences as the representatives of public interest in civil matters (*see* Article 60 of the Court Organization Act and Article 228 infra of the Code of Criminal Procedure for reference). Nevertheless, they have the obligation to obey their superior (the chief prosecutor) (*see* Article 63 of the Court Organization Act for reference) because their principal duties are to investigate and charge in criminal cases, notwithstanding that they may act with a certain level of discretion in the litigation process (*see* Article 61 of the Court

Organization Act for reference). This is in stark contrast to the independence of the judiciary, which is free from interference by any other state organ when carrying out its duties and acts only according to law in a trial. As to the prosecutorial organs where prosecutors carry out their duty, although they are affiliated with courts (*see* Article 58 of the Court Organization Act for reference), they carry out their duties independently and are not subordinate to the judiciary that exercises adjudicative power. It is beyond doubt that the prosecutorial organs are not narrowly-defined courts, and prosecutors are not judges. Nonetheless, the job security of a prosecutor, except for job transfer, is the same as that of an active judge. This has been declared previously in J.Y. Interpretation No. 13, and it remains good law without the need for further elaboration.

[8] Article 8, Paragraph 1 of the Constitution prescribes that "Personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law ..." As far as criminal litigation, namely adjudication in criminal cases, is concerned, this is a process that aims to realize the penal power of a State. It begins with an indictment, which results from an investigations, and ends with the execution of punishment, which is necessary to realize the mandate of final judgment. Therefore, these steps, namely, the process of investigation, indictment, trial, and execution, are all different stages of criminal procedure that are closely related to trial and punishment. Since the prosecutors act on behalf of the State to investigate, indict and punish in this process, and since the power they exercise is to fulfill their duty in criminal justice, their behavior within this sphere shall be seen as "judicial" in a broad sense. The Constitution further provides expressly that "... no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the

procedure prescribed by law ...” Therefore, the judicial organ contained therein, functionally speaking, shall refer to the broadly-defined judiciary that includes the prosecutor’s offices; not to mention that it juxtaposes and regulates the judicial (police) organ and the court respectively. From this perspective, it is clear that the judicial organ referred to herein is not the judicial organ stated in Article 77 of the Constitution, which refers specifically to a narrowly-defined court. Furthermore, the investigation in criminal proceedings is conducted by the police and prosecutors. Since the latter are responsible for deploying and commanding the former, and since the prosecutors take charge of public prosecution, undoubtedly the abovementioned constitutional provision juxtaposing the judicial and police organs for arrest and detention procedure shall include prosecutor’s offices as well.

[9] Article 8, Paragraph 2 of the Constitution provides that “When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and a designated relative or friend, of the grounds for the arrest or detention, and shall, within 24 hours, turn the person over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial.” The term “trial” in the clause “turn the person over to a competent court for trial,” and that in the sentence of the aforementioned Article 8, Paragraph 1 which states that “[n]o person shall be tried or punished other than by a law court in accordance with the procedure prescribed by law” shall both refer exclusively to trials conducted by courts. Persons without the power of adjudication are incompetent in this regard. Therefore, the “court” therein means a court composed of an individual judge or a panel of judges who possess the power of adjudication, that is, a court narrowly defined in the Code of Criminal Procedure. Moreover, since the first sentence of Article 8, Paragraph 1 of the Constitution juxtaposes the judicial (or police) organ and the court and grants the power to arrest and detain

in accordance with the procedure prescribed by law to the former, and prescribes that only the latter has the power of adjudication, it is beyond question that the "court" stated therein and the "court" referred to in the first sentence of Article 8, Paragraph 2 of the Constitution refer to a court composed of judges who possess the power of adjudication independently.

[10] The "court" in the second sentence of Article 8, Paragraph 2 of the Constitution, which prescribes "… may petition the competent 'court' that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial", Paragraph 3 of the same Article, which prescribes that "[t]he court shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for the surrender of the said person for trial," and Paragraph 4, which prescribes that "[w]hen a person is unlawfully arrested or detained by any organ, that person or any other person may petition the court for an investigation. The court shall not reject such a petition, and shall, within 24 hours, investigate the action of the organ concerned and deal with the matter in accordance with law" should all be limited to a court with the power of adjudication. This is because the surrender prescribed in the second sentence of Paragraph 2 and Paragraph 3 is modeled on the "writ of habeas corpus" of the Anglo-American legal tradition, and, according to this legal tradition, only a law court that adjudicates has this writ-issuing power. There is no disputing that a prosecutor does not possess this writ-issuing power, and neither the petitioners nor the Responding government agency (*i.e.*, the Ministry of Justice) disputed this point. Paragraph 4 of the same Article, which follows the rule prescribed in Paragraph 3 and explicitly states "investigation" instead of "prosecution", is not limited to criminal procedures only. In sum, the "court" stipulated in Article 8, Paragraph 2 (either the first or second sentence), Paragraph 3 and Paragraph 4 of the Constitution all refer to an adjudicative body

composed of judges.

[11] "Arrest" means restraining one's personal freedom by physical force. "Incarceration" means confining one's personal freedom to a certain space. Both are instances of deprivation of personal freedom. The term "apprehension" stipulated in the Code of Criminal Procedure refers to a disposition to restrain a defendant's (criminal suspect's) freedom and to force that person to appear before the authorities. "Detention" refers to a disposition to forcefully restrict the personal freedom of the accused (criminal suspect) and confine that person to a certain place (a custodial ward), with an eye to securing the smooth progress of litigation. Therefore, there are no differences between apprehension and arrest, nor are there any differences between confinement and detention, as far as deprivation of personal freedom is concerned. Even apprehension and detention differ only in terms of purpose, method and length of time. Other forms of terminology, such as "internment," "receiving," "confinement" and "taking into custody" do not prevent these dispositions from being kinds of "detention" as well. Their constitutionality should be evaluated substantively by how they deprive personal freedom in reality, not by the words they use ostensibly. The protection of personal freedom in Article 8 of the Constitution, which is a fundamental right, not only openly declares the importance of personal freedom, but also explicitly specifies the procedures for carrying out this protection. By striking a balance between human rights protection and criminal justice, it is indeed paradigmatic of constitutional design. Detention segregates a person from his or her family, society and professional life, detains the person in a custodial ward and restrains the said person's movement for a long period of time. This deprivation of personal freedom will have a tremendous impact not only psychologically but also on a person's reputation and honor. It is a highly coercive disposition on personal freedom and therefore should be used only as a last resort and with extreme caution to preserve evidence. It should not be invoked easily,

only when it is necessary and all legal requirements are met. Based on the protection of human rights, whether the disposition is legal and necessary should be reviewed by an independent tribunal in accordance with procedural law. Only by doing so can it be said that the essence of Article 8, Paragraph 2 of the Constitution has been upheld. Hence, all the following articles are inconsistent with the purpose of the aforementioned Article 8, Paragraph 2 of the Constitution because they grant the prosecutor the power to cancel, cease, resume or continue detention and other powers concerning the detention of an accused (criminal suspect): the current Article 101 of the Code of Criminal Procedure, which states that an accused may be detained, if necessary, after having been examined and one of the conditions specified in Article 76 exists; Article 102, Paragraph 3 that applies *mutatis mutandis* to Article 71, Paragraph 4 for the order of detention issued by a prosecutor; Article 120, which provides that the accused may not be detained after examination if one of the conditions in Article 114 is present unless it is impossible to release the person on bail, to custody, or with a limitation on residence, provides the prosecutors, on top of the court, with a power to detain an accused (criminal suspect); Article 105, Paragraph 3 of the same Code, which states that "... such restraint shall be ordered by the officer in charge of the detention house, and such an order shall be referred immediately to the court or prosecutor concerned for approval" and provides the prosecutor with the power to approve a detention order submitted by the chief officer of the detention house; Article 121, Paragraph 1 of the Same Code, which provides that "[t]he cancellation of detention specified in Article 107, ... the suspension of detention specified in Articles 115 and 116, and the resumption of detention specified in Article 117 ... shall be made by a court ruling or by a prosecutor's order," and Article 259, Paragraph 1, which states that "[a] detained accused person who has received a ruling not to be prosecuted, ... if the circumstances warrant, may be ordered to remain in custody."

[12] Article 8, Paragraph 2 of the Constitution merely prescribes that "When a person is arrested or detained on suspicion of having committed a crime… [t]he said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial." It does not predicate the petition on "unlawful arrest or detention." That is, a criminal suspect is entitled to petition the competent court for a writ once arrested and detained by an organ other than a court, regardless of whether the arrest and detention is objectively unlawful or not. There should be no distinction between "lawful" and "unlawful" arrest, because there is no way to determine the lawfulness of the arrest without a hearing by a competent court. Yet Article 1 of the Habeas Corpus Act prescribes that "[w]hen a person is arrested or detained unlawfully by any organ other than a court, the said person, or any other person, may petition the District Court or High Court that has jurisdiction *ratione loci* for the place of the arrest or detention for habeas corpus." This provision is incompatible with the aforementioned constitutional provision, since it adds "unlawful arrest or detention" as a precondition for petitioning for the writ. Judicial Yuan Letter Yuan-Je No. 4034, which provides that "[a] person lawfully arrested or detained by an organ other than a court shall not be entitled to petition for a writ of Habeas Corpus," therefore, shall be modified accordingly because it is premised on the constitutionality of the "unlawful arrest or detention" requirement in Article 1 of the Habeas Corpus Act.

[13] The aforementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Moreover, although Article 8, Paragraph 1 of the Constitution confers the power of arrest or detention in accordance with legal procedure on a non-court judicial (or police) organ, Paragraph 2 of the same Article requires that the detainee be transferred to a court within 24 hours to determine whether the detainee should be further detained, that

is, according to the detention stipulated in the Code of Criminal Procedure. This is to protect personal freedom, because the Constitution does not permit any organ other than a court (composed of judges) to restrain personal freedom over a long period of time. The fact that the state has the goal of finding out the truth in criminal justice proceedings does not mean that it can invoke any means whatsoever; the personal freedom of a criminal suspect should still be protected properly. However, national security and social order cannot be ignored. The reason that the Constitution conferred on a non-court judicial (or police) organ the power to arrest or detain is to permit it to investigate and charge criminal offenders properly. Therefore, the 24-hour requirement should include the time that is objectively feasible to achieve this purpose. As a corollary, J.Y. Interpretation No. 130 shall still be binding. Furthermore, according to the first sentence of Article 8, Paragraph 2 of the Constitution, when a person is arrested or detained on suspicion of criminal activity, the organ conducting the arrest or detention shall, within 24 hours, turn the person over to a competent court for trial. If the court orders the organ to surrender the accused upon petition made by the accused or by another person within 24 hours of arrest or detention, and, after a trial, confirms the legality of arrest or detention, it shall return the detainee to the arresting organ for further investigation. Needless to say, the time spent on trial should not be counted in the 24-hour detention period. The relevant provisions in the Habeas Corpus Act are to be modified accordingly. That other constitutionally permissible legal factors are also exempt from the 24-hour requirement is hereby confirmed.

[14] Promulgated in 1931, Article 8 of the Provisional Constitution for the Period of Political Tutelage prescribed that when a person is arrested or detained on suspicion of having committed a crime, the executing or detaining organ shall, within 24 hours, turn the person over to a tribunal for trial. The said person, or any other person, may request the detainer to surrender the detainee for trial

within 24 hours according to law. The Double Five Constitutional Draft in 1936 and the current Constitution promulgated in 1947 do not use the word "tribunal" as it appeared in the Provisional Constitution; instead, they use the word "court." This was because the legal and judicial reforms of the late Qing Dynasty, the Tribunal Organization Law for the Da Li Yuan, promulgated in the 30th year of Emperor Guanghsu (1906) and the Law for Court Organization, promulgated in the first year of Emperor Syuantong (1909) all used the word "tribunal" (*e.g.*, high tribunal, district tribunal) to refer to the organs responsible for trial, with the exception of the Da Li Yuan. When the Republic was founded, these organic acts in principle remained in force temporarily. As time went on, the word "tribunal" continued to be used. This does not mean that the later adoption of the word "court" intentionally expanded the definition of "court" to include prosecutors. As mentioned above, moreover, the definition of "court" should be interpreted from its functions. Since the Constitution has used the word "trial" explicitly, the definition of "court" should be interpreted narrowly. Moreover, the fact that prosecutor's offices are affiliated with courthouses indicates that the prosecutor's office, by its nature, is not a court. Otherwise, there would be no need to affiliate it to a court, not to mention the different duties and functions between these two organs. Thus, it cannot be said that the framers intended to expand the definition of "court" in the second sentence of Article 8, Paragraph 2 of the Constitution to include the prosecutor's office. In addition, so far as the history of constitutional evolution is concerned, Article 5 of the 1913 ROC Constitutional Draft (the Temple of Heaven Constitutional Draft) used the word "law court," Article 6 of the "Cao Kun Constitution" promulgated in 1923 used the word "court," Article 29 of the "Tai Yuan Basic Law Draft" in 1930 used the word "court," Article 8 of the Provisional Constitution for the Period of Political Tutelage promulgated in 1931 used the word "tribunal," and Article 9 of the Draft of the Constitution (Double Five Constitutional Draft) in 1936 and the current Constitution promulgated in 1947 both employ the word "court." Therefore, although there

have been a variety of usages, they all connote essentially the same institution responsible for adjudication, that is, the narrowly-defined court. To be sure, there are multiple methodologies for constitutional interpretation. This Interpretation involves objective theory and subjective theory: the former relies on the objective meaning of the Constitution, while the latter reflects faithfully the original intent. Even so, constitutional interpretation should be based on the constitutional wording explicitly chosen by the framers. Only when the textual meaning is ambiguous should we also consult historical materials and the background at the time of drafting, because it is not easy to explore original intent, since doing so involves the relationship between constitutional drafters and makers (the approvers) as well as discrepancies among historical records. Without a reliable standard or criterion, any judgment could be arbitrary and unscrupulous. Furthermore, the facts that existed at the time of drafting were themselves regulated by constitutional norms and should not be used to interpret the Constitution. Following a systematic and objective interpretation of the text, the meaning of Article 8 of the Constitution is crystal clear: the "court" it refers to should include only courts that are composed of judges who are responsible for trial and punishment. This interpretation is not only consonant with the spirit of the Constitution that protects personal freedom but also in harmony with the systems in advanced constitutional democracies that protect personal freedom. After all, the word "court" generally refers to an organ that exercises adjudicative power.

[15] Article 9 of the Constitution has expressly provided that "[e]xcept those in active military service, no person shall be subject to trial by a military tribunal." Thus, it cannot be said that the "judicial organ" in Article 8, Paragraph 1 of the Constitution intends to exclude the trial and punishment of military tribunals. Additionally, the so-called "trial" is not necessarily limited to proceedings commenced after an indictment. The "trial" prescribed in Article 8, Paragraph 2

of the Constitution is intended to review the necessity of continuous detention, rather than the substantive issues of a case. This is similar to the Haftprüfung in Article 117 and the Mündliche Verhandlung in Article 118 of the German Code of Criminal Procedure, both of which are regulations concerning pre-indictment detention. Also, Articles 83, 84 and 85 of the Japanese Code of Criminal Procedure stipulate that the detainee should be informed of the reasons for detention in a tribunal. The assertion that the "trial" provided in the aforementioned constitutional provisions refers to interrogations conducted by prosecutors, and hence the "court" in this article should include the prosecutor's office, is not accurate.

[16] Article 8, Paragraph 4 of the Constitution provides that "When a person is unlawfully arrested or detained ... for an investigation, the court shall not reject such a petition, and, shall, within 24 hours, investigate ... and deal with the matter in accordance with the law." It uses the word "investigate", which differs from the wording in Article 52, which reads, "[t]he President shall not ... be liable to criminal 'prosecution'." Clearly, the term "investigation" is distinct from prosecutorial "prosecution." It may be argued that this provision is superfluous because citizens can inform the prosecutor of the crime under such circumstances anyway, and public servants on duty have an obligation to report the crime if they happen to know that a crime has been committed. The reason why the Constitution is devised as such is to further stress the protection of personal freedom. Therefore, it places "investigation" and "in accordance with the law" in the text to protect personal freedom directly. This also explains why the Constitution further prescribes that "the court shall not reject such a petition, and shall, within 24 hours, investigate ... and deal with the matter in accordance with the law," leaving no discretion for the court to decide whether to investigate and mandating the court to investigate within 24 hours. The court cannot invoke legal excuses to delay the action. This is the reason why Paragraph 3 of the same Article

does not allow the court to reject the petition or order the authorities concerned to make an investigation and report first.

[17] What does the word "court" in Article 97, Paragraph 2 of the Constitution mean? Whether it has the same connotation as the same word in Article 8 is another issue. The Court Organization Act need not regulate the affiliation of the prosecutor's office. This is clear from the case of Japan, which has enacted a "Court Act" and a "Public Prosecutor's Office Act" respectively. Hence, the "law courts" in Article 82 of the Constitution, which prescribes that "[t]he organization of the Judicial Yuan and of law courts of various grades shall be prescribed by law," need not be interpreted as requiring the inclusion of prosecutors to be constitutional. Also, J.Y. Interpretation No. 13 intended to elaborate on the protection of tenured prosecutors, not on whether a prosecutor's office is a narrowly-defined court. Since the said Interpretation stated explicitly that the judge referred to in Article 80 of the Constitution does not include the prosecutor, it is obvious that the prosecutor is not a member of a narrowly-defined court. Based on the said Interpretation and the different usages of the word "court" in various laws, the claim that the "court" in Article 8, Paragraph 2 of the Constitution should include "prosecutors" is a misunderstanding.

[18] In addition, the provision of, "other officer authorised by law to exercise judicial power," in Article 5, Paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force in 1953, and similar provisions in Article 9, Paragraph 3 of the International Covenant on Civil and Political Rights, entered into force in 1976, and Article 7, Paragraph 5 of the American Convention on Human Rights, entered into force in 1978, raise a question of whether this officer includes the prosecutor: that is, whether a person should be brought before a judge after being arrested and detained? Although this question remains controversial, the decision rendered by the European Court of Human Rights in the Pauwels Case (1988) indicated that

a law will violate the requirement of "other officer authorised by law to exercise judicial power," in the said Article 5, Paragraph 3 of the Convention if it grants the power of investigation and the power of public prosecution to the same officer, because the officer's neutrality will be challenged, even though the office exercises the powers independently (G. Pauwels Case, Judgment of May 26, 1988, *Council of Europe Yearbook of the European Convention of Human Rights*, 148-150 [1988]), that is, the officer should not be granted the power of detention. Since prosecutors in our State are the body of criminal investigation and possess the power of public prosecution, it is obvious that, in light of the abovementioned international conventions, they should not exercise the power of detention enumerated in the Code of Criminal Procedure. Furthermore, since Article 8, Paragraph 2 of the Constitution has plainly defined "court" narrowly, that is, composed of judges with independent adjudicative power, as elucidated above, it is inappropriate to invoke the international treaties and conventions and contend that the "court" in the first sentence of Article 8, Paragraph 2 of the Constitution should include "other officers authorised by law to exercise judicial power," such as prosecutors.

[19] The regulations in Article 8 of the Constitution regarding the powers of arrest, detention, investigation and punishment fall within the scope of constitutional reservation and cannot be changed without constitutional amendments (Verfassungsvorbehalt). Since the definition of the "court" in the first sentence of Paragraph 2 of the same Article has been discussed previously, it cannot be said that a prosecutor may have the power of detention stipulated in the Code of Criminal Procedure so long as due process of law is met. To be sure, the prosecutor, as a representative of the public interest, has the duty to make sure that the court applies the law properly. As such, prosecutors do not pursue a guilty verdict as the sole purpose of their role. Furthermore, they belong to the broadly-defined judicial organ. Yet this does not imply that the Constitution has

simultaneously granted the prosecutor the power to detain the accused per the Code of Criminal Procedure. Article 160, Paragraph 2 of the German Code of Criminal Procedure expressly stipulates that a prosecutor must investigate evidence not only adverse to, but also favorable to, a defendant. Yet this requirement does not change the position of the [German] Basic Law that prosecutors do not have the power to detain defendants. Also, as discussed above, the Constitution should protect personal freedom directly. Since the Constitution has prescribed that a judicial or police organ other than a court may arrest or detain a person for less than 24 hours in accordance with the procedure prescribed by law, it is groundless to claim that the power of detention prescribed in the Code of Criminal Procedure is a matter of legislative discretion. Whether this 24-hour requirement is realistically feasible or whether the requirement should be extended to 48 hours, or even to 72 hours, as it is in some other countries, are questions for constitutional amendment.

[20] As discussed previously, judges act independently free from interference from any other State organs. When trying cases, each judge makes decisions independently according only to law. Functionally speaking, this is in stark contrast with prosecutors, who are under the supervision of their superiors (the chief prosecutor) when performing their duties. Furthermore, judges are passive by definition, hearing no suit unless a claim is filed; this is different from prosecutors, who may actively investigate and indict. Since Article 8 of the Constitution intends to protect personal freedom comprehensively, this goal may be better achieved by letting the court composed of judges determine whether or not to detain a person. This does not involve the question of which institution is more objective and impartial. Otherwise, the right of detention may be conferred on the police organ too because, from the perspective of the State, there should be no doubt of the objectivity or impartiality of police departments. Therefore, one should not compare this with the power of detention enjoyed by a court

(judges) in a trial. Moreover, although prosecutors are equipped with certain powers of pre-trial judges (juge d'instruction or Untersuchungsrichter) in some foreign jurisdictions (such as present-day France, Germany prior to 1975, and pre-war Japan), they are not pre-trial judges. Also, Germany abolished the pre-trial system following the revision of its Code of Criminal Procedure in 1975. However, according to the German Basic Law, German prosecutors still have not completely replaced pre-trial judges wielding the power of detention. Therefore, it is unfounded to contend that prosecutors in our country should have the power of detention stipulated in the Code of Criminal Procedure simply because they exercise, to some extent, the function of pre-trial judges.

[21] In sum, a Constitution is not static but grows and evolves continuously during the process of national development. Interpretations based on abstract constitutional texts to solve contemporaneous issues should not ignore social change as time passes by. Indeed, it is inevitable to explore the normative meaning of the Constitution through historical material, but the function and mission of the Constitution is a value judgment based on a holistic legal order, and any constitutional decision should be resonant with this judgment. The protection of human rights is not only the highest principle in our cultural system but also a common principle in civilized societies. Being the normative subject of the Constitution, citizens express what they ask for from the Constitution in real life. When interpreting and applying the Constitution, it is necessary to take into consideration the value judgment embodied by this will. After all, personal freedom is the foundation of all other freedoms. Without adequate protection of personal freedom, it is impossible to realize any other freedom. Since Article 8 of the Constitution must be faithfully followed, this Court believes that only by applying the interpretation articulated above can we entrench the ideal and realize the purpose of this Article. It is so ordered.

Background Note by the Translator

Petitioner, the Legislative Yuan, *ex officio*, petitioned this Court in June 1992 as to whether the "judicial organ" prescribed in Article 8, Paragraph 1 of the Constitution includes the prosecutorial organ.

Petitioner, Mr. HSU, arrested and detained by a prosecutor of the Taiwan High Prosecutors Office, petitioned this Court in October 1989 after his application for Habeas Corpus was rejected by the Taiwan High Court, arguing that Article 1 of the Habeas Corpus Act, Article 101 and Article 76, Paragraph 4 of the Code of Criminal Procedure, relied on by the court of last resort in his final judgment, were repugnant to Article 8 of the Constitution.

Petitioners, Chun-Hsiung CHANG and another 52 legislators, *ex officio*, petitioned this Court in July, 1995, contending that Article 102, Paragraph 3 and Article 71, Paragraph 4 of the Code of Criminal Procedure were repugnant to Article 8 of the Constitution.

Petitioner, Judge Su-Ta KAU of Taiwan Taichung District Court, petitioned this Court, contending that Article 102, Paragraph 3 of the Code of Criminal Procedure, which applies *mutatis mutandis* to Article 71, Paragraph 4 of the same Act, is repugnant to Article 8 of the Constitution.

This Court decided to consolidate these petitions and hold oral arguments on October 19, 1995, and November 2 of the same year.

This Interpretation clearly defines and distinguishes the "judicial organ" provided in Article 8, Paragraph 1 of the Constitution from the "court" stipulated in Paragraph 2 of the same Article. Conceptually, the former includes prosecutors, but the latter does not. The distinction between prosecutors and judges is crucial because only judges have the power to detain a person for more than 24 hours. Hence, the Constitutional Court nullified, inter alia, several provisions of the Code of Criminal Procedure that granted the prosecutors the power to detain

people unilaterally. Given that Taiwan was an authoritarian regime before 1987 in which the separation of powers was a façade and due process of law was not honored, this Interpretation marked a great stride not only in the field of human rights protection but also in the separation of powers.

J.Y. Interpretation No. 567 (October 24, 2003)*

The Disciplinary Measures for Prevention of Recidivism by Communist Espionage Criminals Case

Issue

1. Is an administrative order/decree that provides for an indefinite period of reeducation and disciplinary measures after the completion of a sentence for those convicted of treason or espionage unconstitutional?
2. Is the statute permitting only those who have already completed reeducation or disciplinary sentences following a conviction of treason or espionage to seek state compensation constitutional?

Holding

[1] Article 8 of the Constitution expressly provides that personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained other than by a judicial or police body in accordance with procedures prescribed by law. During the Martial Law period and under the jurisdiction of Martial Law governance, the chief commander could, under necessary circumstances, restrict personal liberty to a certain degree by the issuance of decrees. However, related punishment restricting personal freedom still had to be regulated by law whose provisions were substantially adequate, and the penalty was rendered through trial proceedings. Article 2 of the Disciplinary Measures Governing the Prevention of Recidivism by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of Communist Rebellion provided, "For convicted communist

* Translation by Andy Y. SUN

espionage felons having completed a term of imprisonment or reeducation training but likely to recommit the offense(s) due to lack of improvement in thoughts and behaviors, they may be transferred into a labor re-education facility for compulsory labor for stricter discipline (Paragraph 1). The proceeding felons shall be reported by the agency of correction to the highest provincial security agency for approval (Paragraph 2)." Regardless of whether they were called compulsory labor or disciplinary measures, both penalties are serious intrusions upon personal freedom imposed by administrative orders without authorization by law and necessary trial proceeding. Furthermore, this provision allowed a state agency to recommit those who had already completed their penalties for an indefinite period of disciplinary action simply based on a review of their thoughts and behaviors and the determination of recidivism. Even though it was enacted during an extraordinary period, this provision does not conform to the minimum standards of human rights protection, and is contradictory to Articles 8 and 23 of the Constitution.

[2] Article 6, Paragraph 1, Subparagraph 4, of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law provides that citizens, having completed their sentences, reeducation or disciplinary measures for convictions of treason, espionage, or crimes under the Act for the Punishment of Treason or Act for the Eradication of Communist Espionage but not having been released, may petition the competent district court, and the relevant provisions of the Act of Compensation for Wrongful Detentions and Executions may apply, *mutatis mutandis*, in this regard. The proceeding provision applies to those cases where the term of reeducation or disciplinary measures was arbitrarily extended even after the term was already completed, or other penalties restricting personal freedom were imposed without lawful decisions of courts. Therefore, those provisions do not contradict the purpose of the Constitution in terms of safeguarding the rights of the people.

Reasoning

[1] Article 8, Paragraph 1 of the Constitution states that, "Personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained other than by a judicial or a police organization 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 which is not in accordance with the procedure prescribed by law may be rejected." This means that any punishment concerning the restraint of personal freedom must be regulated by law and may not be executed unless and until a proper trial is conducted. The legislature must further ensure that when enacting a statute, its content must be substantively adequate so that it does not exceed the necessary limitations, even if it is to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare, as expressly stipulated by Article 23 of the Constitution. During the Period of National Mobilization for the Suppression of Communist Rebellion, the nation was under a system that was extraordinary in nature, and the state's power and the protection of citizens' rights were certainly not comparable to what they should have been under normal circumstances. Yet the premises for the protection of all other constitutional rights rest on the full protection of personal freedom, which is a critical and fundamental human right. Thus, even under extraordinary circumstances, the punishment restricting an individual's personal freedom must nevertheless be in conformity to Articles 8 and 23 of the Constitution.

[2] Article 2 of the Disciplinary Measures Governing the Prevention of Recidivism by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of Communist Rebellion provided for, "[f]or convicted communist espionage felons having completed a term of

imprisonment or reeducation training but likely to recommit the offense(s) due to lack of improvement in thoughts and behaviors, they may be transferred into a labor re-education facility for compulsory labor for stricter discipline (Paragraph 1). The proceeding felons shall be reported by the agency of correction to the highest provincial security agency for approval (Paragraph 2)." Based on this regulation, those convicted of the crime of communist espionage, who had fulfilled the term of imprisonment or reeducation but were still physically confined in a certain location without being released, regardless of whether such detention was called compulsory labor or disciplinary measures, were in fact not different from those suffering the penalty of having their personal freedom deprived. By nature, both punishments had seriously encroached on personal freedom and should be rendered only by courts through legal proceedings, in accordance with Article 8 of the Constitution. The aforementioned disciplinary measures permitted an agency other than a court, that is, the highest police authority of the province, to promulgate and execute the conditions by executive order, which clearly violated Article 8 of the Constitution. Any restriction of personal freedom must be stipulated by substantive law and enacted by the legislature. The measures in question were merely executive orders promulgated by an executive organization that permitted the exercise of disciplinary measures without any term restriction, which were invalid as they were not in conformity with Articles 8 and 23 of the Constitution.

[3] While the state may impose more restrictions on individual rights during extraordinary periods and due to necessity under extraordinary circumstances, such restrictions must nevertheless not exceed the boundaries of minimum human rights protection. Freedom of thought must be protected in order to safeguard the spiritual activities of the people. It is the root of human civilization and the foundation of freedom of expression, and also the most fundamental human dignity protected by the Constitution. Given its particularly crucial

meaning to freedom, democracy and the continuance of the constitutional rule of law, no government agencies may intrude upon such freedom in the name of emergency. Even in times of extraordinary nature, and regardless of whether it is in the form of a statute, invasion of the scope of minimum human rights is prohibited, be it via means of compelling revelation or rehabilitation. It should also be pointed out that Article 2 of the Disciplinary Measures Governing the Prevention of Recidivism by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of Communist Rebellion permitted state agencies to order those who were likely to recidivate due to lack of improvement in thoughts and behaviors into a labor re-education facility for compulsory labor and stricter discipline. Such measures are no different from authorization for a state agency to try to reform the thoughts of its citizens through compulsory means. The said Article 2 violates not only the basic purpose of the Constitution for the protection of freedom of expression but also minimum standards of human rights protection.

[4] Article 6, Paragraph 1, Subparagraph 4 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law provides that citizens, having completed their sentences, reeducation or disciplinary sentences for convictions of treason, espionage, or crimes under the Act for the Punishment of Treason or Act for the Eradication of Communist Espionage, but not having been released in accordance with the law, may petition the competent district court, and the relevant provisions of the Act of Compensation for Wrongful Detentions and Executions may apply, *mutatis mutandis*, in this regard. The proceeding provision applies to those cases where the term of reeducation or disciplinary measures was arbitrarily extended even after the term was already completed or where other prolonged penalties restricting personal freedom were imposed without due process under which the State Compensation Law applies. Therefore, these provisions do not contradict the purpose of the Constitution in

terms of safeguarding the rights of the people.

Background Note by Rong-Gen LI

J.Y. Interpretation No. 567 has two petitioners. Both of them were convicted of treason, sentenced to imprisonment, and had completed their punishment. However, even so, both petitioners were not released, but instead transferred to labor re-education facilities for discipline. Those petitioners were released only after they had completed the disciplinary measures. They argued that the compulsory labor and disciplinary measures were illegal detentions and applied for compensation for wrongful detention and execution. The Judicial Yuan Wrongful Detention and Execution Review Committee rejected their applications. Those petitioners applied to the Judicial Yuan for interpretation based on the reason that Paragraphs 1 and 2 of Article 2 of the Disciplinary Measures Governing the Prevention of Recidivism by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of Communist Rebellion and Article 6, Paragraph 1, Subparagraph 4 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law were in violation of Articles 8 and 23 of the Constitution.

J.Y. Interpretation No. 567 has at least two key points. First, the interpretation emphasizes the protection of personal freedom. Personal freedom is the premise of other constitutional rights and fundamental human rights. Personal freedom can be restricted only by law and a law court in accordance with the procedure prescribed by law according to Article 8 of the Constitution. According to Article 23, a statute restricting personal freedom must be substantively adequate so that it does not exceed the necessary limitations, even if it is to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare. This Interpretation recognizes that during the extraordinary period, the state's power

and people's rights were different from how they would have been under normal circumstances. However, the protection of personal freedom should still comply with the aforementioned principle. In other words, this Interpretation establishes the minimum standard of protection of personal freedom.

This Interpretation also outlines the contours of freedom of thought. It holds that, according to the constitutional protection of the freedom of speech, it was unconstitutional to reform people's thoughts by compulsory means. In other words, this Interpretation recognizes the freedom of thought is protected by Article 11 of the Constitution. Many commentators further argued that the freedom of thought is absolute and cannot be restricted or intruded upon by the state.

While this interpretation holds that the labor re-education and disciplinary measures regulated by Article 2 of the Disciplinary Measures Governing the Prevention of Recidivism by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of Communist Rebellion unconstitutional, J.Y. Interpretation No. 471 invalidated Article 12, Paragraph 1 of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife, which provided: "If convicted under Articles 7, 8, 10, 11, Paragraphs 1 to 3 of Article 12 or 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 has been pardoned." The reasoning of J.Y. Interpretation No. 471 was that the provision imposed a mandatory compulsory labor period of three years without considering the prevention necessity of the person's propensity to endanger the society. That provision was thus in violation of Article 23 of the Constitution.

J.Y. Interpretation No. 528 was another case in regard to compulsory labor. In that interpretation, the Constitutional Court upheld the compulsory-labor

provision in the Organized Crime Prevention Act. The Court found the Act to be constitutional because that provision was not mandatory. Paragraphs 4 and 5 of the provision permitted the suspension of execution or continuance of compulsory labor. The compulsory-labor provision, therefore, was in line with Articles 8 and 23 of the Constitution.

J.Y. Interpretation No.708 (February 6, 2013)*

The Immigration Detention of Foreign Nationals Pending Deportation Case

Issue

1. Is it constitutional to not provide prompt judicial remedy to a foreign national who is facing deportation and being temporarily detained by the National Immigration Agency?
2. Is it constitutional to not have a court review of an extension of a foreign national's temporary detention?

Holding

Article 38, Paragraph 1 of the Immigration Act (as amended on December 26, 2007; hereinafter the "Act") provides, "[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ..." (this provision is the same as the provision promulgated on November 23, 2011, which provides, "[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ..."). Under this provision, the temporary detention of a foreign national for a reasonable period in order to complete repatriation does not provide the detainee with prompt judicial relief. Moreover, an extension of the aforementioned temporary detention also is not subject to judicial review. These two aspects of that provision are both in violation of the meaning and purpose of personal freedom protection guaranteed under Article 8 of the Constitution and

* Translation by Yen-Chia CHEN and Margaret K. LEWIS

shall be null and void no later than two years from the issuance of this Interpretation.

Reasoning

[1] Personal freedom is fully guaranteed. It is a prerequisite to the exercise of other freedoms and rights protected under the Constitution and a critical and fundamental human right. Therefore, Article 8, Paragraph 1 of the Constitution expressly provides, "Personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained other than by a judicial or a 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 which is not in accordance with the procedure prescribed by law may be rejected." In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts personal freedom - irrespective of whether the person is facing criminal charges - must be regulated by law and also fulfill required judicial procedures or other due process requirements (*see* J.Y. Interpretations Nos. 588 and 636). Furthermore, personal freedom is a fundamental human right and the foundation of all freedoms and rights of humankind. Protecting the personal freedom of each individual, regardless of his nationality, is a common principle upheld by all modern rule-of-law states. Thus, the guarantee of personal freedom under Article 8 of the Constitution extends to foreign nationals, and they shall receive the same protection as domestic nationals.

[2] Article 38, Paragraph 1 of the Act (as amended on December 26, 2007) provides: "[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ..." (this is the same as the

provision promulgated on November 23, 2011: "[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ...") (hereinafter the "disputed provision"). Accordingly, the National Immigration Agency (hereinafter the "Agency") may detain a foreign national through administrative acts.

[3] While the term "detention" prescribed in the disputed provision differs from criminal detention or punishment in nature, it confines foreign nationals to a certain place for a certain period of time in order to isolate them from the outside world (*see* Article 38, Paragraph 2 of the Act, and the Regulations Governing the Detention of Foreign Nationals). Such detention constitutes deprivation of personal freedom and a compulsory measure that severely interferes with personal freedom (*see* J.Y. Interpretation No. 392). Therefore, it must fulfill the required judicial procedures and other due process requirements in accordance with the meaning and purpose of Article 8, Paragraph 1 of the Constitution. Nonetheless, given that restrictions on personal freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods and degree, the required judicial procedures and other due process requirements for restrictions on personal freedom of non-criminal defendants and of criminal defendants need not be identical (*see* J.Y. Interpretation No. 588). A foreign national does not have the right to freely enter our state's territory. The Agency detains foreign nationals in accordance with the disputed provision in order to repatriate foreign nationals as soon as possible, rather than to arrest and detain them as criminal suspects. In the event that a foreign national can be quickly repatriated in a short period of time, the Agency needs a reasonable period of time to take care of repatriation-related-matters, such as purchasing plane tickets, applying for passports and other travel documents, contacting relevant institutions for assistance and conducting other matters essential to repatriation. Thus, given the values implicit in the entire legal system, it is reasonable and

necessary that the disputed provision provides the Agency with a reasonable period for repatriation operations and permits the Agency to temporarily detain foreign nationals during this short period in order to prevent escape and achieve quick repatriation. This is also an exercise of sovereignty and does not contravene the meaning and purpose of personal freedom protection under Article 8, Paragraph 1 of the Constitution. Accordingly, such temporary detention need not be decided by a court. However, based on the meaning and purpose of the aforementioned constitutional provision, and in order to ensure prompt and effective protection, foreign nationals under the foregoing temporary detention should be afforded a remedial opportunity to request prompt judicial review of the detention. If a detainee objects to the temporary detention or requests judicial review while under detention, the Agency must transfer the detainee to the court within twenty-four hours for speedy review of whether detention should be imposed. Once a temporary detention is imposed via an administrative act or a court ruling, the detained foreign national shall be notified in writing using a language comprehensible to him. The written notice should include the reason and legal basis of the detention, as well as the methods of judicial remedy. In order that the detainee is able to avail himself of the aforementioned procedures for relief to promptly and effectively protect his rights, and thus comply with the spirit and meaning of physical freedom protection under the Constitution, notice shall also be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized organization of the detainee's nation of origin. With regard to the length of the temporary detention for the enforcement of repatriation, the legislature should prescribe it by law after taking into consideration the time required for administrative processing and the practical concerns in pre-repatriation operations. Nonetheless, the length of the temporary detention may not be too long, so as to avoid excessively interfering with the detainee's personal freedom. Moreover, the Agency's current practice results in around seventy

percent of detainees being repatriated within fifteen days (*see* National Immigration Agency Memorandum Yi-Shu-Zhuan-Yi-Lian No. 1020011457, January 9, 2013). Given the foregoing considerations, the maximum duration for the temporary detention imposed by the Agency shall not exceed fifteen days.

[4] In the event that a detainee does not object to or request judicial review of the detention during the period of temporary detention and the detention period is about to expire, if the Agency deems it necessary to continue the detention, an impartial and independent court shall, in accordance with the law, review and decide whether the temporary detention, as stipulated in the disputed provision, shall be extended. The reason is that such extension involves a long-term deprivation of personal freedom and thus must comply with the due process requirements of personal freedom protection under the Constitution. Accordingly, the Agency shall transfer the detainee to a court prior to the expiration of the temporary detention and apply for a ruling to continue the detention; thereafter, if, in accordance with the law, it is necessary to extend the detention again, such extension shall be handled in the same manner.

[5] In sum, the disputed provision authorizes the Agency to temporarily detain foreign nationals facing deportation via administrative acts. It is not unconstitutional that the disputed provision allows a temporary detention for a reasonable period due to the repatriation operation. As far as the necessary protection of a detainee is concerned, Article 38, Paragraph 8 of the Act, as amended on November 23, 2011, has already provided that the detainee shall be notified in writing using a language comprehensible to him; the written notice shall contain the reason of the detention, and the methods, time and relevant authorities for remedies; and that notice shall also be given to the embassy or authorized organization from the detainee's nation of origin. Nevertheless, the disputed provision can hardly be deemed to have sufficiently protected the fundamental human rights of detainees, because it does not afford temporary

detainees with prompt and effective judicial remedies. Therefore, the disputed provision violates due process of law under Article 8, Paragraph 1 of the Constitution. Furthermore, the disputed provision's allowance for the Agency to extend the temporary detention without court review also contravenes the aforementioned meaning and purpose of personal freedom protection under the Constitution.

[6] Amending the laws relevant to this case will require a certain period of time, in order to preserve human dignity while also protecting the rights of foreign nationals and ensuring national security. The amendments should contain a thoroughly-studied and comprehensive set of supporting regulations, for instance, whether to allow release on bail or release of detainees to the custody of another, as well as legal aid and how to structure the mechanisms for hearing cases, such as the courts' speedy review and appellate remedies. The amendments should provide regulations for the facilities of immigration detention centers and the reasonableness of their management. The amendments should also include comprehensive regulations on issues including the effect of the original temporary detention disposition when the detainee objects to or requests judicial review on whether to impose detention, as well as whether the scope of judicial review should necessarily include the deportation decision. In light of the foregoing, the relevant authorities should review and amend the disputed provision and relevant statutes in accordance with the meaning of this Interpretation within two years from the issuance of this Interpretation. The unconstitutional portions of the disputed provision shall become null and void if they have not been amended within two years from the issuance of this Interpretation.

[7] The petitioners argued that the term "detention" in Article 1 of the Habeas Corpus Act should include the "[immigration] detention" in the disputed provision, and thus a person who is not otherwise being arrested and detained as

a criminal suspect may petition for habeas corpus. Accordingly, the petitioners challenge the appropriateness of the final criminal judgments of the Taiwan High Court Taichung Branch 99 Kang No. 300 (2010) and the Taiwan High Court 99 Kang No. 543 (2010). The petitioners' arguments actually disputed the appropriateness of the fact finding and application of law in the courts' final judgments rather than specifically challenging the constitutionality of Article 1 of the Habeas Corpus Act. The petitioners also challenged the constitutionality of Article 38, Paragraphs 2 and 3 of the Act (as amended on December 26, 2007), Article 36, Paragraphs 2 to 5 and Article 38, Paragraph 1, Subparagraph 4 of the Act (as amended on November 23, 2011), as well as Article 8 of the Habeas Corpus Act. However, the petitioners may not petition for an interpretation of these provisions, because the courts did not apply them in the final judgments on which the petitioners relied. The aforementioned portions of the petitions do not comply with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and shall all be dismissed in accordance with Paragraph 3 of the same Article.

Background Note by Rong-Gen LI

In 2008, the Agency issued SU Hu-Hsing, a Thai national, a deportation order because she provided false information on her immigration documents. However, SU did not physically leave Taiwan after receiving the order and was arrested in 2010. Based on Article 38, Paragraph 1, Subparagraph 1 (failure to depart the state in accordance with a deportation order) and Subparagraph 2 (illegal entry or overstay beyond the period of stay or residence) of the Act, as amended on December 26, 2007, the Agency detained SU at the Nantou Detention Center for 90 days before SU was repatriated.

Purwati, an Indonesian national, was dismissed by her employer after she fled from her place of employment at the end of 2008. In 2010, the Agency

detained Purwati based on Article 38, Paragraph 1, Subparagraph 2 (overstaying the period of residence) of the Act. Purwati was detained for 145 days before repatriation.

While under detention, SU and Purwati respectively petitioned for habeas corpus, but both were rejected by the courts on the grounds that they did not meet the requirements of Article 1 of the Habeas Corpus Act, because they were not arrested and detained as criminal suspects. SU and Purwati then respectively petitioned for interpretation, arguing that the foregoing provisions were unconstitutional.

Before J.Y. Interpretation No. 708, the Constitutional Court had issued several interpretations with respect to personal protection. In this Interpretation, the Constitutional Court holds that Article 8 of the Constitution also applies to foreign nationals. The personal protection for foreign nationals, nevertheless, may be different from citizens. Detention for repatriation could be decided by the immigration agency, instead of a court. The reason is that the restrictions on personal freedom of criminal defendants and non-criminal defendants differ. A foreign national does not have the right to freely enter the state's territory. In addition, the detention is to prepare for the repatriation and an exercise of sovereignty. The temporary detention is not in violation of Article 8, Paragraph 1 of the Constitution. The length of detention, nevertheless, is not to exceed fifteen days.

According to the meaning and purpose of the foregoing provision of the Constitution, however, the provisions with respect to a detained foreign national should be compliance with due process of law. A detained individual should be given an opportunity for prompt judicial review of the detention. The detained foreign national should be transferred to a court within twenty-four hours if he/she objects the temporary detention. A detained foreign national has the right

to be informed in writing using a comprehensible language. The notice should include the reason, legal basis and judicial remedy of detention. The written notice should be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized organization of the detainee's nation of origin.

J.Y. Interpretation No. 708 establishes the due process for the personal protection for foreign nationals. It emphasizes that the detention of foreign nationals could be decided by the immigration agency, but that a detained foreign national has the right to request a prompt judicial review of the detention. In order words, according to Article 8, Paragraph 1 of the Constitution, a foreign national may not have the right to be tried by a court in regard to the repatriation, but the detainee should be guaranteed the right to prompt judicial remedy. A foreign national's personal freedom is also within the protection of Article 8 of the Constitution.

After the issuance of J.Y. Interpretation No. 708, the Constitutional Court tried a similar case. In J.Y. Interpretation No. 710, the Court held that the temporary detention provision in the Act Governing Relations between the People of the Taiwan Area and the Mainland Area was unconstitutional because it did not specify the reasons of temporary detention and did not provide a detainee with prompt judicial remedy. In addition, that provision did not specify a certain period of time of temporary detention. Both J.Y. Interpretation Nos. 708 and 710 were related to the personal freedom of non-citizens. The two interpretations held that the immigration agency is allowed to temporarily detain foreign nationals and people of the mainland area for repatriation, but that such detention should be regulated by substantive due process law, and prompt judicial remedy is to be given to detainees. In sum, according to these two interpretations, the personal freedom of foreign nationals and people from the mainland area is also within the protection of Article 8 of the Constitution.

J.Y. Interpretation No. 690 (September 30, 2011)*

Compulsory Quarantine and Personal Liberty and Security Case

Issue

Is the "necessary measures" provision of Article 37, Paragraph 1 of the Communicable Disease Control Act, including compulsory quarantine, unconstitutional?

Holding

[1] Article 37, Paragraph 1 of the Communicable Disease Control Act, revised January 30, 2002, provides: "Any person who has physical contacts with patients of contagious diseases, or is suspected of being infected, shall be detained and checked by the competent authority, and if necessary, shall be ordered to move into designated places for further examinations, or to take other necessary measures, including immunization, etc." As far as the provision of necessary measures is read to include compulsory quarantine, and hence deprivation of personal freedom, said provision neither violates the void-for-vagueness doctrine, nor the principle of proportionality implicit in Article 23 of the Constitution. It also does not violate the due process requirement of Article 8 of the Constitution.

[2] Any person who has had physical contacts with patients of contagious diseases, or is suspected of being infected, while compulsorily quarantined, is deprived of his or her personal freedom. In order to keep the length of quarantine period reasonable and not excessive, the law should prescribe a reasonable maximum time for compulsory quarantine, as well as organizational, procedural and other regulations for carrying out said compulsory quarantine. Moreover,

* Translation by Huai-Ching R. TSAI

prompt remedies and an adequate compensation system should be established for persons and their families disputing the compulsory quarantine. The authorities concerned should promptly review the Communicable Disease Control Act.

Reasoning

[1] Article 8 of the Constitution stipulates that personal freedom shall be safeguarded. However, if the government restricts personal freedom using a law that does not violate the void-for-vagueness doctrine or the principle of proportionality implicit in Article 23 of the Constitution, and follows requisite judicial procedures or other due process of law, then it cannot be said that Article 8 of the Constitution is violated (*see* J.Y. Interpretations Nos. 602 and 677). Where the restriction of personal freedom has reached a degree of deprivation, in light of the manner of actual deprivation, purpose and resulting effects, adequate standards shall be defined for review (*see* J.Y. Interpretations Nos. 392, 588, 636 and 664).

[2] Because the occurrence and spread of contagious diseases endanger the life and health of people, the government should take appropriate preventative measures to counter it. To prevent the infection and spread of contagious diseases, Article 37, Paragraph 1 of the Communicable Disease Control Act, revised January 30, 2001, (hereinafter "former Communicable Disease Control Act"), provides: "Any person who has had contacts with patients of contagious diseases, or is suspected of being infected, shall be detained for examination by the competent authority, and if necessary, shall be ordered to move into designated places for inspection, or to receive immunization or other necessary measures" (hereinafter "the provision at issue"). The term "necessary measures" refers to various statutes regulating the implementation of necessary measures to prevent the infection and spread of contagious diseases and is not limited to the examples

of detention for examination, order to move to designated places for inspection and immunization mentioned in the provision at issue. Article 5, Paragraph 1 of the Provisional Regulations Governing Prevention and Relief of SARS, promulgated on May 2, 2003, retroactively effective March 1, 2003 (repealed December 31, 2004), provides: "When implementing promptly effective epidemic prevention measures, government authorities at all levels shall designate specified areas for epidemic prevention or disease control; and if necessary, may compel quarantines, relocation of residents, or any other disease control measures." It can be said that the legislators intended to retroactively strengthen the Communicable Disease Control Act by this legislative measure, expressly recognizing that compulsory quarantine is a necessary measure in the sense of the provision at issue. Furthermore, Regulation No. 0921700022, promulgated by the Department of Public Health, Executive Yuan, on May 8, 2003, "serving as the legal basis for government measures adopted to control Severe Acute Respiratory Syndrome (SARS)," clearly shows that the so-called necessary measures for disease control mentioned in the provision at issue include concentrated quarantine. Compulsory quarantine obliges people to stay at a specified place for a specified period and not to contact other persons, or else suffer mandatory punishment. This is a deprivation of personal freedom.

[3] The void-for-vagueness doctrine requires the text of law be detailed and specific. Nevertheless, it also allows legislators, when drafting legislation, to consider the complex nature of real life and the appropriateness of application in real cases, and to employ indeterminate legal concepts when they see fit. If the meaning of a statute is not too difficult to ascertain from legislative intent and the entire context of the legal system, and if whether the facts of the case fall within the statute's normative objective or not is foreseeable by the people subject to the regulation, as well as determinable by the judiciary, then the void-for-vagueness doctrine is not violated (*see* also J.Y. Interpretations Nos. 432, 521, 594 and 602).

According to Article 8 of the Constitution, the government's right to restrict personal freedom, if it involves severe restriction of personal freedom tantamount to criminal punishment, shall be subject to strict scrutiny to determine whether its statutory elements conform to the void-for-vagueness doctrine (*see* J.Y. Interpretation No. 636). Although compulsory quarantine restricts personal freedom to a specified location, its purpose is to protect people's life, safety and health. It differs from criminal punishment in nature. It also involves the expertise of medical treatment and public health. Therefore, a more lenient test shall be adopted for judicial review in lieu of the strict scrutiny test used for reviewing criminal sanctions restraining personal freedom. Although the provision at issue does not explicitly mention compulsory quarantine in its illustrations, it does provide for ordering people to move into designated places, so that persons who have had contacts with patients of contagious disease, or are suspected of being infected, cannot keep in touch with the outside world. This kind of compulsory quarantine is a necessary measure for the provision at issue. Judging from literal interpretation and legislative intent of the statute, it is not unforeseeable by people subject to the regulation. Its meaning can also be determined by common sense in society, and it must furthermore obtain affirmation by way of judicial review. Hence, it does not violate the void-for-vagueness doctrine.

[4] The purpose of compulsory quarantine contained in the controversial "necessary measures" provision is to authorize the competent authority to detain persons in designated places who have had contacts with patients of contagious diseases or are suspected of being infected, to isolate them from the outside world and to undertake further investigations, medical treatments or other measures, so as to prevent the spread of contagious diseases and to safeguard the life and health of citizens. This legislative purpose is legitimate. Although compulsory quarantine is a deprivation of the personal freedom of a quarantined person, whether or not this violates the principle of proportionality should still be subject

to a strict scrutiny test. The purpose of compulsory quarantine prescribed by the provision at issue is not directly to restrain the personal freedom of quarantined persons, but rather to deal with the abrupt outbreak of a new type of contagious disease. Various statutes regulating the quick spread of contagious diseases inflicting, or that could inflict, multiple deaths or serious injuries nationwide (*e.g.* the Severe Acute Respiratory Syndrome outbreak in March 2003, hereinafter SARS) exist in order to prevent the spread of disease, to gain quick control of the epidemic situation, for important public interests to mitigate fear, anxiety etc. in society. These statutes order persons who have had contacts with patients of contagious diseases, or who are suspicious of being infected, to move into designated places for a reasonable period of mandatory quarantine and for further observation, examination, immunization, and medical treatment. The purpose of compulsory quarantine is to protect the quarantined person's life and health. Since there is no other less restrictive alternative, it is a necessary and effective method for disease control. Although the provision at issue did not prescribe in detail the length of period for compulsory quarantine, the length for necessary measures is related to pathogeny, pathway, incubation period, and seriousness of the contagious disease. Hence it should be determined by the competent authority, weighing the surrounding circumstances and opinions of World Health Organization (WHO), in accordance with the principle of proportionality (taking the abovementioned SARS as an example, Taipei City Government, the competent authority, had determined that the quarantine period was to be 14 days, weighing factors such as lack of international experience, no conclusive medical method in handling this new disease, the fact that the epidemic had already caused many serious injuries and deaths etc. domestically and abroad, as well as the WHO's opinions; see Public Health Disease Regulation Letter No. 09945686400, published January 18, 2011, by the Public Health Bureau, Taipei City Government). Moreover, from the viewpoint of violation of personal

freedom, although compulsory quarantine contained in the necessary measures provision at issue causes deprivation of the personal freedom of quarantined persons. Yet it protects their life and health, and does not have the same severe impact on human dignity of quarantined persons as the sanction of detention. In sum, compulsory quarantine is a reasonable and necessary method for protecting important public interests. It does not constitute an excessive burden on quarantined persons and does not violate the principle of proportionality implicit in Article 23 of the Constitution.

[5] Personal freedom is an important fundamental human right. It shall receive adequate protection. Any deprivation or limitation of personal freedom shall abide by due process of law. In determining whether respective procedural standards are adequate and reasonable, besides considering specific provisions in the Constitution and the types of fundamental rights involved, also the facts of a specific case, the extent and scope of the fundamental rights invaded, the public interests pursued, possible alternative procedures, related costs and other factors must be comprehensively evaluated (*see* J.Y. Interpretation No. 639). As indicated above, the purpose of compulsory quarantine is to protect people's life and health, unlike the nature of criminal punishment. Therefore, the due process of law that must be followed is not necessarily the same as in a criminal proceeding restricting the personal freedom of a defendant. Compulsory quarantine and other disease control decisions must be made by the specialized competent authority, based on knowledge of medical treatment and public health, follow stringent organizational procedures and balance seriousness of the epidemic and surrounding circumstances, in order to form an objective decision and to ensure correctness. It differs from the case where an independent, impartial court determines whether or not to detain a person for trial and interrogation. The key to epidemic control lies in the swift adoption of adequate measures to achieve the goal. The central competent authority in charge of

controlling contagious diseases shall lay down policies and plans for disease control, including immunization, disease prevention, monitoring, reporting, and investigation of epidemic situations, inspections, treatments, training and other measures. The local competent authority shall develop implementation plans based on the policies and plans of the central competent authority, taking into account the particular requirements for epidemic prevention in its locality, and carry out the plan (*see* former Communicable Disease Control Act, Article 4, Paragraph 1, Subparagraph 1, Item 1; Subparagraph 2, Item 1). Therefore, relevant measures for controlling contagious diseases shall refer to the expertise of the competent authority. A decision made by the competent authority to impose necessary measures for compulsory quarantine, balancing seriousness of the epidemic and surrounding circumstances, will be better than a decision made by the court for prompt disease control. As for the legality aspect, the competent authority, when making the abovementioned measures, shall follow the Administrative Procedure Act and relevant procedures prescribed by other laws. Persons ordered to move into designated places for compulsory quarantine, if they refuse to accept the measures of the competent authority, may still resort to administrative procedures for remedy. Therefore, compulsory quarantine for the provision at issue, although not ordered by courts, does not violate Article 8 of the Constitution guaranteeing due process to protect personal freedom.

[6] The provision at issue did not prescribe the period of compulsory quarantine, nor did it leave the decision with the courts to impose compulsory quarantine. Although these do not affect its constitutionality, a person who has had contacts with patients of contagious disease, or who is suspicious of being infected, is deprived of his or her personal freedom while in compulsory quarantine. In order to keep his or her quarantine time within a reasonable length, it is better to stipulate statutorily the maximum length of compulsory quarantine, the organs and procedures for implementing compulsory quarantine, the court remedies for

quarantined persons or their families who refuse compulsory quarantine, and the mechanism for compensating the quarantined persons. The relevant organs shall thoroughly review the Contagious Disease Control Act for revision.

[7] As for the allegations that Article 11, Article 24, Paragraph 1, Subparagraph 2 and Article 34, Paragraph 1 of the previous Contagious Disease Control Act violate Article 8 and Article 23 of the Constitution, petitioner merely disputed by subjective opinion the appropriateness of the court in applying the law to the facts and did not allege concretely how the provision at issue contradicts the Constitution in an objective sense. Because these allegations do not conform to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, they shall be dismissed according Subparagraph 3 of the same article. It is hereby noted as well.

Background Note by Mong-Hwa CHIN

The petitioner of this case was a physician working at Taipei City Ho-Ping Hospital. In April 2003, the epidemic of Severe Acute Respiratory Syndrome broke out in Taipei. The Taipei City Government ordered all Ho-Ping Hospital personnel who had "had physical contacts with patients of contagious diseases, or [who were] suspected of being infected" to return to the hospital for quarantine. Petitioner failed to follow that order, which resulted in a record of demerit, a fine, and a three-month suspension. The petitioner sought to challenge the Communicable Disease Control Act based on the vagueness of the statute, the proportionality principle, and due process of law.

This Interpretation was extremely controversial when it was announced in 2011. In their dissenting opinions, four justices addressed concerns that this decision failed to uphold the constitutional standard of due process of law, especially considering that this case involves the deprivation of personal liberty

and security. Justice Tzong-Li HSU, for example, criticized the majority opinion for endorsing a procedure that authorizes authorities to deprive people's freedom without judicial scrutiny.

It is also worth comparing this case with J.Y. Interpretation No. 664. In J.Y. Interpretation No. 664, the Court ruled that a preventative detention mechanism designed for juveniles who frequently skive or run away from home, authorized by the Juvenile Proceeding Act, was constitutional. However, unlike J.Y. Interpretation No. 690, in the juvenile scenario, it was the courts that had the authority to make preventative detention decisions. Therefore, J.Y. Interpretation No. 690 is extremely important in that it essentially creates a different constitutional standard for the deprivation of personal liberty and security.

J.Y. Interpretation No. 588 (January 28, 2005)*

Deprivation of Personal Liberty and Security Case

Issue

Are the various reasons for arrest and custody listed in Article 17, Paragraph 1 of the Administrative Execution Act unconstitutional? Are the provisions of Article 17, Paragraphs 2 and 3 and Article 19, Paragraph 1 of the said Act consistent with the principle of due process of law?

Holding

[1] For purposes of substantial public interests, the Constitution stipulates that the legislature may use compulsory measures that restrain the freedom of people in order to ensure that they fulfill their legal obligations within the scope that is consistent with the principle of proportionality. The provision concerning "custody" in the Administrative Execution Act is intended to satisfy the obligation of monetary payment under public law whereby an indirect compulsory measure to restrain the obligor's body is taken when the obligor is able but unwilling to perform, which is not disallowed by the Constitution. However, in respect of those reasons under which application may be made to the court for an order of custody as listed in Article 17, Paragraph 1 in reference to Paragraph II of the same Article, only Subparagraphs 1, 2, and 3 of Paragraph 1, which provide, respectively: "where the obligor is apparently able to perform but intentionally does not perform"; "where the obligor apparently is likely to abscond"; and "where the obligor has concealed or disposed of the assets that are subject to the compulsory execution," are difficult to consider as beyond the

* Translation and note by Vincent C. KUAN

scope of necessity. The remaining provisions, *i.e.*, Subparagraphs 4, 5 and 6 of the same Paragraph, which provide, "where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution"; "where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate"; and "where the obligor refused to appear without legitimate reason after legal notice was served," are clearly beyond the boundary of necessity and thus violate the intent of Article 23 of the Constitution.

[2] In respect of those reasons under which application may be made to the court for an order of arrest as listed in Article 17, Paragraph 2 in reference to Paragraph 1 of the same Article, only Subparagraphs 2 and 6 of Paragraph 1 which provide, respectively, "where the obligor apparently is likely to abscond," and "where the obligor refused to appear without legitimate reason after legal notice was served," may be deemed to have satisfied the requirement of the principle of proportionality. The remaining provisions, *i.e*., Subparagraphs 1, 3, 4, and 5 of the same paragraph, which provide, "where the obligor is apparently able to perform but intentionally does not perform"; "where the obligor has concealed or disposed of the assets that are subject to the compulsory execution"; "where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution"; and "where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate," are clearly beyond the boundary of necessity and thus also violate the intent of Article 23 of Constitution.

[3] Liberty and security of person is an essential prerequisite for people to enjoy their various rights of freedom under the Constitution. The phrase "the procedure prescribed by law" described in Article 8, Paragraph 1 of the Constitution means that the procedure based on which the government imposes any measures to restrain a person's liberty, whether he or she is a criminal defendant or not, must

not only have statutory foundation, but also fulfill necessary judicial procedure or other due process of law. This procedure is within the scope of constitutional reservation, and even the legislative body cannot limit it by enacting statutes to that effect. However, the restrictions imposed on the liberty and security of the person of a criminal defendant and a non-criminal defendant are, after all, different in nature, and therefore the judicial procedure or other due process of law need not be identical. Custody is meant to confine a person to a bounded area during a certain period of time, which shall fall within the meaning of "detention" as prescribed in Article 8, Paragraph 1 of the Constitution. Therefore, it is essential before the decision of custody is made that certain necessary proceedings be carried out, under which the matter will be heard by an impartial and fair third party, *i.e.*, the court, and the obligor will appear and participate in the proceeding so as to both ascertain whether the legal requirements and necessity of the custody are satisfied, and to enable the obligor to have an opportunity to defend himself/herself by producing evidence in his or her favor for the court to investigate. Thus, the constitutional guarantee of the liberty and security of person may be realized. In accordance with Article 17, Paragraph 3 of the Administrative Execution Act, the court should render its ruling concerning custody within five days of the application. In other words, the court may elect not to try and hear the matter immediately after the application is filed, which renders the protection of human rights incomplete. The provision that a ruling should be made "within five days" is ill considered, and the authorities concerned shall review and rectify it accordingly. In addition, under Article 17, Paragraph 2 of the Administrative Execution Act, which provides, "Where the obligor neither performs the obligation nor provides collateral afterward upon expiration of the deadline prescribed in the preceding paragraph, the Administrative Enforcement Office may apply to the competent court for an order of arrest and custody"; and Article 19, Paragraph 1 thereof, which provides,

"After rendering the order of arrest and custody, the court shall deliver the warrant of arrest and custody to the Administrative Enforcement Office, which office shall assign junior enforcement officers to make the arrest and send the arrested obligor to the institution of custody," when the Administrative Enforcement Office applies for arrest and custody concurrently and the court makes a concurrent order of arrest and custody, it is impossible to carry out a hearing, since the obligor concerned will not have appeared in court, for the arrest has not yet been made. Nevertheless, the court can still go so far as to render a ruling of custody, which, in particular, violates the requirement of the aforementioned due process of law. Furthermore, if and when an application for custody is made under Article 17, Paragraph 2 and Article 17, Paragraph 1, Subparagraph 6 of the Administrative Execution Act, which provides, "Where the obligor refused to appear without legitimate reason after legal notice was served," it is also impossible for the court to carry out a hearing and trial, since the obligor is not present. However, the court can still render a ruling of custody, which violates the aforementioned constitutional intent of due process of law as well.

[4] The "police organ" prescribed in Article 8, Paragraph 1 of the Constitution, providing, "Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law" means not only the institution named "police" under organizational law but also any agency or person who is authorized by law to use the means of interference and suppression for the purposes of preserving social order or promoting public interests. Therefore, the provision of Article 19, Paragraph 1 of the Administrative Execution Act in respect of the arrest and custody exercised by the junior enforcement officers sent by the Administrative Enforcement Office is not in violation of the constitutional intent mentioned above.

[5] The aforesaid provisions of the Administrative Execution Act that violate the constitutional intents shall become null and void no later than six months from the date of publication of this Interpretation.

Reasoning

[1] For purposes of substantial public interests, the Constitution stipulates that the legislature may use compulsory measures that restrain the freedom of people in order to ensure that they fulfill their legal obligations within the scope that is consistent with the principle of proportionality. The Administrative Execution Act is the procedural rule for the purposes of practicing administrative law, upholding their effective exercise, and compelling people to perform their obligations under public law by using the force of the state. With respect to the monetary obligations under public law, the indicated obligor shall perform automatically without the enforcement of the state, and the realization of the payment under public law has a material relationship with the finance and the measures of society, health and welfare of the state; the maintenance of the order of society is based on it, and the public interest relies on it to increase revenue. "Custody" is a compulsory measure whereby the obligor's body is restrained in a bounded area for a period of time for the purpose of compelling him or her to perform his or her obligations, and is a method of indirect measure of enforcement. Although custody restrains an obligor's body, the rule concerning "custody" in the Administrative Execution Act is intended to fulfill the obligation of monetary payment under public law, where the obligor is indeed able but unwilling to perform, which is an indirect and compulsory method to compel the person to fulfill the obligation of monetary payment under public law that he or she is able to perform but has refused to perform. Given the above statement, it is not disallowed by the Constitution.

[2] Although the principle of proportionality is a fundamental principle on the

constitutional level, attention should always be paid to the interpretation and application of individual regulations; in particular, to "legislation," the purpose of which is to prevent people from excessive intrusion by the legislative authorities. In respect of those reasons under which application may be made to the court for an order of custody as listed in Article 17, Paragraph 1 in reference to Paragraph 2 of the same Article, only Subparagraphs 1, 2, and 3 of Paragraph 1, which provide, respectively: "where the obligor is apparently able to perform but intentionally does not perform"; "where the obligor apparently is likely to abscond"; and "where the obligor has concealed or disposed of the assets that are subject to the compulsory execution," are difficult to consider as beyond the scope of necessity and therefore may be justified because they require the prerequisite that the enforcement authorities hold substantial evidence to corroborate the obligor's capability of performance (*see* Article 8, Paragraph 1, Subparagraph 3 of the Administrative Execution Act). The remaining provisions, *i.e.*, Subparagraphs 4, 5, and 6 of the same Paragraph, which provide, "where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution"; "where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate"; and "where the obligor refused to appear without legitimate reason after legal notice was served," are clearly beyond the boundary of necessity and thus violate the intent of Article 23 of the Constitution because they fail to ascertain whether the obligor has the capability of performance and whether the enforcement authorities have less intrusive means available (*e.g.*, having not exhausted all other available execution measures) under the circumstances to investigate the assets of liability subject to the execution but, instead, once any such conditions occur, no tracking of assets is required before an application may be made to the court for an order of custody. With respect to the judgment as to the capability of performance, the authorities concerned should review the relevant information

about the obligor's income, property and ability to work to determine whether payment (performance) may be anticipated from the obligor's salary or other resources (*e.g.*, disposal of property, reduction of living expenses, etc.). Naturally, it should be taken into account whether there remain assets necessary to maintain the obligor's basic livelihood (*see* Article 21, Subparagraph 1 of the Administrative Execution Act); and, as to "work ability," the age and health status of the obligor, as well as demand and supply in the labor market, should also be considered.

[3] Arrest is a measure to force an obligor to appear and is also a kind of restraint on the liberty and security of person. The arrest of the obligor as prescribed in Article 17 of the Administrative Execution Act is for the purpose of compelling the obligor to appear, state or report. Although the restraint imposed on the liberty and security of person is less restrictive than custody, and the degrees of intrusion are different, it does not mean that the application of the principle of proportionality provided by Article 23 of the Constitution can be excluded. In respect of those reasons under which application may be made to the court for an order of arrest as listed in Article 17, Paragraph 2 in reference to Paragraph 1 of the same Article, only Subparagraphs 2 and 6 of Paragraph 1 which provide, respectively, "where the obligor apparently is likely to abscond," and "where the obligor refused to appear without legitimate reason after legal notice was served," may be deemed to have satisfied the requirement of the principle of proportionality; the remaining provisions, *i.e.*, Subparagraphs 1, 3, 4 and 5 of the same paragraph which provide, "where the obligor is apparently able to perform but intentionally does not perform"; "where the obligor has concealed or disposed of the assets that are subject to the compulsory execution"; "where the obligor refused to state to the execution personnel when they investigated as to the subject matter of execution"; and "where the obligor refused to report or made a false report after he or she was ordered to report the status of the estate,"

are clearly beyond the boundary of necessity and thus also violate the intent of Article 23 of the Constitution because they fail to stipulate whether the enforcement authorities should first execute the assets of liability or make further asset tracking, or whether the obligor has made a statement to the enforcement personnel, thus rendering it unnecessary to make the arrest, but, instead, it constitutes a reason for the authority to apply for an order of arrest once the obligor neither performs in due time nor furnishes collateral.

[4] Liberty and security of person is an essential prerequisite for people to enjoy their various rights of freedom under the Constitution. The phrase "the procedure prescribed by law" described in Article 8, Paragraph 1 of the Constitution means that the procedure based on which the government imposes any measures to restrain a person's liberty, whether he or she is a criminal defendant or not, must not only have statutory foundation, but also fulfill the necessary judicial procedure or other due process of law (*see* J.Y. Interpretation No. 384). This procedure is within the scope of constitutional reservation, and even the legislative body cannot limit deprive it by enacting statutes to that effect. However, the restrictions imposed on the liberty and security of the person of a criminal defendant and a non-criminal defendant are, after all, different in nature, and therefore the judicial procedure or other due process of law need not be identical. Custody is meant to confine a person to a bounded area during a certain period of time, which shall fall within the meaning of "detention" as prescribed in Article 8, Paragraph 1 of the Constitution. However, it is different from the detention in a criminal procedure in terms of purposes. Detention emphasizes procedural security that aims to ensure the appearance of the defendant throughout the entire criminal procedure so as to facilitate the effective proceeding of investigation and trial, as well as effective execution of the judgment. The purpose of custody, as mentioned above, is to make the obligor perform the obligation of paying money. It is a kind of indirect measure of

execution, which is not designed to secure the obligor's body, so the required judicial procedure need not be exactly the same as that of detention. Nonetheless, as is true with detention, it is essential before the decision of custody is made that certain necessary proceedings be implemented, under which the matter will be heard by an impartial and fair third party, *i.e.*, the court, and the obligor will appear and participate in the proceeding so as to both find out whether the legal requirements and necessity of the custody are satisfied, and to enable the obligor to have an opportunity to defend himself/herself by producing evidence in his or her favor for the court to investigate. Thus, the constitutional guarantee of the liberty and security of person may be realized.

[5] Article 17, Paragraphs 2 and 3 and Article 19, Paragraph 1 of the Administrative Execution Act provide, respectively, "Where the obligor neither performs the obligation nor provides collateral upon expiration of the deadline prescribed in the preceding paragraph, the Administrative Enforcement Office may apply to the competent court for an order of arrest and custody"; "The court shall render the order within five days of the application provided in the preceding paragraph. In case of dissatisfaction with the order, the Administrative Enforcement Office or the obligor may file an appeal within ten days; the provisions concerning the appeal to set aside court rulings as prescribed under the Code of Civil Procedure shall apply *mutatis mutandis* to the proceeding of the aforesaid appeal"; and "After rendering the order of arrest and custody, the court shall deliver the warrant of arrest and custody to the Administrative Enforcement Office, which office shall assign junior enforcement officers to make the arrest and send the arrested obligor to the institution of custody." With respect to the order of custody, the Compulsory Execution Act and the Code of Criminal Procedure shall be applicable *mutatis mutandis* in accordance with Article 17, Paragraph 5 of the said Act. However, the Administrative Execution Act simultaneously provides for arrest and custody (*see* Article 17, Paragraph 2

et seq.), which is different from the Compulsory Execution Act (*see* Article 21, Article 22, Paragraphs 1 and 2 thereof) and the Code of Criminal Procedure (*see* Articles 75 et seq., 93, 101 et seq. and the second sentence of 228, Paragraph 4 thereof). Therefore, besides "arrest," or "custody" alone or "custody subsequent to arrest," the Administrative Enforcement Office may decide to consolidate them and apply for arrest and custody, and the court may render an order consolidating arrest and custody. Additionally, according to the said Article 19, Paragraph 1 of the Administrative Execution Act, "after rendering the order of arrest and custody, the court…may carry out the arrest of the obligor and send the obligor directly to the institution of custody," which is also a special provision under the said act that is absent in the Compulsory Execution Act. Even the Code of Criminal Procedure does not expressly provide that, after arrest, the defendant may be sent to prison directly (*see* the first sentence of Article 91 and Article 103, Paragraph 1 thereof). Therefore, it is impossible for the Compulsory Execution Act and the Code of Criminal Procedure to be applied *mutatis mutandis* under these circumstances. In addition, under Article 17, Paragraph 3 of the Administrative Execution Act, the court shall render its ruling concerning custody "within five days" of the application, which is also a special provision that is different from the Compulsory Execution Act (*see* Article 22-5 thereof), to which the Code of Criminal Procedure shall be applicable *mutatis mutandis*. According to Article 93, Paragraph 5 of the Code of Criminal Procedure, after receiving the application for detention, the court shall interrogate the defendant immediately. Articles 100 and 101-1 thereof further provide that, "upon interrogation of the defendant by the court," the defendant may (by a ruling) be detained if the court deems it appropriate or necessary. In other words, after accepting the application for detention, the court shall interrogate immediately and decide whether the detention should be ordered. The reason for immediate interrogation is to afford the "defendant" an opportunity to plead against the

detention, whereas the court may also investigate into the necessity of detention. The reason for an immediate decision as to whether detention should be made after interrogation is to protect human rights by preventing unreasonable restraint of a defendant's physical freedom. Nonetheless, under the aforesaid provisions of the Administrative Execution Act, the court may elect not to try and hear the matter immediately after the application is filed and may render its ruling "within five days," which obviously renders the protection of human rights incomplete. The provision that a ruling should be made "within five days" fails to consider the foregoing reasons and, accordingly, shall be reviewed and rectified for its inadequacy in protecting human rights.

[6] Furthermore, where the Administrative Enforcement Office applies for arrest and custody concurrently, the obligor for whom a ruling of custody is issued naturally cannot appear by means of arrest, and it is thus unlikely that he or she will have a hearing and trial. However, the court can still render an order of custody based merely on information furnished unilaterally by the Administrative Enforcement Office without any oral hearing and trial to determine whether the application for custody satisfies statutory requirements and whether custody is necessary. And, thus, the obligor is not given any opportunity to defend himself/herself by proffering favorable pleas and pointing out means of proof for the court to deliberate before the court issues an order for his or her custody and sends him or her directly to an institution of custody after his/her arrest. There is no hearing at all, not even an inquiry as to his/her "identity," (*i.e.*, inquiry as to whether the person is the one subject to the arrest) so it violates the requirement of due process of law more than anything else. Moreover, as for another reason that the court may give an order of custody, *i.e.*, "where the obligor refused to appear without legitimate reason after legal notice was served," it is also not found in the Compulsory Execution Act (*see* Article 22, Paragraphs 1 and 2 thereof) and the Code of Criminal Procedure (*see* Articles 101 and 101-

1 thereof). Since the obligor did not appear, it is also impossible for the court to carry out the trial. However, the court can still render an order of custody as per an application based on written hearings, which, needless to say, is contrary to the aforesaid constitutional intent of due process of law as well.

[7] As to the proceedings regarding hearings on custody, an obligor should be given an opportunity to appear for the hearing, which is absolutely essential. In addition, if the materials submitted by the Administrative Enforcement Office are considered by the court to be insufficient or still ambiguous, the court may order the said office to have personnel appear before the court to make supplementary statements or submissions, and the office cannot refuse to do so. It should be noted that the required burden of proof for the office to apply under the said proceedings is met subject to the court's discretion rather than beyond a reasonable doubt.

[8] The "police" is a state administrative action or entity that is characterized by its authority to use compulsory means (interference, suppression) for the purposes of preserving social order or promoting public interests; it is a word of multiple meanings, *i.e.*, both broad and narrow, which are also substantive and formal, respectively. The broad, or substantive, meaning is observed in terms of its "function," *i.e.*, any and all actions that have the abovementioned qualities of the "police" or, in other words, that exercise the authority under this meaning. On the other hand, the narrow, or formal, meaning focuses on the organization of the police and limits the scope of the term to the form of a police organ--the Police Act. Thus, only the authorities and personnel expressly provided under the said Act satisfy the definition, while those who merely carry out the actions of police or shoulder the missions of the police do not. The said Administrative Execution Act provides expressly for the custody and arrest and the required order rendered by the court. In other words, a judicial review is required before it is granted so the "execution" can be made by the competent authority, namely,

the personnel of the Administrative Enforcement Office (*see* J.Y. Interpretation No. 559). Therefore, the "police organ" prescribed in Article 8, Paragraph 1 of the Constitution, which provides, "Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law" has adopted the broad meaning, denoting not only the institution named "police" under organizational law but also the functional "police," *i.e.*, any agency or person who is authorized by law to use the means of interference and suppression for the purposes of preserving social order or promoting public interests. Therefore, the provision of Article 19, Paragraph 1 of the Administrative Execution Act in respect of the arrest and custody exercised by the junior enforcement officers sent by the Administrative Enforcement Office is not in violation of the constitutional intent mentioned above.

[9] The aforesaid provisions of the Administrative Execution Act that violate the constitutional intents shall become null and void no later than six months from the date of publication of this Interpretation.

Background Note by the Translator

Petitioner, *i.e.*, Kuo-Hsun CHANG, Judge of the Shilin District Court of Taiwan (ten cases in total)

Kuo-Hsun CHANG, Judge of the Shilin District Court of Taiwan, while hearing a total of ten cases with respect to the applications for arrest and custody, had doubt as to the constitutionality of the applicable provisions of the Administrative Execution Act, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.

Petitioner, *i.e.*, Yan-Cheng WEN, Judge of the Taoyuan District Court of Taiwan (fourteen cases in total)

Yan-Cheng WEN, Judge of the Taoyuan District Court of Taiwan, while hearing a total of fourteen cases with respect to the applications for arrest and custody, suspected that Article 17 of the Administrative Execution Act and other applicable provisions thereof were in conflict with the Constitution, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.

Petitioner, *i.e.*, Yu-Jie KAO, Judge of the Shilin District Court of Taiwan Yu-Jie KAO, Judge of the Shilin District Court of Taiwan, while hearing a case with respect to the application for arrest and custody, suspected that Article 17 of the Administrative Execution Act and other applicable provisions thereof were in conflict with the Constitution, and hence ordered the stay of the proceedings and petitioned the Constitutional Court for interpretation.

J.Y. Interpretation No. 535 (December 4, 2001)*

Spot Checks Case

Issue

Are the provisions in the Police Service Act concerning spot checks unconstitutional?

Holding

[1] The Police Service Act, provisions of which include police services and the division of functions and specification of methods by which police services are to be provided, is not merely an organic act, but also an act of regulatory nature. According to Article 11, Subparagraph 3 of the said Act, spot checks are authorized as a method of law enforcement to be used by the police. However, spot checks, including inspections, street checks or interrogations may have substantial effects upon personal freedom, property rights, and the right to privacy, and hence, such checks must be exercised in accordance with specific legal principles guiding police functions and law enforcement. In order to fully ensure constitutional protections of people's fundamental rights and freedoms, the requirements and procedures of spot checks as well as legal remedies for unlawful checks must be specifically prescribed in the law.

[2] The relevant provisions concerning spot checks in the aforementioned Act never delegate unlimited authority to the police to exercise any check, law enforcement or interrogation without due consideration of time, place, manner or subjects. Unless otherwise prescribed in the law, the police shall limit checking

* Translation and Note by Wen-Chen CHANG

authority to public transportation, public places, or other places where danger exists or may exist according to reasonable and objective judgment. Among these places, some places may be private residences that must be protected to the same extent as a home. The police shall not exercise checking authority over any persons unless there is a reasonable belief that actions taken by such persons have caused or may cause danger; and in so doing, police must abide by the principle of proportionality and not go beyond the necessity. Before conducting any checks, police must inform the persons immediately of the reasons for exercising such checks and identify themselves clearly as law enforcement officers. Any spot check must be conducted on the spot. Unless the consent of persons to be checked is given, or if there is no alternative to identify persons to be checked, or if conducting on-the-spot checks may have harmful effects or jeopardize traffic flow or public tranquility, police are not permitted to request checked persons to go to a police station for further interrogation. After the identification of such persons is confirmed, police should permit them to leave without delay unless they are suspected of having committed a crime, in which case criminal law procedures should apply. To the extent that Article 11, Subparagraph 3, of the aforementioned Act is construed and applied, it is constitutional and not inconsistent with the constitutional protection of human rights. Nevertheless, the current laws concerning law enforcement are not sufficient; therefore, the competent authorities should review relevant provisions, taking into consideration this Interpretation as well as social circumstances, and enact new laws within two years after the date of announcement of this Interpretation to allow the police to deal with unexpected occurrences in law enforcement while sufficiently ensuring the people's freedom and the police's own safety.

Reasoning

[1] Pursuant to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional

Court Procedure Act, a person whose constitutional rights are illegally infringed upon and who has lodged a suit according to legal procedures may apply for constitutional interpretation on the grounds that the law or regulation applied in the final judgment is in violation of the Constitution. The issue of whether "the law or regulation applied in the final judgment" is in violation of the Constitution must be examined in substantial relation to the judgment. Taking criminal judgments as an example, the purpose of constitutional interpretation is not limited to substantive laws or procedures applied to determine crimes and prison terms in the judgment, but also includes the laws or regulations applied to decide on the illegality of concerned behaviors. With regard to the criminal judgment involved in this interpretation, the question of whether the applicant, the defendant in the criminal judgment, would be found guilty of insulting government officials legally carrying out their duties is premised upon whether the insulted government officials were legally carrying out their duties at that time. The judgment grounded the findings of legal duty enforcement in the stipulated provisions of the Police Service Act, which should then be deemed as substantially related to the judgment and considered here as the object of interpretation.

[2] Article 2 of the Police Act provides that the duties of police are to maintain public order according to law, protect social security, prevent harms, and promote people's welfare. Article 3 gives the power to establish the police and police services to the national legislature. Furthermore, Articles 3 to 10 of the Police Service Act are concerned with police services, organizations, division of duty, and the command system. Article 11 enumerates the methods by which police services are to be implemented. Hence, the Police Service Act is an organic act as well as an act of a regulatory nature. To comply with the rule of law principle, administrative agencies–when performing their duties–not only consider relevant provisions in the organic act, but also delegations by the acts of a

regulatory nature. Since the Police Service Act can also be deemed as an act of a regulatory nature, it can serve as a general rule for the police and the carrying out of their functions. According to Article 11, Subparagraph 3 of the said Act, in stop and check, police officers conduct inspections or street checks at public or other designated places or roads to question suspicious individuals, enforce laws, or perform other functions delegated by relevant laws or regulations. Thus, spot checks are an authorized method of legal enforcement. However, spot checks, including inspections, street checks or interrogations may have substantial effects upon personal freedom, property rights and the right to privacy. According to the law (Articles 128 and 128a of the Code of Criminal Procedure), before searching those suspected of having committed crimes, the police must obtain warrants from the court for maintaining public order or preventing danger from happening. It is not in accordance with any legislative intention to authorize spot checks at will. Hence, in performing spot checks, police officers must comply with specific legal principles guiding police functions and law enforcement. In order to fully ensure the constitutional protection of people's fundamental rights and freedoms, the requirements and procedures of spot checks, as well as legal remedies for unlawful checks, must be specifically prescribed by the law.

[3] The relevant provisions concerning spot checks in the aforementioned Act never delegate unlimited power to the police to exercise any check, law enforcement action or interrogation without due consideration of time, place, manner and subjects. Unless otherwise prescribed in other laws (such as the Code of Criminal Procedure, the Administrative Execution Act, or the Social Order Maintenance Law), the police–in exercising checks–must limit their checking authority to public transportation, public places, or other places where there has been a danger or may be a danger according to reasonable and objective judgments. Among these places, some may be private residences that must be protected to the same extent as a home. The police shall not exercise checking

authority over persons unless there is a reasonable belief that actions taken by such persons have caused or may cause harm; and in so doing, police officers must abide by the principle of proportionality and not go beyond necessity in order to avoid causing property damage or interfering with business or people's daily lives. To prevent possible harms, the police should employ proper methods, such as setting up warning signs, partitioning off designated areas, establishing alerting measures, and reinforcing protections of objects which would probably be damaged, instead of executing spot checks or interrogating persons directly. Before exercising any checks, the police must immediately inform the persons–including those who will be checked, owners of public places, vehicles or places, and users–of the reasons for exercising such checks and identify themselves clearly as law enforcement officers. Any spot check must be conducted on the spot. Unless the consent of persons to be checked is given, or if there is no alternative to identify persons to be checked, or if conducting such on-the-spot checks may have harmful effects or jeopardize traffic flow or public tranquility, the police are not permitted to request checked persons to go to a police station for further interrogation. After the identification of checked persons is confirmed, they must be permitted to leave without delay unless they are suspected of having violated the law and can be detained under specific procedural laws. Only when Article 11, Subparagraph 3 of the Police Service Act is applied within the scope of the above interpretation is the Act deemed as not contravening the Constitution and human rights thus guaranteed. As for illegal, unauthorized or abusive spot checks, legal remedies, including monetary compensation, should be provided under the current legal mechanism. Before there is a proper legal mechanism, when people encounter spot checks, they must have access to file complaints against the order, methods, processes or other potentially harmful effects of spot checks to the police. If a complaint is deemed reasonable, the highest-ranking police officer in place must suspend the spot check immediately. If the complaint

is deemed unreasonable, the check may continue, but a written document specifying checking procedures should be issued upon the request to those who are being checked. The aforementioned written document is to be considered as an administrative action that can be appealed further to the court. The current laws for the police to execute their duties are not sufficient, and hence, within two years after the date of announcement of this Interpretation, the competent authorities should review relevant provisions, taking into consideration this Interpretation as well as social circumstances, and enact new laws to allow the police to deal with unexpected occurrences in law enforcement while sufficiently protecting people's freedom and the police's own safety.

Background Note by the Translator

In 1998, the petitioner Mr. LEE passed by a street spot check at night. He was requested to present his identification card, but he refused. The police officers then conducted a body search on Mr. LEE, causing him to insult the officers. The police sued Mr. LEE for violating Article 140, Paragraph 1 of the Criminal Code, which punishes a person insulting a public officer discharging his or her legal duties. The Shihlin District Court held that under Article 11, Subparagraph 3 of the Police Service Act, the police officers had the power and legal duty to check individual identity, and sentenced Mr. LEE to a short term of imprisonment. The petitioner appealed to the Taiwan High Court, but his appeal was dismissed. On August 25, 1999, the petitioner brought the case before the Constitutional Court, arguing that Article 11, Subparagraph 3 of the Police Service Act infringed upon personal freedom and violated Article 8 of the Constitution.

J.Y. Interpretation No. 535 is considered as a landmark decision in regard to the protection of personal freedom and the right to privacy. Prior to this decision, the Constitutional Court had made two interpretations on the protection

of privacy rights without much elaboration of its protected scopes and contents. In J.Y. Interpretation No. 293, the issue was concerned with the extent to which commercial banks could disclose personal information of consumers. In J.Y. Interpretation No. 509, the right to privacy was mentioned as one of the values with which freedom of speech must be balanced in a criminal conviction of defamation. J.Y. Interpretation No. 535 is the first case in which the Constitutional Court expressly recognizes the right to privacy as a constitutional shield against government interventions.

J. Y. Interpretation No. 763 (May 4, 2018)*

Obligation to Notify the Original Landowner of the Use of the Expropriated Land Case

Issue

Is Article 219, Paragraph 1 of the Land Act, which does not require the competent authority to notify periodically the original landowner of the subsequent use of the expropriated land and, as a consequence, renders the original landowner unable to obtain sufficient information to exercise the right of redemption, inconsistent with the due process in administrative procedure required by the Constitution and unconstitutional for violation of Article 15 of the Constitution which guarantees the people's right to property?

Holding

[1] Article 219, Paragraph 1 of the Land Act provides that "the day following one year after the payment of expropriation compensation" shall be the starting point of statute of limitations for the redemption right. This provision does not require the competent authority of the governing municipality or county (city) to notify periodically the original landowner or to publicly announces the subsequent use of the expropriated land and, as a consequence, renders the original landowner unable to obtain sufficient information in a timely manner to determine whether to exercise the right of redemption. Thus, this provision is inconsistent with the due process in administrative procedure required by the Constitution. In this regard, it violates Article 15 of the Constitution which guarantees the people's right to property and shall be revised within two years

* Translation and note by Chung-Lin CHEN

from the date of publication of this Interpretation.

[2] From the date of publication of this Interpretation, if the statute of limitations for the original landowner's redemption right is still yet to pass, such statute of limitations is to be suspended. After the competent authority of the governing municipality or county (city) sends notifications or make public announcements in accordance with this Interpretation, the remaining period of the statute of limitations is to resume. Once the amended law is promulgated, such new law shall apply.

Reasoning

[1] On December 20, 2011, petitioners Chin-Te LIU and Wei-Hsiang LIU applied to the Kaohsiung City Government for redemption of the land at issue in the original amount of expropriation compensation under Article 219 of the Land Act and Article 9 of the Land Expropriation Act. They alleged that Kaohsiung County Government (merged into Kaohsiung City Government on December 25, 2010) had publicly announced the expropriation of their lands located in Renwu Township of Kaohsiung County (hereinafter "the land") from March 2, 1989 to March 31 of the same year. However the land was not used within the prescribed period of time in accordance with the expropriation plan and not used for the undertaking intended under the expropriation project. After approval by the Ministry of the Interior, the Kaohsiung City Government rejected the petitioners' application on the ground that the petitioners' application was not filed within the statutory period of time for redemption application and not consistent with Article 219, Paragraph 1 of the Land Act (hereinafter "the Provision") and Article 83 of the Urban Planning Law. Both petitioners disagreed with the decision and filed an administrative appeal, which was rejected. Petitioners then initiated an administrative litigation, which was ruled against them by the Kaohsiung High Administrative Court Judgment 101-Su-399 (2013). On appeal, the Supreme

Administrative Court dismissed their appeal by Order 102-Cai-642 (2013) on the ground that they failed to specify how the original judgement was inconsistent with the law. Therefore, the final judgment should be the aforementioned judgment of the Kaohsiung High Administrative Court. Petitioners further asserted that the Provision applied in the final judgment was not consistent with Articles 15 of the Constitution and due process of law because it did not require the competent authority to notify the original landowners of the use of the expropriated land in a timely manner. As a result, the original landowners were unable to apply for redemption to which they are entitled. Based upon this ground, petitioners brought their case to this Court for constitutional interpretation. The final judgment found that the petitioners did not apply to redeem their land within the time limit set by Article 83 of the Urban Planning Law and the Provision for exercising the redemption right, and the land was actually used according to the approved project within the project period. Accordingly, the final judgment held that there was no such issue as whether petitioners can redeem their land. However, petitioners' claim that the Provision's failure to include the post-expropriation notification obligation, resulting in their inability to obtain sufficient information in a timely manner in order to determine whether to exercise their right of redemption, violates their right to property protected by the Constitution involves a constitutional principle of importance. Based on the precedents of this Court's interpretations (*see* J.Y. Interpretations Nos. 477, 747, 748 and 762), this petition satisfies the requirements set out in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. This Court hereby grants review of this petition. This Court renders this Interpretation with the following reasons:

[2] Article 15 of the Constitution provides that people's right to property shall be guaranteed. The purpose of this Article is to ensure that owners of property may freely exercise their rights to use, profit by, and dispose of their property

during the existence of the property, and prevent infringements by the government or any third party. Thus, people may secure their resources of life on which the survival of individuals and the free development of personality rely (*see* J.Y. Interpretations Nos. 596, 709 and 732). At the same time, Article 143, Paragraph 1 of the Constitution expressly states that private ownership of land acquired by the people in accordance with law shall be protected and restricted by law. The State may expropriate the people's property according to the procedures prescribed by law when it is necessary for the purpose of public use or other public interests. However, the expropriation of land is the most severe means of infringement on the people's rights to property. Pursuant to the due process requirement under the Constitution, the State shall implement the most rigorous procedure. The procedural protection shall be provided not only before an expropriation (for example, the State shall hear the opinions of landowners and interested parties before the finalization of an expropriation plan, *see* J.Y. Interpretation No. 409), but also when an expropriation is carried out (for example, when carrying out an expropriation, the State shall be strictly required to implement the procedure of providing public announcements and written notifications in order to ensure that the owners of land or land improvements and the holders of other rights are aware of any relevant information, so that they may exercise their rights in a timely manner. Besides, compensation shall be made promptly, otherwise the approval of the expropriation shall no longer be in effect, *see* J.Y. Interpretations Nos. 516 and 731).

[3] Whether due process is also applied after the completion of land expropriation depends on whether the original landowners can still claim the protection of their constitutional right to property after the completion of expropriation. After a land is expropriated, the State has the obligation to ensure that the expropriated land is used for the purpose of public use or other public interests continuously in order to satisfy the strict requirement of necessity of

expropriation. Moreover, the party applying for land acquisition shall use the expropriated land according to the approved plan within a certain period of time, so that abuse of expropriation could be prevented and the people's private interests on land could be protected (*see* J.Y. Interpretation No. 236). Therefore, after expropriation, if the expropriated land is not used according to the approved plan or within the time limit, such expropriation loses its legitimacy and the cause leading to people's suffering special sacrifice for public interests will no longer exist. Based on the intention and purpose of the protection of the people's property rights under the Constitution, in principle, the original landowners may apply for the redemption of the expropriated land to protect their rights and interests. This right of redemption is an extension of the protection of constitutional property rights. It is landowners' right of claim under public law derived from the legal relationship of land expropriation and is protected under the constitutional property right. In order to ensure the realization of the redemption right, the State still bear certain obligations to provide procedural protection after expropriation.

[4] After the party applying for land acquisition acquires the ownership of expropriated land in accordance with law, the original land owner usually may not know and realize promptly whether the expropriated land is no longer needed or is not used within the time limit, leading to loss of necessity for the expropriation. Based on the due process in administrative procedure required by the Constitution, within certain period of time from the completion of expropriation, the competent authorities of the governing municipality or county (city) shall periodically notify the original landowners, enabling them to be aware of the status of subsequent use of the expropriated land in a timely manner. If any of the original landowners cannot be notified, the competent authority shall make a public announcement in accordance with law, so that they can apply for the redemption of the expropriated land in time.

[5] The Provision expressly provides that "[a]fter expropriation of a private land,

the original landowner of the expropriated land may, within five years from the day following one year after the completion of the payment of expropriation compensation, apply to the land administration agency of the governing municipal or county (city) for redemption of expropriated land in the original amount of expropriation compensation, if either of the following conditions occurs: (1) failure to use the expropriated land according to the expropriation plan after one year following the completion of the payment of compensation; (2) failure to use the expropriated land for the undertaking which had received approval for the expropriation." Although the Provision is the embodiment of the people's redemption right under the Constitution, it simply stipulates "the day following one year after the completion of the payment of expropriation compensation" as the starting point of statute of limitations and does not require the State periodically notify the original landowner of, or publicly announces, the status of subsequent use of the expropriated land. As a result, the people are unable to obtain sufficient information in a timely manner in order to determine whether to exercise their right of redemption. Thus, the Provision is inconsistent with the due process in administrative procedure required by the Constitution. In this regard, it contravenes the meaning and spirit of the Article 15 of the Constitution which guarantees the people's right to property. Concerned authorities shall review and revise the Provision based upon the meaning and spirit of this Interpretation within two years from the date of publication of this Interpretation. For balancing between the protection of the people's right to property and the mandate of stability of legal relationship, the Provision, in creating the obligation of notification, shall stipulate a reasonable short period and a long period of statute of limitations respectively, according to whether the obligation of notification is fulfilled. As for how to organize the short period and long period of statute of limitations, it is within the scope of the legislature's discretion.

[6] From the date of publication of this Interpretation, if the statute of limitations for the original landowner's redemption right is still yet to pass, such statute of limitations is to be suspended. After the competent authority of the governing municipality or county (city) sends notifications or make public announcements in accordance with this Interpretation, the remaining period of the statute of limitations is to resume. Once the amended law is promulgated, such new law shall apply.

[7] If the petitioners rely on this Interpretation to file for a retrial, certainly the Court should apply related laws to determine whether the case has merit. It is also worth noting that this Interpretation only applies to general expropriation and does not address zone expropriation. However, the right of redemption involves the stability of legal relationship of expropriated land and the protection of the original landowner's rights and interests. To ensure that the original landowner receive sufficient information to determine whether to exercise the right of redemption, the competent authority shall also examine other laws related to land expropriation (for example, Article 9 and 49 of the Land Expropriation Act and Article 83 of the Urban Planning Law) with respect to how to periodically notifies the original landowner or publicly announces the status of subsequent use of the expropriated land based on the meaning and intention of this Interpretation.

Background Note by the Translator

In March 1989, Kaohsiung County Government publicly announced the expropriation of the petitioners Chin-Te Liu and Wei-Hsiang Liu's land located in Renwu Township of Kaohsiung County. According to Article 219, Paragraph 1 of the Land Act, the expropriated land has to be "used according to the expropriation plan one year after the completion of the payment of compensation" and "used for the undertaking which had received approval for the expropriation." Otherwise, the original landowner has the right to redeem the land "within five

years from the day following one year after the completion of the payment of expropriation compensation". On December 20, 2011, the petitioners applied for redemption of the land. The Government rejected their application on the ground that the application was filed beyond the statute of limitations. After exhausting available judicial remedies, petitioners filed a petition to the Constitutional Court on May 16, 2017, claiming that the provision at issue was not consistent with Articles 15 of the Constitution and due process of law because it did not require that the competent authority proactively notify the original landowner the status of subsequent use of the expropriated land. In this Interpretation, J.Y. Interpretation No. 763, the Court hold that the lack of stipulating the obligation of notification indeed renders the provision at issue inconsistent with the due process in administrative procedure required by the Constitution and unconstitutional under the Article 15 of the Constitution which guarantees the people's right to property.

Following J.Y. Interpretations Nos. 663, 709, 731 and 739, this Interpretation is made mainly in light of the due process in administrative procedure. In J.Y. Interpretation No. 663, the Court mentions the term "due process in administrative procedure" for the first time and resorts to this concept to impose constitutional procedural requirements on the taxation cases. A more influential development is J.Y. Interpretation No. 709, in which the Court elaborates this concept under the long-standing principle of "due process of law" and heavily relies on this concept to strikes down several provisions of the Urban Renewal Act, giving this concept a clearer constitutional foundation and more extensive applications. As to this Interpretation, the Court further applies this concept to address the question whether the procedural protection shall extend to cover the post-expropriation stage.

This Interpretation is also a case that further clarify and enrich the protection of the people's property rights against the State's power of eminent

domain. Early in 1989 in J.Y. Interpretation No. 236, the Court has recognized the right of redemption in Article 219 of the Land Act as a mechanism to prevent the abuse of eminent domain and protect the people's land rights and interests. Yet, before J.Y. Interpretation No. 763, another two decisions related to the right of redemption (J.Y. Interpretations Nos. 236 and 534) address only the issues of statutory interpretation and do not question the constitutionality of the statute. Rather, in J.Y. Interpretation No. 763, the Court clearly establishes the right of redemption as an extension of the protection of constitutional property rights. Based upon the right of redemption, this Interpretation further imposes another procedural requirement and accordingly strikes down the provision at issue.

It is also worth noting that the Constitutional Court appears to play a more active role in forming the constitutional boundary of the exercise of eminent domain in recent years. This Interpretation is just one of several examples. Other prominent examples, in addition to J.Y. Interpretations Nos. 709, 731, and 739 mentioned earlier, include J.Y. Interpretations Nos. 732, 743, and 747. Both J.Y. Interpretations Nos. 732 and 743 involve the constitutional restraint on land expropriated for private use. In J.Y. Interpretation No. 732, petitioners claim that the disputed provisions are unconstitutional for allowing competent authorities to expropriate the "adjacent lands," which are not necessary for the mass rapid transit system. The Court agrees. The Court indicates that, although the purposes of the provisions are to pursue justifiable public interests, the means adopted is neither a necessary means nor the least restrictive way to achieve those purposes. In J.Y. Interpretation No. 743, in response to the question whether competent authorities may expropriate lands for the mass rapid transit system and then use the lands for joint development under the same project, the Court holds that they may not. The Court stresses that the competent authority, after lawfully acquiring the lands by expropriation, is not the same as ordinary landowners. It is to be constrained by the specific purpose of constructing the mass rapid transit system

and may not use the lands for joint development. Therefore, the competent authority may not transfer the lands to a third party. As for J.Y. Interpretation No. 747, the issue involved is whether landowners may apply to the competent authority of land acquisition for expropriation of superficies, when the space above or below their lands is occupied to the extent beyond their social obligation to endure. The Court concludes that, to fulfil the constitutional mandate of property rights protection, the landowners shall be granted the right to request for such expropriation and compensation under such circumstances. Each of these Interpretations has its own implication on law. As a whole they represent a wave of judicial activism originated from a common social and political background. The social movements against the abuse of eminent domain and urban renewal, such as the "Unjust Taking Laws Shall Stop Right Now" movement triggered by the 2010 Dabu incident, have led to a fascinating story in which the civil society, legislature, and judiciary responds to each other. The story is still going on.

J.Y. Interpretation No. 709 (April 26, 2013)*

Review and Approval of Urban Renewal Project Summaries and Plans Case

Issue

Are the Urban Renewal Act's provisions governing the review and approval of urban renewal project summaries and plans unconstitutional?

Holding

[1] Article 10, Paragraph 1 of the Urban Renewal Act, as amended on November 11, 2008 (the amendment on January 16, 2008, only changed the punctuation of this Article), which governs the procedures of the competent authority's approval of urban renewal project summaries, is inconsistent with the due process of administrative procedure as required by the Constitution because this provision does not establish an appropriate organization to review urban renewal project summaries and also fails to ensure that interested parties are informed of all relevant information and have the opportunity to present their opinions in a timely manner. Paragraph 2 of the same Article, which provides the required ratio of consent for an application for approval of an urban renewal project summary (as amended on January 16, 2008, without changing the ratio of consent), is also inconsistent with the due process of administrative procedure as required by the Constitution. Article 19, Paragraph 3, First Sentence of the Urban Renewal Act, as amended on January 29, 2003 (the amendment on May 12, 2010, split Paragraph 3 of this Article into two paragraphs and renumbered them as Paragraphs 3 and 4 of this Article), is also inconsistent with the due process of

* Translation and Note by Yen-Chia CHEN

administrative procedure as required by the Constitution, because this provision does not require the competent authority to separately deliver an urban renewal project plan's relevant information to land and legal building owners other than the applicants in a renewal unit. Nor does this provision require the competent authority to hold the hearings in public, allow interested parties to be present at the hearings as well as present their statements and arguments orally, or, after taking the entire records of the hearings into consideration, explain the rationale for adopting or declining the arguments when deciding on the approval. Neither does this provision ask the competent authority to separately deliver the approved urban renewal project plans to the owners of the land and legal building in a renewal unit, the holders of other rights, the agencies for registration of restriction requests, or the holders of the right to registration of caution. All of the aforementioned provisions are in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence. The relevant authorities should review and amend the unconstitutional parts of the aforementioned provisions in accordance with the meaning and purpose of this Interpretation within one year from the date of announcement of this Interpretation. The said unconstitutional parts of the provisions should become null and void if they have not been amended within one year from the date of announcement of this Interpretation.

[2] Article 22, Paragraph 1 of the Urban Renewal Act, as amended on January 29, 2003, and January 16, 2008, which provides the required ratio of consent for an application for approval of an urban renewal project plan, is not in violation of the principle of proportionality under the Constitution or the due process of administrative procedure as required by the Constitution. Nonetheless, the relevant authorities should consider factors such as the actual implementation situations, general societal attitudes, and the needs for promoting urban renewal, and review and modify relevant provisions from time to time.

[3] The application of Article 22-1 of the Urban Renewal Act, as amended on January 29, 2003 (the amendment on June 22, 2005, polished the text of this Article), is limited to an application for urban renewal in a damaged urban renewal area due to war, earthquake, fire, flood, storm or other major incident, and promptly demarcated by the municipal, county (city) authority in accordance with Article 7, Paragraph 1, Subparagraph 1 of the Urban Renewal Act. Such application also must meet the condition of not changing the divided unit ownership and the land ownership of building lot possessed by the divided unit owners of other buildings. To this extent, this Article is consistent with the principle of proportionality under the Constitution.

Reasoning

[1] In this Interpretation, the statutes applied by the courts in the underlying final judgments (Supreme Administrative Court Administrative Judgment 100- Pan-1905 (2011), Supreme Administrative Court Administrative Judgment 100-Pan-2004 (2011), Supreme Administrative Court Administrative Judgment 100-Pan-2092 (2011), and Taipei High Administrative Court Administrative Judgment 98-Su-2467 (2010)), including Article 10, Paragraphs 1 and 2, of the Urban Renewal Act (as amended on November 11, 1998), Article 22, Paragraph 1, and the amended Article 22-1 of the Urban Renewal Act (as amended on January 29, 2003; hereinafter the "former Act"), and Article 22, Paragraph 1 of the Urban Renewal Act (as amended on January 16, 2008) (the current Urban Renewal Act and the former Act are referred to collectively as "Act"), all fall within this Court's scope of review according to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. Moreover, Article 19, Paragraph 3, First Sentence of the former Act applied in the Supreme Administrative Court Administrative Judgment 100-Pan-1905 (2011), which is a final judgment, is not included in the petitions filed by the petitioners, but this provision provides

procedures which should be followed by the municipal or county (city) authority when deciding on the approval of an urban renewal project plan, which is a subsequent stage following an approval of an urban renewal project summary by the municipal or county (city) authority according to Article 10, Paragraph 1 of the Act. The approval of an urban renewal project summary is a prerequisite for the approval of an urban renewal project plan. Apparently, there is a substantial relation between the regulatory function of Article 19, Paragraph 3, First Sentence of the former Act and Article 10 of the same Act. Hence, this Court will also review Article 19, Paragraph 3, Sentence 1 of the former Act in this Interpretation.

[2] Article 15 of the Constitution provides that the people's right to property shall be protected. The purpose of this Article is to guarantee each individual the freedom to exercise his rights to use, profit by, and dispose of his property during the existence of the property, and to prevent infringement by the government or any third party, so as to ensure that a person can realize his or her freedoms, develop his or her personality, and maintain his or her dignity (*see* J.Y. Interpretation No. 400). In addition, Article 10 of the Constitution stipulates that people shall have freedom of residence. This Article guarantees people the freedom to choose their residence and to enjoy their life in privacy without intrusion (*see* J.Y. Interpretation No. 443). However, in order to advance public welfare, the State may by law impose restrictions on the people's right to property or freedom of residence pursuant to the principle of proportionality under Article 23 of the Constitution (*see* J.Y. Interpretation Nos. 596 and 454).

[3] Urban renewal is part of urban planning. Urban renewal promotes the planned redevelopment and utilization of urban lands, revitalizes urban functions, improves living environments, and enhances public interests. The Act was enacted for these very purposes. The Act ensures that the people enjoy an adequate standard of living with safety, peace, and dignity (*see* Article 11(1) of the International Covenant on Economic, Social and Cultural Rights). The Act

also serves as a legal basis for imposing restrictions on the people's rights to property and freedom of residence. The implementation of urban renewal involves consideration of factors such as politics, economics, society, substantial environment, and residence rights, and is, in essence, a public affair of the State or local autonomous bodies. The law may, out of the policy consideration of coping with actual needs and the introduction of the utilization of vitality in the private sector, stipulate that, under certain conditions, the people may apply to implement urban renewal on their own initiative. Nevertheless, the implementation of urban renewal requires necessary supervision, review, and decision-making by the State or a local autonomous body via its public authority. According to the Act, an urban renewal project may be implemented by the competent authority itself, by an urban renewal project institution chosen by the competent authority, or by another agency (institution) approved by the competent authority, or may be implemented by an urban renewal group organized by or by an urban renewal project institution delegated by the land and legal building owners who, under certain conditions, have filed an application following legal procedures and obtained approval from the competent authority at the municipal or county (city) level (*see* Articles 9, 10 and 11 of the Act). In the case of a renewal implementation by an urban renewal group organized by or by an urban renewal project institution delegated by the land and legal building owners, the competent authority's approval of an urban renewal project summary drafted by private parties (including the designation of renewal units—the same shall apply hereinafter) (*see* Article 10, Paragraph 1 of the Act) and the competent authority's approval of an urban renewal project plan (*see* Article 19, Paragraph 1 of the Act) drafted by private parties constitute the acts of the competent authority exercising public authority according to legal procedures, making an urban renewal project summary or an urban renewal project plan legally binding. The legal nature of both aforementioned acts of the competent authority exercising public authority is an administrative disposition issued to a specified

person in respect of a specific matter (*see* Article 92, Paragraph 1 of the Administrative Procedure Act). An administrative disposition approving an urban renewal project summary not only designates the scope of the renewal units, in which an urban renewal project may be implemented separately, in a renewal area, but also affects the legal rights and interests of all residents in the renewal units. A resident unwilling to be included in a renewal unit may seek relief through available legal remedies. An administrative disposition rendered by the competent authority approving an urban renewal project plan involves the critical components of the implementation of the plan, including the layout of the building(s), the sharing of expenses, removal and settlement plans and financial plans. In addition, the consequences that result from the subsequent procedures implementing an approved summary or an approved plan may have different levels of impact on the owners or other right holders of lands or legal buildings, or even on the rights of someone residing outside the renewal units; and, in certain circumstances, may even result in the forfeiture of the rights of these people and a compulsory removal, forcing them to move out of their residences (*see* Article 21; Article 26, Paragraph 1; Article 31, Paragraph 1; and Article 36, Paragraph 1 of the Act). Therefore, the approval of an urban renewal project summary and the approval of an urban renewal project plan mentioned above are both administrative dispositions imposing restrictions on the people's rights to property and freedom of residence.

[4] With respect to the content of the principle of due process of law under the Constitution, the legislature should promulgate corresponding legal procedures after taking into consideration the types of underlying basic rights, the intensity and scope of the restrictions, the public interests pursued, the proper functions of the decision-making authority and the availability of alternative procedures or the cost of the possible respective procedures (*see* J.Y. Interpretation No. 689). A renewal implementation involves the pursuit of important public interests,

significantly affects the property rights and the freedom of residence of owners of various renewal units and surrounding lands and legal buildings, and is prone to disputes due to the complicated interests involved. In order to ensure that the competent authority's approval of an urban renewal project summary or an urban renewal project plan serves important public interests, complies with the principle of proportionality and the requirements of relevant laws, and also to pursue a broader acceptance of an approved urban renewal project summary or plan through building a consensus among people by encouraging people to become actively involved, the Act should require the competent authority to establish an impartial, professional, and diverse appropriate organization for the review of urban renewal project summaries and urban renewal project plans. Furthermore, the Act should, in light of the items to be reviewed by the competent authority, the content and effect of an administrative disposition, and the degrees of the restrictions imposed upon the people's rights, prescribe the due process for administrative procedures that must be observed, including procedures ensuring that interested parties are kept informed of all relevant information and allowing interested parties to present their opinions in a timely manner in oral or written form to the competent authority to assert or protect their rights. The approval of an urban renewal project plan in particular directly and significantly imposes restrictions on the people's rights to property and freedom of residence. Therefore, the Act should require the competent authority to conduct the hearings in public, allow interested parties to be present at the hearings as well as present their statements and arguments orally during the hearings, and, after taking into consideration all the records of the hearings, explain the rationale for adopting or declining the arguments when deciding on the approval. Only in this fashion is the Act consistent with the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

[5] Article 10, Paragraph 1 of the former Act provides that "[t]he owners of the

lands and legal buildings of an area that has been designated for renewal implementation may designate the renewal units by themselves as per renewal units defined by the competent authority, or based on the criteria for designating a renewal unit, conduct a public hearing and draft a renewal project summary. They may then present the project summary together with the public records of the hearing to the municipal or county (city) authority to apply for approval. After obtaining approval, they may organize a renewal group or delegate an urban renewal project institution as the implementer to implement the urban renewal business of that area" (the amendment on January 16, 2008, only changed the punctuation in this provision). Although this provision requires applicants or implementers to conduct public hearings, this provision fails to sufficiently guarantee interested parties an opportunity to timely present their opinions to the competent authority to assert or protect their rights. This provision and other relevant provisions do not require the competent authority to establish an appropriate organization to review urban renewal business summaries and fails to ensure that interested parties be kept informed of all relevant information. As a result, this provision is inconsistent with the due process of administrative procedure as required by the Constitution and in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

[6] When people file an application in accordance with the law to an administrative agency requesting that the administrative agency conduct a specific administrative action, the administrative agency shall first review the application to see whether the application meets the procedural requirements prescribed by law. Only when the procedural requirements prescribed by law are met will an administrative agency render an administrative disposition. From this point of view, the requirements for an application by the people are part of the entire administrative procedure. Provisions prescribing the requirements for an

application by the people must therefore comply with the requirement of due process of administrative procedure. Since the Act provides that, under certain conditions, the owners of lands and legal buildings may file an application to the competent authority for approval of an urban renewal project summary or an urban renewal project plan, the Act should also, according to the State's constitutional duty to protect the people's rights to property and freedom of residence, properly prescribe the required ratio of consent among the owners of the lands and legal buildings which are to be included in the application. Article 10, Paragraph 2 of the former Act provides that "[t]he application mentioned in the preceding paragraph shall require the consent of more than ten percent of the owners of the lands and legal buildings in the renewal unit, and the total land area and floor space of the legal buildings of such owners shall account for more than ten percent of the entire land area and floor space; . . . " (After the amendment on January 16, 2008, this provision reads "[t]he application mentioned in the preceding paragraph shall require the consent of more than ten percent of the owners of the private lands and private legal buildings in the renewal unit, and the total land area and floor space of the legal buildings of such owners shall account for more than ten percent of the entire land area and floor space; . . . "). According to this provision, any application for approval of an urban renewal project summary is filed in accordance with the law as long as such an application meets the required ratio of consent, regardless of whether such an application is filed by more than ten percent of the owners of the lands and legal buildings or by owners who own more than ten percent of the total land area and floor space of the legal buildings. The required ratio of consent prescribed in this provision is far too low, which leads to the potential result that such an application may be filed by minority residents in the same renewal unit and calls into question the willingness to participate of all residents as well as the lack of representation. Moreover, insufficient communication prior to the filing of such an application likely leads the residents to worry that their rights may be infringed upon, which,

as a result, traps the residents in a dilemma of conflict among various values and rights. Particularly in the case where the majority of residents are reluctant to participate in urban renewal, the majority of residents will be forced to participate in the procedure of urban renewal and risk their property rights and freedom of residence simply because an administrative procedure shall be commenced after an application has been filed by the minority of residents (Article 34, Final Sentence of the Administrative Procedure Act). Accordingly, this provision, prescribing such a low ratio of consent, does not match the spirit of democracy by majority rule or the expansion of citizens' participation and clearly fails to fulfill the State's constitutional duty to protect the people's rights to property and freedom of residence. This provision is inconsistent with the due process of administrative procedure as required by the Constitution and is also in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

[7] Article 19, Paragraph 3, First Sentence of the former Act provides that "[a]fter an urban renewal project plan is established or revised, and before such a plan is sent to a competent urban renewal review committee at a municipal, county (city) government or township (village, city) for review, such a plan should be publicly exhibited for thirty days at each respective municipal, county (city) government or township (village, city) hall. The date and venue of the exhibition should be published in the newspaper for the public. A public hearing should be conducted as well. During the public exhibition period, any citizen or group may submit written opinions with their names or titles and addresses to the competent municipal, county (city) government or township (village, city) hall for the reference of the competent urban renewal review committee at that municipal, county (city) government or township (village, city) during review." (This provision was amended on May 12, 2010. The amendment on May 12, 2010, split the original Paragraph 3 into Paragraphs 3 and 4, which subsequently read

as "[a]fter an urban renewal project plan is established or revised, and before such a plan is sent to a competent authority for review, such a plan should be publicly exhibited for thirty days at each respective municipal, county (city) government or township (village, city) hall. A public hearing should be conducted as well. The duration of the public exhibition (of an urban renewal project plan) may be shortened to fifteen days when an implementer has obtained the consent of all owners of the private lands and private legal buildings in the renewal unit." "The date and venue of the exhibitions and public hearings mentioned in the two preceding paragraphs should be published in the newspaper for the public, and notice sent to the owners of the lands and legal buildings in the renewal unit, the holders of other legal rights, the agencies for registration of restriction requests, and the holders of the right to registration of caution. During the public exhibition period, any citizen or group may submit a written opinion with their name(s) or title(s) and address(es) to the competent authority for the reference of the competent authority during review."). The aforementioned provision regarding the approval of an urban renewal project plan has expressly prescribed that, before an urban renewal project plan is sent is sent to a competent urban renewal review committee for review, such a plan should be publicly exhibited, and any citizen or group may submit a written opinion during the public exhibition period. Nevertheless, the foregoing provision and other relevant provisions do not require the competent authority to separately deliver the relevant information of such an urban renewal project plan (including a list of the owners of the private lands and private legal buildings who agree to participate in that urban renewal project plan) to those owners of the lands and legal buildings in the renewal unit other than applicants. In addition, the conduct of a public hearing and the submission of opinions by interested parties to the competent authority prescribed under this provision are only for the reference of the competent authority. This provision does not require the competent authority to hold a hearing in public, allow interested parties to be present at the hearing as well as present their statements

and argument orally during the hearing, or, after taking into consideration all the records of the hearings, explain the rationale for adopting or declining the arguments when deciding on approval. Nor does this provision ask the competent authority to separately deliver the approved urban renewal project plans to each of the owners of the lands and legal buildings in the renewal unit, the holders of other legal rights, the agencies for relevant authorities of registration of restriction requests and the holders of the right to registration of caution. All of the above is inconsistent with the aforementioned due process of administrative procedure as required by the Constitution and is also in violation of the meaning and purpose of the constitutional guarantees of the people's rights to property and freedom of residence.

[8] Within one year from the issuance date of announcement of this Interpretation, relevant authorities should review and amend the unconstitutional parts of those provisions mentioned in the preceding paragraphs in accordance with the meaning and purpose of this Interpretation. The unconstitutional parts of those provisions shall become null and void if those parts have not been amended within the aforesaid period.

[9] Article 22, Paragraph 1 of the former Act provides that "[w]hen an implementer presenting an established or revised urban renewal project plan for approval files its application in accordance with Article 10, for an urban renewal area demarcated according to Article 7, such an implementer shall obtain the consent of more than fifty percent of the owners of the lands and legal buildings in a renewal unit, and the total land area and floor space of the legal buildings of such owners shall account for more than fifty percent of the entire land area and floor space; whereas, for an urban renewal area other than the aforesaid area, such an implementer shall obtain the consent of more than sixty percent of the owners of the lands and legal buildings in a renewal unit, and the total land area and floor space of the legal buildings of such owners shall account for more than two-thirds

of the entire land area and floor space. When an implementer presenting an established or revised urban renewal project plan for approval files its application in accordance with Article 11, such an implementer shall obtain the consent of more than two-thirds of the owners of lands and legal buildings in a renewal unit, and the total land area and floor space of the legal buildings of such owners shall account for more than seventy-five percent of the entire land area and floor space." This provision was amended on January 16, 2008, and subsequently read "[w]hen an implementer presenting an established or revised urban renewal project plan for approval files its application in accordance with Article 10, for an urban renewal area demarcated according to Article 7, such an implementer shall obtain the consent of more than fifty percent of the owners of the private lands and private legal buildings in a renewal unit, and the total land area and floor space of the legal buildings should be more than fifty percent of the entire land area and floor space; whereas, for an urban renewal area other than the aforesaid area, such an implementer shall obtain the consent of more than sixty percent of the owners of the private lands and private legal buildings in a renewal unit, and the total land area and floor space of the legal buildings shall account for more than two-thirds of the entire land area and floor space. When an implementer presenting an established or revised urban renewal project plan for approval files its application in accordance with Article 11, such an implementer shall obtain the consent of more than two-thirds of the owners of the private lands and private legal buildings in a renewal unit, and the total land area and floor space of the legal buildings shall account for more than seventy-five percent of the entire land area and floor space. . ." The legislative intent of this provision is, on the one hand, to carry out and promote urban renewal, as well as to protect the rights and interests of majority residents desiring to improve their living environment and promote the planned development and reuse of urban lands from being affected by the different concerns of minority residents. Accordingly, this provision stipulates that one may file an application for approval of an urban renewal project after

obtaining the consent of a certain number of people owning a certain area of land and/or floor space and achieving the prescribed threshold of the ratio of consent. On the other hand, the ratio of consent should not be too low because the law is designed to encourage residents to communicate with each other in advance so as to reduce fighting and facilitate a smooth implementation of an urban renewal project plan. Moreover, considering the special need of a disaster area for speedy reconstruction, this provision, being based on whether a renewal unit is located in a demarcated renewal area and whether a renewal unit belongs to a renewal area demarcated at the earliest time, thus provides different ratios of consent for applications filed in accordance with Articles 7, 10 or 11 (*see* Committee Records, Legislative Yuan Gazette 87(4): 302-303; Committee Records, Legislative Yuan Gazette 87(12): 291-304; Records of General Assembly, Legislative Yuan Gazette 87(42): 282-283, 330-331; Committee Records, Legislative Yuan Gazette 92(6): 109-110, 149-150; Records of General Assembly, Legislative Yuan Gazette 92(5): 77-78, 84-85). The aforementioned legislative intent is proper and can be fulfilled by prescribing certain ratios of consent. In addition, there will be no application filed by minority residents because all ratios of consent prescribed in all aforementioned provisions are above fifty percent. The legislature should have discretion in balancing different interests because urban renewal involves not only the property rights and freedom of residence of those unwilling to participate in urban renewal, but also the realization of important public interests, the property of those willing to participate in urban renewal as well as their rights and interests in an appropriate living environment, and the rights of interested parties residing around the renewal unit. Furthermore, the legislature should be able to exercise its legislative discretion in determining the required ratio of consent as long as the ratio of consent is not far too low to violate the due process of administrative procedure as required by the Constitution. It is necessary for the legislature to lay down provisions prescribing the aforementioned ratios of consent after considering the actual situation of renewal implementation, the level

of impact on the public interest, the needs of the society, and other factors. Also, the balancing of the relevant interests at stake is not apparently inappropriate. Thus, there is no violation of the principle of proportionality under the Constitution or the due process of administrative procedure as required by the Constitution. Nonetheless, the relevant authorities shall review and amend relevant provisions from time to time after considering factors such as the actual situations of renewal implementation, general societal attitudes, and the need for promoting urban renewal. In addition, under the Act, there are three methods for the processing of urban renewal: reconstruction, renovation, and maintenance. These three methods have different levels of impact on the rights and interests of the owners of the lands and legal buildings. Accordingly, the law should prescribe different ratios of consent for different types of applications. Furthermore, in order to ensure that the computation of the required ratio of consent is true and accurate, the following should be reviewed and amended as well: whether listing the content of a transfer of rights on the consent agenda is necessary during the process of obtaining the consent to an urban renewal project plan; and whether an implementer should, after obtaining consent for an urban renewal project plan, obtain further consent if the content of the urban renewal project plan has been changed.

[10] Article 22-1 of the former Act provides that "[d]uring the implementation of an urban renewal project plan in an urban renewal area demarcated according to Article 7, if several buildings on the same building base are affected and processed for reconstruction, renovation, or maintenance, the ratio of consent may be calculated separately based on the number of the divided unit owners of each respective affected building, the divided unit ownership of the unit owners of each respective affected building and the part of the building base they own, without changing the divided unit ownership of the unit owners of the other buildings and the part of the building base they own." (This provision was

amended on June 22, 2005. The amendment revised the phrase "several buildings" to read "some of the buildings," revised the phrase "the other buildings" to read "other buildings," revised "each building" to read "each respective building," and also revised "the number of the divided unit owners, the divided unit ownership" to read "the number of the unit owners, the unit ownership;" with the rest of this provision remaining unchanged). This Article was amended, modelled aftert Article 17-2 of the Provisional Act Governing 921 Earthquake Post-Disaster Reconstruction. The purpose of this amendment was to efficiently and effectively resolve the difficult problem of reconstruction by using the affected portion to calculate the ratio of consent when some of the buildings on the same building base were affected due to a disaster (*see* Records of General Assembly, Legislative Yuan Gazette 89 (58): 38, 47-48; Committee Records, Legislative Yuan Gazette 92 (6): 107 & 109; Records of General Assembly, Legislative Yuan Gazette 92 (5): 75-78, 85). In addition, where there is damage caused by a disaster, any measure taken to facilitate the quick reconstruction of affected buildings certainly serves the public interest, as such a measure prevents the damage from escalating. From this point of view, the legislative intent of this Article is proper, and the calculation of the ratio of consent prescribed in this Article should be able to efficiently and effectively fulfill the legislative intent. Moreover, considering the text and the legislative intent of the this Article as a whole, this Article has taken the rights of the residents of other buildings into consideration, because the application of this Article is limited to an application for urban renewal in a destructed or damaged urban renewal area and demarcated by the municipal, county (city) authority at the earliest time, due to war, earthquake, fire, flood, storm or other major incidents prescribed in Article 7, Paragraph 1, Subparagraph 1 of the Act, and also must possess the condition of not changing the divided unit ownership of the divided unit owners of other buildings and the part of the building base they own. Furthermore, considering that quick post-disaster reconstruction and the prevention of damage from escalating are both necessary

and in the public interest since the affected or collapsed buildings have endangered the rights of the people, including their rights to life, bodily safety, property, and freedom of residence, it is necessary for the aforementioned Article to prescribe that the calculation of the ratio of consent is based on the number of the divided unit owners of each respective affected building, the divided unit ownership of the unit owners of each respective inflicted building, and the part of the building base they own. Also, the balancing of the relevant interests is not apparently inappropriate. Therefore, this Article is not inconsistent with the principle of proportionality under the Constitution. However, it will be more meaningful for the protection of the rights of the residents and the realization of the public interest if all buildings on the same building base are developed as a whole and renewed at the same time. Given the foregoing, and also to avoid any undesirable outcomes which may arise from separate urban renewal processes, it would be better to encourage other buildings on the same building base to participate in urban renewal together if there are no obstacles to overcome. Thus, the aforementioned Article is inadequate and requires further review and amendment because this Article fails to require the residents of affected buildings or an implementer delegated by these residents presenting an urban renewal project plan for approval to inquire about the willingness of the residents of other buildings on the same building base to participate in urban renewal before filing an application for approval.

[11] One of the petitioners argued that, according to the final judgment of Supreme Administrative Court Administrative Judgment 100-Pan-1905 (2011), Article 22, Paragraph 3 of the former Act (as amended on January 16, 2008), which provides that "[i]f an owner disagrees with an urban renewal plan exhibited in public, he may withdraw his consent by the end of the exhibition period," is unconstitutional. Nevertheless, this disputed provision is not a subject for interpretation because this disputed provision was not applied in the aforesaid

final judgment. Article 36, Paragraph 1, First Sentence of the former Act (as amended on May 12, 2010) provides that " [a]n implementer shall publicly announce the land improvements inside the areas covered by rights transfer to be dismantled or relocated, and also notify the owners, managers or users to dismantle or relocate the land improvements within thirty days on their own initiative. If the land improvements are not dismantled or relocated within the given period, the implementer may dismantle or relocate the land improvements for the owners, managers or users, or request the municipal, county (city) authority to dismantle or relocate the land improvements to dismantle or relocate the land improvements. The municipal, county (city) authority has an obligation to dismantle or relocate the land improvements; . . ." (Article 36, Paragraph 1, First Sentence of the former Act promulgated on November 11, 1998, and the same provision amended on January 16, 2008, share the same meaning and purpose). Petitioners contend that the part of this provision, that authorizes an implementer to dismantle or relocate the land improvements for the owners, managers or users, or request the municipal, county (city) authority to dismantle or relocate the land improvements, and also imposes on the competent authority an obligation to dismantle or relocate the land improvements, is unconstitutional. However, this disputed provision is not a subject for interpretation either, because this disputed provision was not applied in those final judgments mentioned above. Given the foregoing, the aforementioned petitions do not comply with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and are to be dismissed according to Paragraph 3 of the same Article.

Background Note by the Translator

Ta Ch'ing Hsin I Futs'un in the Tucheng District of New Taipei City is a five-story condominium complex with ninety units on the same building base. The forty units at the front of the complex were affected by the great earthquake

of September 21, 1999 (also known as the "1999 Jiji Earthquake" or the "921 Earthquake"), and were processed for reconstruction according to the Act. Later, the City Government of New Taipei City (hereinafter the "New Taipei City Government") publicly announced the use of the rights transformation method to implement urban renewal on the aforesaid forty units. However, some owners of those forty units were not satisfied with the content of the rights transformation. In addition, some owners of other units other than the aforesaid forty units alleged that they had a right to participate in the reconstruction. Subsequently, fifty-two people jointly filed an administrative lawsuit challenging the New Taipei City Government's administrative disposition approving an urban renewal project plan and a rights transformation plan. Nonetheless, the said administrative lawsuit was dismissed by the court, and the dismissal has become final. The parties then petitioned for an interpretation alleging that relevant provisions of the Act were unconstitutional.

1. Kuang-Shu WANG and two other people owned lands and buildings located in the Yangming Section of Taipei City. 2. Shu-Lan CHEN owned land and buildings located in the Wanlong Section in Taipei City. The City Government of Taipei City (hereinafter the "Taipei City Government") demarcated the aforementioned lands and buildings for urban renewal and approved an urban renewal project plan and a rights transformation plan related to those lands and buildings. 3. Lung-San PENG owned land and buildings located in the Yongji Section in Taipei City. In order to implement urban renewal, the Taipei City Government approved a change to the previously-established urban renewal project plan and rights transformation plan. The parties in the three aforementioned cases were dissatisfied with the relevant administrative dispositions of the Taipei City Government and separately filed administrative lawsuits to challenge those administrative dispositions of the Taipei City Government. Nevertheless, the aforesaid administrative lawsuits were dismissed

by the courts, and the dismissals have become final. Therefore, the parties jointly petitioned for an interpretation. Upon separately accepting these two petitions, the Constitutional Court reviewed these two petitions together because the subjects of both petitions for interpretation were identical.

J.Y. Interpretation No. 709 is a landmark decision of the Constitutional Court, because in this Interpretation the Constitutional Court formally enunciated the doctrine of "due process of administrative procedure as required by the Constitution," requiring administrative authorities to observe due process in administrative proceedings. Dating back to when the Constitutional Court rendered J.Y. Interpretation No. 348 in 1994, the Constitutional Court has long held that due process is enshrined in the Constitution and guarantees both substantive due process and procedural due process. The phrase "due process of administrative procedure" first appeared in the reasoning of J.Y. Interpretation No. 663. However, not until J.Y. Interpretation No. 709 did the Constitutional Court use the phrase "due process of administrative procedure as required by the Constitution" in the holding of a J.Y. Interpretation. J.Y. Interpretation No. 709 construed the doctrine of "due process of administrative procedure as required by the Constitution" from the requirements of due process enshrined in the Constitution and in parallel with the due-process-of-administrative-procedure line of previous J.Y. Interpretations (*e.g.*, J.Y. Interpretations Nos. 409, 462, 488, 491, 535, and 663). After J.Y. Interpretation No. 709, procedural due process in administrative proceedings became a constitutional requirement rather than a statutory requirement under the Administrative Procedure Act in Taiwan. The doctrine of "due process of administrative procedure as required by the Constitution" articulated in J.Y. Interpretation No. 709 is followed in subsequent J.Y. Interpretations (*e.g.*, J.Y. Interpretations Nos. 731 and 739) and further tailored in J.Y. Interpretation No. 739, where the Constitutional Court reiterated that "due process of administrative procedure as required by the Constitution"

includes both substantive due process and procedural due process. In J.Y. Interpretations Nos. 709 and 739, the Constitutional Court upheld that "due process of administrative procedure as required by the Constitution" is part of the due process guarantee under the Constitution and contributes to building a society of greater social justice.

J.Y. Interpretation No. 755 (December 1, 2017)*

Judicial Remedies for Inmates Case

Issue

According to Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, inmates are not allowed to seek remedies in court. Does the foregoing contradict Article 16 of the Constitution, which protects the people's right to judicial remedy?

Holding

[1] According to Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, when inmates contest disciplinary actions or other management measures taken by the prison, they are not allowed to seek remedies in court. However, if the aforementioned actions or measures exceed the extent necessary for achieving the purposes of enforcing prison sentences, and if they unlawfully infringe upon inmates' constitutional rights—especially when such infringement is not obviously minor—denying inmates the right to seek remedies in court exceeds the scope of necessity under Article 23 of the Constitution and is not in conformity with Article 16 of the Constitution, which protects the people's right to judicial remedy. Authorities concerned shall review and revise the Prison Act and relevant regulations within two years from the date of announcement of this Interpretation and enact appropriate regulations to allow inmates timely and effective judicial remedies.

[2] Prior to the revision of the aforementioned laws, if inmates believe that the disciplinary actions or other management measures taken by the prison exceed

* Translation by Chen-Hung CHANG

the extent necessary for achieving the purposes of enforcing prison sentences—thus unlawfully infringing upon their constitutional rights, especially when such infringement is not obviously minor—they shall first file a grievance to the supervisory authority. If they want to challenge the decisions made by the supervisory authority subsequently, they can directly litigate in local district administrative courts in accordance with the location of the prison to seek a remedy. Such litigation shall be filed within a peremptory period of thirty days from the date they receive the decision from the supervisory authority. Regulations related to summary proceedings in the Administrative Court Procedure Act shall apply *mutatis mutandis* to these cases, which may be tried without oral arguments.

Reasoning

[1] While serving his sentence of imprisonment, Petitioner Ching-Yen HSIEH (hereinafter Petitioner A) resented not being allowed to use the word "jailer" and criticized the prison in his correspondence. He was, therefore, disciplined by the Taoyuan Prison, Agency of Corrections, Ministry of Justice (hereinafter Taoyuan Prison) for this violation. Petitioner A objected and filed a grievance according to Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules. Subsequently, he filed a petition to the Taiwan Shilin District Court for revocation of the aforementioned disciplinary measure. The Taiwan Shilin District Court dismissed the case via Criminal Order 104-Sheng-884 (2015) (hereinafter Final Decision 1), holding that "if inmates contest disciplinary actions taken by the prison, they shall seek remedy following Article 6 of the Prison Act and Article 5, Paragraph 1 of its Enforcement Rules." The ruling was final and binding. Moreover, Petitioner A complained that the warden of the Taipei Detention Center, Agency of Corrections, Ministry of Justice (hereinafter Taipei Detention Center) took his ballpoint pen away from him and restricted him

from sending greeting cards. Therefore, he filed a petition to the Taiwan Taipei District Court for revocation of these restrictions. The Taiwan Taipei District Court dismissed the case via Criminal Order 104-Sheng-1968 (2015) (hereinafter Final Decision 2), holding that "if the inmate in this case disagrees with actions taken by the Taipei Detention Center, he shall seek remedy following the aforementioned procedures[1] enacted by legislators." In addition, Petitioner A claimed that the warden of Taoyuan Prison had threatened to punish him for violation and so deleted his grievance. He filed an objection to the Taiwan Taoyuan District Criminal Court, and later appealed to the Taiwan High Court. The Taiwan High Court pointed out that the supervisory authority of prisons mentioned in Article 6 of the Prison Act was the Agency of Corrections, Ministry of Justice, not the court. "…Once a final and binding judgment is made and the prosecutor issues the command instructions for execution, the enforcement of the sentences, including how prisons manage and discipline inmates, is out of the jurisdiction of the criminal court. Since the criminal court is not the supervisory authority of prisons, it naturally cannot review the actions taken by prisons or the agency-in-charge." The Taiwan High Court therefore dismissed the case via Criminal Order 104-Kang-972 (2015) (hereinafter Final Decision 3).

[2] Petitioner Yu-Hua LIU (hereinafter Petitioner B) complained that the Taoyuan Prison had canceled edifying activities on short notice, changed lunch and dinner menus and asked inmates to pay for washing-up liquid. After filing a grievance according to Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, he filed a petition to the Taiwan Yilan District Court and later appealed to the Taiwan High Court. The Taiwan High Court dismissed the case via Criminal Order 104-Kang-757 (2015) (hereinafter Final Decision 4), holding that "as an inmate, if the appellant contests actions

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[1] Translator's note: The procedures prescribed in Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules.

taken by the prison, he should file a grievance according to the Prison Act through the warden to the supervisory authority or inspectoral officials."

[3] Petitioner Ching-Hsiang HSU (hereinafter Petitioner C) refused to accept that the Pingtung Prison, Agency of Corrections, Ministry of Justice had denied his application for prison camp. He filed an administrative appeal but was denied by the agencies with jurisdiction. He then instituted administrative litigation, but the case was dismissed by the Supreme Administrative Court via Order 105-Tsai-1249 (2016) (hereinafter Final Decision 5). The Supreme Administrative Court affirmed the ruling made by the previous court, which stated that "according to Article 6 of the Prison Act and Article 5 of its Enforcement Rules, when inmates disagree with actions taken by the prison, they can only file a grievance to the warden or inspectoral officials. In addition, the supervisory authorities of sentence enforcement institutions shall have the final decision on inmates' grievances. It is within the discretion of the Legislature to enact these provisions, which constitute a grievance system designed by the Legislature and the agency-in-charge to cope with grievances filed by inmates who disagree with actions taken by the prison. Therefore, when the actions taken by the prison are in conformity with the nature of sentence enforcement and implementation, though these provisions do not allow inmates to institute administrative litigation, they do not violate Article 16 of the Constitution, which protects the people's right to judicial remedy, and should still be applied." The case was dismissed; the order was final and binding.

[4] Petitioner Ho-Shun CHIU (hereinafter Petitioner D) complained that the Taipei Detention Center denied his application to send letters, so he filed an administrative appeal but was denied by the agencies with jurisdiction. He then initiated administrative litigation, but the case was dismissed by the Supreme Administrative Court via Judgment 102-P-514 (2013) (hereinafter Final Decision 6). In the ruling, the Supreme Administrative Court stated, "…While enforcing imprisonment or death penalties, if a prison restrains inmates' freedom of

correspondence and speech according to the Prison Act, it is actually enforcing a concomitant restraint to the deprivation of liberty and security of person or the right to life. This is part of sentence enforcement just as much as the deprivation of liberty of person before carrying out the death penalty and is based on the State's power to punish crime. The purpose is to implement sentences given by final and binding rulings. Since these restraints do not create new regulatory effects, they are not administrative dispositions regulated by the Administrative Procedure Act. Hence, the inmates cannot file an administrative appeal or institute administrative litigation following the usual administrative remedial procedures. According to Article 6 of the Prison Act and Article 5 of its Enforcement Rules, when inmates disagree with actions taken by the prison, they can only file a grievance to the warden or inspectoral officials. In addition, the supervisory authorities of sentence enforcement institutions have the final decision on inmates' grievances (the highest supervisory authority is the Ministry of Justice). Since inmates cannot institute administrative litigation when the actions taken by the prison are in conformity with the nature of sentence enforcement and implementation, Article 6 of the Prison Act and Article 5 of its Enforcement Rules do not violate Article 16 of the Constitution, which protects the people's right to judicial remedy, and should still be applied." The case was dismissed; the judgment was final and binding.

[5] Petitioners A through D all alleged that Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, which the aforementioned final decisions had applied, were unconstitutional and filed petitions for constitutional interpretation. Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules were applied in Final Decisions 1, 2, 4, 5 and 6. Article 6 of the Prison Act was cited and discussed in Final Decision 3, and hence should be considered as applied in the decision. The petitions by petitioners A to D are in accordance with Article 5, Paragraph 1,

Subparagraph 2 of the Constitutional Court Procedure Act, and hence shall be heard.

[6] Petitioner E is a judge from the Taiwan Taipei District Criminal Court. While judging a case (104-Sheng-Geng-1--19 (2015) of the Taiwan Taipei District Criminal Court), Petitioner E felt Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, which were applicable in the case, may have contravened Article 16 of the Constitution. Consequently, Petitioner E filed a petition for constitutional interpretation providing concrete reasons for objectively believing the statute to be unconstitutional. This petition has fulfilled the requirements, which are explained in J.Y. Interpretation No. 371, 572 and 590, for judges filing a petition for constitutional interpretation, and hence shall be heard.

[7] All the aforementioned petitions concern whether the remedial procedures for inmates who disagree with disciplinary actions or other management measures taken by prisons, are inconsistent with the Constitution. Considering the commonality of these petitions, the Constitutional Court decided to consolidate them for review and made this Interpretation. The reasoning is as follows:

[8] Article 16 of the Constitution protects the people's right to judicial remedy, meaning that individuals shall have the right to seek judicial remedies when their rights or legal interests are infringed. Based on the constitutional principle of "where there is a right, there is a remedy," when a person's rights or legal interests are infringed upon, the State should provide such person an opportunity to litigate in court, to request a fair trial in accordance with due process of law and to obtain timely and effective remedy, which shall not be denied simply because of the person's status (*see* J.Y. Interpretation No. 736).

[9] The purpose of a sentence of imprisonment is to encourage inmates to reform and adapt to social life (*see* Article 1 of the Prison Act). During

imprisonment, inmates are deprived of liberty of person. Their other rights and freedoms (such as freedom of residence and movement) may also be restrained concomitantly. Considering that prisons are highly purposeful correctional institutions, for them to achieve the purpose of enforcing prison sentences (including maintaining order and security in prison, providing appropriate correctional treatment for inmates, preventing inmates from becoming involved in other illegal behavior, etc.), they should be able to take measures necessary for inmate management, to which the judiciary should show a high degree of deference. Therefore, if their constitutional rights are not infringed upon, or if the infringement is obviously minor, inmates can only follow the grievance procedures in prisons and their supervisory authorities, urging internal review and resolution. However, if the disciplinary actions or other management measures taken by the prison exceed the extent necessary for achieving the purpose of enforcing prison sentences and unlawfully infringe upon inmates' constitutional rights, especially when such infringement is not obviously minor, due to the principle "where there is a right, there is a remedy" under Article 16 of the Constitution, inmates shall be allowed to litigate in court for judicial remedies.

[10] Article 6 of the Prison Act prescribes: "1. If inmates contest actions taken by the prison, they can file grievances through the warden to the supervisory authority or inspectoral officials. Actions taken by the prison remain effective until the related authority decides otherwise. 2. A warden shall report inmates' grievances to the supervisory authority at once. 3. When inspectoral officials visit a prison, inmates who contest actions taken by the prison can file grievances to them directly." Article 5, Paragraph 1 of the Enforcement Rules of the Prison Act prescribes: "Grievances filed by inmates, who contest actions taken by the prison, shall be processed pursuant to the regulations stipulated below: … 7. The supervisory authority shall have the final decision on inmates' grievances." These provisions constitute a grievance system designed by the Legislature and the

agency-in-charge to cope with grievances filed by inmates who disagree with actions taken by the prison. This grievance system allows imprisonment enforcement institutions an opportunity to reflect on, review and correct their decisions, in addition to providing inmates timely and effective remedies. It is within the discretion of the Legislature to design such grievance systems. However, it should not be grounds for depriving inmates of the right to litigate in court for judicial remedies.

[11] Article 6 of the Prison Act was enacted on December 29, 1945, promulgated on January 19, 1946, and came into force on December 14, 1947. Subsequent amendments only revised the names of authorities handling grievances. The Enforcement Rules of the Prison Act were enacted and promulgated on March 5, 1975. Article 5, Paragraph 1, Subparagraph 7 has not been revised by subsequent amendment to the Rules. Given the time, place and circumstances wherein the aforementioned provisions were enacted, it was believed that inmates and prisons were in a special relationship of subordination. Accordingly, if inmates disagreed with disciplinary actions or other management measures taken by the prison, they could only seek remedies through grievance procedures and did not have the right to litigate in court for judicial remedies. However, grievance procedures only provide a method of internal review and correction. They are not equivalent to judicial proceedings for seeking remedies. Hence, they cannot replace judicial procedures for seeking remedies in court. The Agency of Corrections, Ministry of Justice issued Letter Tzong-10101609910 of April 5, 2012, to its subordinate institutions, stating that prior to the revision of the Prison Act, inmates' grievances and remedies "shall be handled in accordance with the procedure for transferring cases to the criminal court, and not to be bound by Article 5, Paragraph 1, Subparagraph 7 of the Enforcement Rules of the Prison Act." On November 7, 2012, Letter Tzong-10101194401 was issued to repeat the same instruction. However, the aforementioned Letters are not binding on courts.

Moreover, Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules have not yet been revised. Hence, it is necessary to make this Interpretation.

[12] According to Article 6 of the Prison Act and Article 5, Paragraph 1, Subparagraph 7 of its Enforcement Rules, when inmates contest disciplinary actions or other management measures taken by the prison, they are not allowed to seek remedies in court. However, if the aforementioned actions or measures exceed the extent necessary for achieving the purpose of enforcing prison sentences and if they unlawfully infringe upon inmates' constitutional rights—especially when such infringement is not obviously minor—denying inmates the right to seek remedies in court exceeds the scope of necessity under Article 23 of the Constitution and is not in conformity with Article 16 of the Constitution, which protects the people's right to judicial remedy. Authorities concerned shall review and revise the Prison Act and relevant regulations within two years from the date of announcement of this Interpretation and enact appropriate regulations to allow inmates timely and effective judicial remedies.

[13] Prior to the revision of the aforementioned laws, if inmates believe that the disciplinary actions or other management measures taken by the prison exceed the extent necessary for achieving the purpose of enforcing prison sentences, thus unlawfully infringing upon their constitutional rights—especially when such infringement is not obviously minor—they shall first file a grievance to the supervisory authority. If, subsequently, they want to challenge the decision made by the supervisory authority, they can directly litigate in local district administrative courts in accordance with the location of the prison to seek remedy. Such litigation shall be filed within a peremptory period of thirty days from the date they receive the decision from the supervisory authority. Regulations relating to summary proceedings in the Administrative Court Procedure Act shall apply *mutatis mutandis* to these cases, which may be tried without oral arguments.

When oral arguments are needed, remote hearings using video technology in accordance with Article 130-1 of the Administrative Court Procedure Act can be held.

[14] In addition, Article 5 of the Enforcement Rules of the Prison Act has yet to require the supervisory authorities of prisons to establish a committee composed of external, impartial and professional members to review and handle grievances. This shall be reviewed and revised by authorities concerned as well.

[15] Petitioner A also filed a petition to supplement J.Y. Interpretations No. 639, 663 and 667. Considering the aforementioned Interpretations are not flawed by ambiguity or incompleteness, supplementary Interpretations are not necessary. Hence that petition does not meet the requirements stipulated in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and should be dismissed in accordance with Paragraph 3 of the same Article. Furthermore, Petitioner D filed a petition for constitutional interpretation of several provisions, including Article 66 of the Prison Act, and Articles 82 and 81, Paragraph 3 of the Enforcement Rules of the Prison Act. Since that petition does not share the same subject matter with petitions filed by Petitioners A, B, C and E, it is to be reviewed separately.

Background Notes by Szu-Chen KUO

There are several petitioners in this case. One of the petitioners, Ho-Shun CHIU, in his petition, challenged both the restriction on inmates' right to seek judicial remedy and several provisions authorizing the prison to inspect and review inmates' mail in the Prison Act and its Enforcement Rules. The Constitutional Court consolidated CHIU's petition on the right to judicial remedy with other petitions and rendered J.Y. Interpretation No. 755 on the first day of December 2017. On the same day, the Constitutional Court also announced J.Y. Interpretation 756, responding to CHIU's challenge to the provisions which

permit the prison to inspect and review inmates' mail. These two Interpretations are milestones in the Constitutional Court's history both in terms of the protection of inmates' human rights and breakthroughs in the doctrine of the special relationship of subordination.

Inmates and the State were believed to be in a special relationship of subordination. According to the doctrine, inmates did not enjoy the same full rights as other citizens and were prohibited from filing a suit against the State. J.Y. Interpretations No. 755 and 756 are the first two cases in which the Constitutional Court has ever confirmed that inmates, except for the restriction of liberty of person and other incidentally restricted liberties, enjoy constitutional rights guaranteed to other people, including the right to judicial remedy. The Constitutional Court emphasized in J.Y. Interpretation No. 755, as it did in other Interpretations that loosened the doctrine of special relationship of subordination, such as J.Y. Interpretations Nos. 653, 684, and 736:

> [W]hen a person's rights or legal interests are infringed upon, the State should provide such person an opportunity to litigate in court, to request a fair trial in accordance with due process of law and to obtain timely and effective remedy, which shall not be denied simply because of the person's status.

Apart from the significance of the conclusion, the reasoning and measure the Constitutional Court took in J.Y. Interpretation No. 755, compared with its counterpart, J.Y. Interpretation No. 653, are also noteworthy. J.Y. Interpretation No. 653 recognized detainees' right to judicial remedy when they disagree with the disciplinary action taken by the detention center. In the detainee case, the Constitutional Court used two constitutional rights, the right to judicial remedy and the right to liberty of person, to develop its reasoning. In the inmate case,

however, the Constitutional Court mentioned only the right to judicial remedy. Secondly, in the detainee case, the Constitutional Court only requested authorities concerned to revise laws as appropriate to allow detainees to litigate against the State without saying anything in regard to the proper proceedings before the laws are revised. In contrast, the Constitutional Court in J.Y. Interpretation No. 755 instructed what proceedings shall be taken before the revision of the laws.

J.Y. Interpretation No. 582 (July 23, 2004)*

Cross-examination of Co-defendants Case

Issue

Are the relevant precedents holding that a statement made by a criminal co-defendant against another co-defendant may be admissible without cross-examination unconstitutional?

Holding

[1] Article 16 of the Constitution guarantees the people's right to judicial remedy. As far as a criminal defendant is concerned, such guarantee should also include his right to adequately defend himself in a legal action brought against him. A criminal defendant's right to examine a witness is a corollary of such right, which is also protected by the due process of law concept embodied under Article 8, Paragraph 1 of the Constitution, providing, among other things, that "no person shall be tried and punished otherwise than by a court of law in accordance with the procedure prescribed by law." In order to ensure the defendant's right to examine any witness during a trial, a witness should appear in court and sign an affidavit to tell the truth in accordance with the relevant statutory procedures. And, it is not until the witness is confronted and examined by the defendant that the witness's statement may be used as a basis upon which decisions as to the defendant's criminal culpability can be made. The situation of a criminal co-defendant exists due to efficiency concerns, as a result of either the merger or addition of complaints filed by a public or private prosecutor, or the merger of trials initiated by the court. The respective defendants and the facts related to their

* Translation by Vincent C. KUAN

respective crimes, however, still exist independently of each other. Therefore, a co-defendant is, in essence, a third-party witness in a case concerning another co-defendant. Thus, the merger of cases should not affect the aforesaid constitutional rights of such other co-defendant. It has been held in Supreme Court Criminal Precedent 31-Shang-2423 (1942) and Supreme Court Criminal Precedent 46-Tai-Shang-419 (1957) that a statement made by a co-defendant against himself may be admitted into evidence supporting the crime (determination of facts) related to another co-defendant. Such holding has failed to treat a co-defendant as a witness in making a statement during the trial against another co-defendant, but instead has admitted the co-defendant's statement into evidence against such other co-defendant merely because of his status as a co-defendant. In doing so, the holding has denied a co-defendant the standing as a witness in the trial for another co-defendant, and thus failed to follow the statutory investigative procedure as to witnesses. Hence, it is in breach of Article 273 of the Code of Criminal Procedure as amended and promulgated on January 1, 1935, and has unjustly deprived such other co-defendant of the right to examine the co-defendant who should have had standing as a witness. We, therefore, are of the opinion that such holding is inconsistent with the constitutional intent first described above. Those portions of the opinions as detailed given in the aforesaid two precedents, as well as in other precedents with the same holding, which are not in line with the intent described above, should no longer be cited and applied.

[2] Under the constitutional principle of due process of law, the principles of judgment per evidence and voluntary confession have been adopted as to the determination of criminal facts in a criminal trial. Accordingly, the Code of Criminal Procedure has adopted the doctrine of strict proof, under which no defendant shall be pronounced guilty until a court of law has legally investigated admissible evidence and achieved firm belief that such evidence is sufficient to prove the defendant's guilt. And, in order not to give undue weight to confession,

thus negatively impacting the discovery of truth and protection of human rights, the said Code also provides that the confession of an accused person shall not be used as the sole basis of conviction, and that other necessary evidence shall still be investigated to see if the confession is consistent with the facts. In light of the foregoing doctrine of strict proof and restrictions on the probative value of confessions, such "other necessary evidence" must also be admissible evidence that should be legally investigated. Besides, as far as the probative value is concerned, the weight of confessions is not necessarily stronger than that of such other necessary evidence, which should not be considered only secondary or supplemental to confessions and hence flimsier. Instead, the confessions and other necessary evidence should be mutually probative of each other, leading to a firm belief after a thorough judgment that the confessed crime is confirmed by such other necessary evidence. Supreme Court Criminal Precedent 30-Shang-3038 (1941), Supreme Court Criminal Precedent 70-Tai-Shang-5638 (1981) and Supreme Court Criminal Precedent 74-Tai-Fu-103 (1985) were intended to elaborate on the meaning, nature, scope and degree of proof for such "other necessary evidence," as well as its relationship with confessions. Furthermore, these precedents also stressed that such evidence should corroborate the truth of confessions so that the confessed crime can be established beyond reasonable doubt. We, therefore, are of the opinion that these precedents, as well as other precedents with the same gist, do not run afoul of the constitutional intent first described above.

Reasoning

[1] This Court has repeatedly issued interpretations to the effect that a final and conclusive judgment should be deemed as an order and thus subjected to judicial review if any precedent is cited and invoked in reaching the judgment. (*see* J.Y. Interpretations Nos. 154, 271, 374, and 569) The petition at issue concerns a final

and conclusive criminal judgment, namely, Supreme Court Criminal Judgment 89-Tai-Shang-2196 (2000). Though the judgment did not formally specify the reference numbers of the aforesaid five interpretations, it did describe in the reasoning that the criminal facts regarding the Petitioner were determined and sustained by the judgment rendered by the court of the second instance (Taiwan High Court Criminal Judgment 88-Shang-Keng-Wu-145 (1999)). Such facts were all established by the confessions given by the co-defendants of the Petitioner at the time of interrogations conducted by the police and prosecution, as well as parts of the confessions given at the appellate trial; that such confessions were consistent with the circumstances surrounding the kidnapping and ransom and stolen car as alleged by the parents of the victim to the offense of kidnapping for ransom and the victim to the offense of theft; that other witnesses also testified unambiguously as to the course of the crime committed by the Petitioner and the co-defendants; that the judgment was also based on additional material evidence and documentary evidence attached to the case file; and that the court of second instance, in addition to hearing the foregoing confessions of the co-defendants, had also done everything in its power to investigate any other essential evidence related to the offenses allegedly committed by the Petitioner. The foregoing, in our opinion, is in line with the five precedents cited in the petition at issue both in form and in substance, which apparently signifies that the aforesaid judgment has cited and invoked the precedents at issue as the basis for its decision. Since the Petitioner has considered such precedents to be unconstitutional, they are unquestionably subject to review by this Court. Therefore, under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, this petition should be accepted (*see* J.Y. Interpretation No. 399).

[2] Article 16 of the Constitution provides for the people's right to judicial remedy. As far as a criminal defendant is concerned, he should enjoy the right to adequately defend himself under a confrontational system, according to

adversarial rules, to ensure a fair trial (*see* J.Y. Interpretations Nos. 396 and 482). The right of an accused to examine a witness is a corollary of such right. As early as July 28, 1928, Article 286 of the then-effective Code of Criminal Procedure, as well as the subsequent amendment to Article 273 of the same Code promulgated on January 1, 1935, already provided, "Upon the conclusion of questioning of a witness or an expert witness by the presiding judge, the party concerned or his defense attorney may file a motion with the court to have the presiding judge examine such witness or expert witness or to examine the same directly. (Paragraph 1) If a witness or an expert witness is called to testify by means of motion, he shall first be examined by the party calling him or the party's defense attorney, then cross-examined by the counter-party or the counter-party's defense attorney, and then re-examined by the party calling him or the party's defense attorney; provided that the re-direct examination shall be limited in scope to the matters revealed during the cross-examination. (Paragraph 2)" Subsequently, Article 166 of the Code of Criminal Procedure as amended and promulgated on January 28, 1967, preserved the same provision. And, more detailed provisions were added to the said Code when it was amended on February 6, 2003, namely, Article 166 through Article 167-7 thereof. Such right of a criminal defendant is universally provided — whether in a civil law country or a common law jurisdiction, and whether an adversarial system or an inquisitorial setting is adopted in administering a state's criminal justice system. (*see*, *e.g.*, 6th Amendment to the United States Constitution, Article 37, Paragraph 2 of the Japanese Constitution, Article 304 of the Code of Criminal Procedure of Japan, and Article 239 of the Code of Criminal Procedure of Germany) Article 6, Paragraph 3, Subparagraph 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, effective on November 4, 1950, and Article 14, Paragraph 3, Subparagraph 5 of the International Covenant on Civil and Political Rights, passed by the United Nations on December 16, 1966, and enter into force on March 23, 1976, both provide, "everyone charged with a crime

shall be entitled to the following minimum guarantees: … to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him …" Apparently, it is the universal and fundamental right of an accused to examine a witness. Under the Constitution of this nation, such right is not only covered by the fundamental right to judicial remedy as safeguarded by Article 16 of the Constitution, but is a right concerning the people's body and freedom, which is also protected by the due process of law concept embodied in Article 8, Paragraph 1 of the Constitution, providing, among other matters, that "no person shall be tried and punished otherwise than by a court of law in accordance with the procedure prescribed by law." (*see* J.Y. Interpretation No. 384).

[3] Under the principle of due process of law, the facts related to a criminal should be determined pursuant to evidence during a criminal trial. (*see* J.Y. Interpretation No. 384, Article 282 of the Code of Criminal Procedure promulgated on July 28, 1928, Article 268 of the said Code as amended and promulgated on January 1, 1935, the first half of Article 154 of the said Code as amended and promulgated on January 28, 1967, and the first half of Paragraph 2 of the identical Article of the said Code as amended and promulgated on February 6, 2003). The doctrine of strict proof is the core of the principle of judgment per evidence. In other words, any evidence that is inadmissible or that has not been lawfully investigated shall not form the basis of a decision as to criminal facts. (*see* Article 155, Paragraph 2 of the Code of Criminal Procedure, as amended and promulgated on January 28, 1967, and amended again on February 6, 2003). Admissibility refers to the capacity of any evidence that may be admitted in a court of law for purposes of investigation and determination of criminal facts. Such capacity will not be achieved unless the evidence and the facts to be proved are naturally related to each other, in conformity with statutory formalities and

not subject to legal prohibitions or exclusions. For instance, a witness should sign an affidavit to tell the truth, or his testimony will not be admitted into evidence. (*see* ex-Grand Review Yuan Precedent Fei-10 (1915); Supreme Court Criminal Precedent 34-Shang-824 (1945); and Article 158-3 of the existing Code of Criminal Procedure). In addition, the confession of an accused shall not be induced by unjust means, or it will not be admissible in court. (*see* Article 280, Paragraph 1 of the Code of Criminal Procedure promulgated on July 28, 1928; Article 270, Paragraph 1 of the said Code as amended and promulgated on January 1, 1935; and Article 156, Paragraph 1 of the said Code as amended and promulgated on January 28, 1967). A lawful investigation should denote the procedure implemented by a trial court in accordance with the principles prescribed by the Code of Criminal Procedure and other applicable laws (such as direct hearing, oral argument, open trial), as well as various means of investigation prescribed by law. Moreover, if a witness is under investigation, his presence should be made available pursuant to law, and his signing an affidavit to tell the truth and making truthful statements should be ordered after informing him of his obligation to sign an affidavit to tell the truth and of the punishment for perjury. The witness should then be examined by the parties concerned or be questioned by the presiding judge. Upon conclusion of arguments between the parties, defense attorneys and other relevant individuals regarding the examination and/or questioning, the court should come up with its own belief as to the evidence. [Refer to the provisions contained in Part I, Chapter 13 (Witnesses) and Part II, Chapter 1, Section 3 (Trial of the First Instance) of the Code of Criminal Procedure prior to its amendment and promulgation on January 28, 1967; and Part I, Chapter 12, Section 1 (Evidence--General), Section 2 (Witnesses) and Part II, Chapter 1, Section 3 (Trial of the First Instance) of the said Code subsequent to said amendment and promulgation].

[4] In light of the above, a defendant's right to examine a witness is not only a

right to defend himself in a legal action brought against him, but also a right guaranteed under constitutional due process of law. Such institutional safeguard for a constitutional right is conducive to the fulfillment of a fair trial (*see* J.Y. Interpretations Nos. 442, 482 and 512) and the discovery of truth, so as to achieve the purposes of criminal procedure. In order to ensure the defendant's right to examine any witness during a trial, a witness (or any other person eligible to testify) should appear in court and sign an affidavit to tell the truth in accordance with statutory procedure as to witnesses. And, it is not until the witness is confronted and examined by the defendant that the witness's statement may be used as a basis upon which decisions as to the defendant's criminal culpabiltiy can be made. As for the statements of anyone other than an accused (including a witness or co-defendant) made outside the court, if admissible under any special provision of law (*see* Article 159, Paragraph 1 of the Code of Criminal Procedure), the examining procedure should still be carried out during the trial unless examination is not feasible under the circumstances. In order both to discover the truth and protect human rights, proper criminal procedure requires that, unless otherwise provided by law, anyone be under an obligation to testify in a trial against another. A criminal co-defendant situation exists only for reasons like economy of lawsuits, which result either from the merger or addition of complaints filed by a public or private prosecutor, or from the merger of trials initiated by a court of law. The respective defendants and the facts related to their respective crimes, however, still exist independently of each other. Therefore, a co-defendant is, in essence, a third-party witness in the case concerning another co-defendant. Whether a co-defendant's in-court or out-of-court statement may be admitted into evidence against another co-defendant should be determined by applying the aforesaid principle. Thus, the merger of cases should not affect the aforesaid constitutional rights of such other co-defendant. Article 106, Subparagraph 3 of the Code of Criminal Procedure promulgated on July 28, 1928, Article 173, Paragraph 1, Subparagraph 3 of the said Code as amended and

promulgated on January 1, 1935, and December 16, 1945, and Article 186, Subparagraph 3 of the said Code as amended and promulgated on January 28, 1967, provided, "A witness shall not be ordered to sign an affidavit to tell the truth if he is a co-defendant or suspect in the case at issue." The legislative intent thereof is nothing other than to prevent a witness who is a co-defendant or suspect in a case from incriminating himself or involving himself with the offense of perjury while testifying at the trial for the accused after signing an affidavit to tell the truth. This provision, however, was deleted on February 6, 2003, because the admission of a statement given by a person without signing an affidavit to tell the truth against an accused is not only detrimental to the discovery of truth, but also damaging to the effective exercise of the right of an accused to examine a witness. Nevertheless, prior to the deletion of the said provision, a court of law should still investigate such a co-defendant-witness in accordance with the statutory procedures as to witnesses for the purposes of discovering the truth and ensuring the right of an accused to examine the witness. In addition, a co-defendant is also an accused as far as his own case is concerned, and therefore should enjoy the same constitutional rights afforded to an ordinary criminal defendant, including, *e.g.*, the right to make voluntary statements. If and when an accused and a co-defendant have conflicting interests while exercising their respective rights, special efforts should be made to ensure that the rights of both sides are attended to without willfully protecting one party's right at the expense of the other. Although an accused is entitled to examine a co-defendant eligible to testify in his own case, such right does no affect the co-defendant's exercise of his right to make voluntary statements. Thus, if the co-defendant fears that his testimony may tend to result in criminal prosecution or punishment against himself, he is entitled to refuse to give any statement. The Code of Criminal Procedure has given a witness (including a co-defendant eligible to testify as a witness) the right to refuse to testify for fear of prosecution or punishment after giving any statement (*see* Article 100 of the Code of Criminal Procedure promulgated on July 28, 1928,

Article 168 of the said Code as amended and promulgated on January 1, 1935, and Article 181 of the said Code as amended and promulgated on January 28, 1967), which is an effective institutional design to ensure the rights and interests of an accused and a witness (including a co-defendant eligible to testify as a witness). Furthermore, although the Code of Criminal Procedure has provided that, where there are multiple defendants, one defendant may be ordered to confront another ex officio or upon request made by the accused (*see* Article 61 of the Code of Criminal Procedure promulgated on July 28, 1928, and Article 97 of the said Code as amended and promulgated on January 1, 1935, and January 28, 1967), such confrontation, however, merely requires that several co-defendants, in the presence of each other, take turns raising questions as to suspicious points or questioning each other for answers when they have different or contradictory stories regarding the same or related facts. No affidavits to tell the truth are signed for such statements, thus making such confrontation less effective than examination, and therefore making it impossible to replace the right to examine. If one co-defendant's statement is adopted and admitted into evidence against another co-defendant simply because the co-defendants concerned have confronted each other, it would not only confuse the nature of the right to examine and the right to confront, but also jeopardize both the right of an accused to adequately defend himself in a legal action brought against him and the fulfillment of the court's discovery of the truth.

[5] It was held in Supreme Court Criminal Precedent 31-Shang-2423 (1942) that a statement made by a co-defendant against himself may be admitted into evidence supporting criminal facts related to another co-defendant, but under Article 270, Paragraph 2 of the Code of Criminal Procedure, other necessary evidence must also be investigated to determine whether such statement is in line with the facts, and that such statement alone may not be used as the sole basis for determining the guilt of another co-defendant. It has also been held in Supreme

Court Criminal Precedent 46-Tai-Shang-419 (1957) that a statement made by a co-defendant against himself may be admitted into evidence supporting criminal facts related to another co-defendant; provided that such statement should not be used as the basis of determining the guilt of another co-defendant unless it is flawless and consistent with the facts discovered upon investigation into other relevant evidence. The aforesaid precedents held that a statement made by a co-defendant against himself may be admitted into evidence supporting the crime (determination of facts) related to another co-defendant, but also held that, according to Article 270, Paragraph 2 of the then-effective Code of Criminal Procedure (*i.e.*, Article 156, Paragraph 2 of the said Code as amended and promulgated in 1967), other necessary evidence should still be investigated. Such holding clearly has treated the statement made by a co-defendant against himself as a confession made by an accused (namely, the so-called "another co-defendant" referred to in the aforesaid precedents). It has admitted a co-defendant's statement into evidence against another co-defendant simply because of his status as a co-defendant. As far as the case of another co-defendant is concerned, such holding not only has failed to differentiate an in-court statement from an out-of-court statement, but has also denied a co-defendant the standing as a witness in the trial of another co-defendant, thus excluding the statutory investigative procedure pursuant to which a co-defendant may testify as a witness. Hence, it is in breach of Article 273 of the Code of Criminal Procedure as amended and promulgated on January 1, 1935, and has unjustly deprived such other co-defendant of the right to examine the co-defendant who should have had standing as a witness. We, therefore, are of the opinion that such holding is inconsistent with the constitutional intent first described above. Those portions of the opinions as offered in the aforesaid two precedents, as well as in other precedents with the same holding (*e.g.*, Supreme Court Criminal Precedent 20-Shang-1875 (1931); Supreme Court Criminal Precedent 38-Sui-Te-Fu-29 (1949); Supreme Court Criminal Precedent 47-Tai-Shang-1578 (1958), which are not in line with the

intent described above, should no longer be cited and applied.

[6] As already elaborated upon earlier, under the constitutional principle of due process of law, the principles of judgment per evidence and voluntary confession were adopted as to the determination of criminal facts in a criminal trial. (*see* J.Y. Interpretation No. 384). Accordingly, the Code of Criminal Procedure has adopted the doctrine of strict proof, under which no defendant shall be pronounced guilty until a court of law has legally investigated admissible evidence and achieved firm belief that such evidence is sufficient to prove the defendant's guilt. (*see* Articles 282 and 315 of the Code of Criminal Procedure promulgated on July 28, 1928; Articles 268 and 291 of the said Code as amended and promulgated on January 1, 1935; Articles 154, 155, Paragraph 2 and Article 299, Paragraph 1 of the said Code as amended and promulgated on January 28, 1967; and Articles 154, Paragraph 2, 155, Paragraph 2 and Article 299, Paragraph 1 of the said Code now in force.) Although a voluntary confession made by an accused may also be admitted into evidence, the said Code, nevertheless, provides that the confession of an accused shall not be used as the sole basis of conviction, and that other necessary evidence shall still be investigated to see if the confession is consistent with the facts, so as not to give undue emphasis to confession, thus negatively impacting the discovery of truth and protection of human rights. (*see* Article 156, Paragraph 2 of the Code of Criminal Procedure as amended and promulgated on January 28, 1967; both Article 280, Paragraph 2 of the said Code as amended and promulgated on July 28, 1928, and Article 270, Paragraph 2 of the said Code as amended and promulgated on January 1, 1935, provided, "In spite of confession made by an accused, other necessary evidence shall still be investigated to determine if the confession is consistent with the facts.") In light of the foregoing doctrine of strict proof and restrictions on the probative value of confessions, such "other necessary evidence" must also be admissible evidence that should be legally investigated. Besides, as far as the probative value is

concerned, the weight of confessions is not necessarily stronger than that of such other necessary evidence, which should not be considered only secondary or supplemental to confessions and hence flimsier. Instead, the confessions and other necessary evidence should be mutually probative of each other, leading to a firm belief after thorough judgment that the confessed crime is confirmed by such other necessary evidence. Supreme Court Criminal Precedent 30-Shang-3038 (1941), Supreme Court Criminal Precedent 70-Tai-Shang-5638 (1981) and Supreme Court Criminal Precedent 74-Tai-Fu-103 (1985) have held, respectively, that: "The term 'other necessary evidence' should, as a matter of course, refer to such evidence as is relevant to the criminal facts. If the confession of an accused should be abruptly overturned merely because of some pointless issues, the judgment at issue could then hardly be considered to stand on legitimate grounds." "Even though the mere confession of an accused may not be used as the sole basis of conviction, and corroborative evidence is required to confirm such confession's consistency with the facts, it is not necessary that the 'corroborative evidence' tend to prove each and every fact of the requisite elements of the crime. It would be sufficient if such corroborative evidence would support the non-fabrication of the confessed crime, and thus guarantee the truth of the confession. Additionally, the 'corroborative evidence' is admissible as long as it is sufficient to determine the facts related to the crime upon a thorough judgment and comparison with the confession, even if it may not directly prove that the accused carried out the crime." "Article 156, Paragraph 2 provides, 'In spite of a confession made by an accused, other necessary evidence shall still be investigated to determine if the confession is consistent with the facts.' The legislative intent thereof is to endorse the truth of a confession with corroborative evidence. In other words, the existence of corroborative evidence is used to limit the probative value of confessions. And, the term 'corroborative evidence' should refer to any evidence, other than confessions, that is sufficient to prove, to some extent, that the confessed crime has indeed been committed. Though it is not

necessary that such corroborative evidence tends to support the facts in their entirety, the corroborative evidence and confession must be mutually probative of each other, resulting in a firm belief that the confessed crime has been committed." The foregoing precedents were intended to elaborate upon the meaning, nature, scope and degree of proof for such "other necessary evidence," as well as its relationship with confessions. Furthermore, these precedents also stressed that such evidence should corroborate the truth of confessions so that the confessed crime can be established beyond reasonable doubt. We, therefore, are of the opinion that these precedents, as well as other precedents with the same meaning (*see*, *e.g.*, Supreme Court Criminal Precedent 18-Shang-1087 (1929); Supreme Court Criminal Precedent 29-Shang-1648 (1940); Supreme Court Criminal Precedent 46-Tai-Shang-170 (1957) and Supreme Court Criminal Precedent 46-Tai-Shang-809 (1941)), do not run afoul of the constitutional intent first described above.

[7] The Directions for the Ministry of Justice in Examining the Execution of Death Penalty Cases are not a law or regulation applied in reaching the final and conclusive judgment at issue. To the extent that the Petitioner's petition concerns the said Directions, we find it inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. Therefore, under Article 5, Paragraph 3 of the said Act, it shall be dismissed accordingly.

Background Note by Mong-Hwa CHIN

J.Y. Interpretation No. 582 is a landmark interpretation regarding cross-examination in criminal procedure. The petitioner and other two co-defendants were charged with kidnap and murder and were sentenced to death in 1996. The verdict was upheld and finalized in 2000. The main issue in this case was that the co-defendants were never cross-examined by the petitioner, and yet their statements were used to determine the petitioner's guilt. According to the

precedents at issue, the statements of co-defendants were admissible regardless of whether they had been cross-examined. Those precedents were ruled unconstitutional because "such holding clearly has treated the statement made by a co-defendant against himself as the confession made by an accused." The petitioner was exonerated in 2015, and the exoneration was finalized in 2016.

It is worth noting that the Court distinguishes confrontation from cross-examination. The Court emphasizes that in Taiwan's Code of Criminal Procedure, confrontation and cross-examination differ in both scope and procedure.

In addition to this Interpretation, this original case was the main driving force behind the amendment of the Code of Criminal Procedure in 2003. The 2003 amendment created two Articles, 287-1 and 287-2. Article 287-1 allows courts to sever or merge the procedures for co-defendants ex-officio or based upon request from the two parties. Article 287-2 explicitly provides that the testimony of co-defendants shall follow the rules regarding witnesses. This would require co-defendants to be cross-examined by the defendant as witnesses.

The Court rendered another interpretation in 2005 to answer an issue derived from this interpretation: at what point and to what extent shall J. Y. Interpretation No. 582 apply? In J.Y. Interpretation No. 592, the court made clear that J. Y. Interpretation No. 582 shall not have a retrospective effect. Since the precedents had been in existence for so long, giving the interpretation a retrospective effect would have created innumerable potential post-conviction extraordinary appeals and would have had devastating effects on the social order and public welfare. Therefore, the Court ruled that other than in the case of its petitioner, J. Y. Interpretation No. 582 did not have full retroactive effect in all cases. For cases that were pending in courts at that time, the Court ruled that J. Y. Interpretation No. 582 were to be limited to cases that "involve[d] the use of a co-defendant's statement as evidence supporting the guilt of another co-defendant."

J.Y. Interpretation No. 762 (March 9, 2018)*

The Right of a Defendant to Access Information in the Court Dossier Case

Issue

Is the first part of Paragraph 2 of Article 33 of the Criminal Procedure Code, which prevents a defendant from gaining timely access to all dossiers and exhibits in the case, unconstitutional?

Holding

[1] The first part of Paragraph 2 of Article 33 of the Criminal Procedure Code, stipulating that a *pro se* defendant may pay the required fees in advance to request copies of minutes in the dossier at trial yet which fails to provide a defendant with counsel the right to directly access information in the dossier, or a defendant with or without counsel the right to request copies of anything other than the minutes in the dossier, hinders the defendant from effectively defending the case. In this, the first part of Paragraph 2 of Article 33 of the Criminal Procedure Code is in contravention of the constitutional guarantee of due process under Article 16 of the Constitution. The authorities concerned shall amend the relevant provisions of the Criminal Procedure Code in accordance with the ruling of this Interpretation within one year from the date of issue of this Interpretation. Should the amendment not be completed in time, courts should, at the time of trial, follow this ruling by giving all copies of dossiers and exhibits to a defendant who requests them, after the necessary costs have been paid in advance.

[2] The petition for preliminary injunction is thus dismissed.

* Translation and Note by Ming-Woei CHANG

Reasoning

[1] The petitioner, Won-Xing CHU (hereinafter Petitioner 1), after being convicted by the Taiwan High Court, Tainan Branch, in Case Number 98 Chung Geng (4) 42, which is the final judgment, claimed that the final judgment made factual errors and so made a request to the Taiwan High Court, Tainan Branch, for copies of photos in the dossier to remedy the errors. However, the request was denied by the Tainan Branch Court in 105 Sheng 20. After appeal, the Supreme Court confirmed the holding of the case in 105 Tai Kang 205 (hereinafter the Final Ruling 1) by holding that, although a *pro se* defendant might analogically apply Paragraph 2 of Article 33 of the Criminal Procedure Code, which stipulates that "a *pro se* defendant may pay the necessary fees in advance to request copies of the minutes in the dossier at trial" (hereinafter Stipulation at issue), to request copies of the minutes in the dossier, however, because photos of the criminal case by their very nature are either documents or exhibits used as evidence, this request for photocopies of the photos in the criminal case did not conform to law, and therefore there was no cause for appeal.

[2] The petitioner, Chuan-Chung WANG (hereinafter Petitioner 2), the defendant in the Taiwan Taichung District Court criminal case Number 106 Yi 3060, requested that the Taiwan Taichung District Court provide the whole case dossier, including discs. Nonetheless, the request was dismissed by the district court in the final ruling 106 Yi 3060 on November 15, 2017 (hereinafter the Final Ruling 2), holding that a request for information, other than for the minutes in the dossier, filed by a *pro se* defendant did not conform to the Stipulation at issue. The court confirmed that no appeal could be lodged.

[3] Petitioners 1 and 2 claimed that Final Rulings 1 and 2, either applying or analogically applying, relevant provisions violated the right to litigate guaranteed by Article 16 of the Constitution, and then petitioned to this Court for a constitutional interpretation. This Court granted a review in accordance with the

requirements of by Article 5, Paragraph 1, Subparagraph 2 of the Act. The reasoning is as follows:

[4] Article 16 of the Constitution provides the people with the right to initiate litigation to ensure the right to a fair trial. According to due process of law, the right to complete defense includes protection of the access right to a fair trial (*see* J.Y. Interpretation No. 654). Hence, in criminal trials, a defendant is generally entitled to timely access to all necessary information related to any accusation against them in the dossier.

[5] The Stipulation at issue clearly provides that a *pro se* defendant may pay the necessary fees in advance to request copies of the minutes in the dossier at trial. It seems that only a *pro se* defendant may directly access information in the dossier (by requesting copies of the minutes). This excludes a defendant with counsel from making such a request, thereby limiting the scope of access to information in the dossier to the acquisition of copies of the minutes, rather than any other necessary information in the dossier, and only allowing the defendant to pay fees in advance to request copies of minutes. This does not allow a defendant to obtain the information in the dossier by perusing it and then either copying or photographing it or by any other means. Whether the subject, scope and method of the Stipulation at issue comply with the requirements of due process of law must be evaluated by a comprehensive judgment and affirmation of factors such as: the requirements for a full defense by the accused, the content touched upon in the case, the security of the dossier, whether or not there is an alternative process, and efficient use of judicial resources.

[6] First, regarding the subject's right to access, as the constitutional right to initiate litigation ensures the right to a full defense, a defendant, with or without counsel, should be entitled to directly access information in the dossier in person. Since the defendant personally experienced the relevant facts and may be in a better position than counsel to decide which information in the dossier might

defend the case effectively, permitting only counsel to examine the dossier is not a complete substitute for the right to access of the defendant. The Stipulation at issue, providing that a defendant with counsel might defend the case through examination of the dossier by the counsel (*see* Legislative Yuan Gazette, Vol. 96, No. 54, pp. 137-138), is in violation of the aforementioned due process of law under the Constitution, because the defendant with counsel would not be entitled to directly access information in the dossier.

[7] Second, concerning the scope of the right to access, all information in the dossier is important for the court to proceed to trial. Based on the constitutional concept of due process of law, a defendant is entitled to access to all information in the dossier to effectively defend the case. The Stipulation at issue, based on the reasoning that records and documents other than minutes in the dossier which may be used as evidence shall be investigated according to the law by the judge at trial so that the *pro se* defendant may have access to information therein (*see* Legislative Yuan Gazette, Vol. 96, No. 54, pp. 137-138), is in violation of the aforementioned due process of law under the Constitution, because the defendant would be entitled neither to timely access to all documents and exhibits other than the minutes, nor to comment on all related information other than the minutes in the dossier during the court investigation, which impedes an effective defense by the defendant.

[8] Last, in regard to the method of exercising the right to access, the Stipulation at issue, which is based on the view that "[b]ecause the defendant himself would closely be interested in the outcome of trial, directly allowing the defendant to access all information in the dossier might increase not only the cost of protection of the dossier but also the manpower required for safeguarding the defendant on the way to the court to examine the dossier should the defendant be in custody; thus the first part of Paragraph 2 of the article is newly adopted to protect the right to defense of a *pro se* defendant as well as to ensure an effective utilization of

judicial resources" (*see* Legislative Yuan Gazette, Vol. 96, No. 54, pp. 137-138) was reasonable at that time, in 2007, in not allowing the defendant to examine the dossier in person. However, given that the techniques of copying and the equipment to do so are now much more common, copies referred to in the Stipulation at issue should go beyond minutes and include duplicates (such as: photos of exhibits, copies of electronic records and e-files). Since copies play almost the same role as the originals do at trial, the Stipulation at issue providing that access to information in the dossier by paying for copies (which might reasonably be extended to duplicates) in advance constitutes no violation of due process, as it does not impede a defendant from effectively defending the case. Should it happen that the defendant be in a situation such that failure to examine the dossier leads to inadequacy in upholding the right to effective defense, it is certain that to protect the defendant's right to litigate under the Constitution, the defendant might at any time examine the dossier in a timely fashion either with the presiding judge present or with the designated judge's approval on the premise that the security of the dossier be ensured.

[9] To sum up, except for restrictions under the proviso of Paragraph 2 of Article 33 of the Criminal Procedure Code, the Stipulation at issue which deprives the defendant of the right either to directly access information or to request documents other than the minutes in the dossier impedes a defendant from effectively defending the case. The aforementioned Paragraph 2 of Article 33 of the Criminal Procedure Code is inconsistent with the meaning and purpose of Article 16 of the Constitution, which protects the right to litigate. The authorities concerned shall amend the relevant provisions of the Criminal Procedure Code in accordance with the ruling of this Interpretation within one year from the date of issue of this Interpretation. The court should follow this ruling to give all copies of dossiers and exhibits to a defendant (whether *pro se* or not) who requests them after the necessary costs have been paid in advance at the trial should the

amendment not be completed in time.

[10] The other claims also filed by Petitioner 2 that Article 27, Paragraphs 1 and 2, Articles 29 and 30, Article 31, Paragraph 1, Subparagraph 4, and Article 95, Paragraph 1, Subparagraph 3 of the Criminal Procedure Code, Articles 9 and 11 of the Attorney Regulation Act, Items 1 and 2 of the Notice of Request for Reviewing the Criminal Dossier, Article 5 of the Constitutional Court Procedure Act and Article 5, Paragraph 3, Subparagraph 2 of the Legal Aid Act are unconstitutional should be dismissed because those articles were not cited by Final Ruling 2,. The claim that Paragraph 1 of Article 33 of the Criminal Procedure Code is unconstitutional, as well as the petition filed by CHIANG Man-Na (the Assistant of Petitioner 2), claiming that the aforementioned article provides to the Assistant of Petitioner 2 no right to access information in the dossier, should also be dismissed according to Paragraph 3 of Article 5 of the Constitutional Court Procedure Act for not satisfying the requirements set out in Paragraph 1, Subparagraph 2 of the same Article, because the petitioner did not submit specific reasons for the formation of objective belief that the law is unconstitutional.

[11] Moreover, it is no longer necessary to rule on the petition for preliminary injunction filed by Petitioner 2, as the case has been completely interpreted. And given that the petition in the same case filed by Man-Na CHIANG is dismissed, it is no longer necessary to review the related petition for preliminary injunction. It shall also be dismissed.

Background Note by the Translator

Article 33 of the 1967 Criminal Procedure Code only granted defendants the right to counsel at the trial stage. Although its amendment in 1982 extended the right to counsel to the pre-trial investigatory period, prior to indictment, a criminal suspect, with or without counsel, was prohibited not only from reviewing

the dossier and exhibits but also from transcribing minutes and making copies and photographs thereof. In 2013, a former Taipei City councilor Lai Su-ru and her appointed counsel, Attorney Yi-Kwang LI, requested at her pre-trial detention hearing to examine the investigatory dossiers. However, her request was denied by the Taiwan High Court in the final ruling No. 102 Jen Kan 616. Defendant Su-Ru LAI then claimed the ruling was unconstitutional for wrongful application of Article 33, Paragraph 1 of the Criminal Procedure Code and thus requested constitutional review.

The Justices of the Judicial Yuan granted a writ of certiorari for the petition and then, in J. Y. Interpretation No. 737 on April 29, 2016, held it unconstitutional for the criminal suspect and his or her counsel to only have access to factual issues cited in the detention motion at the investigatory stage. In response to J. Y. Interpretation No. 737, the Legislative Yuan in 2017 revised Articles 93 and 101 of the Criminal Procedure Code and added Articles 31-1 and 33-1 to it as well. Following those changes, courts are obliged to appoint a public defender or attorney for the accused if he or she has not retained a defense attorney during the detention hearing of an investigation. Moreover, the defense attorney may inspect the dossier and evidence, as well as copy, or film, during a detention hearing proceeding of an investigation. And the court at the detention hearing should present a *pro se* defendant with the contents of the dossier and evidence by appropriate means.

However, according to Article 33, Paragraph 2, added in 2007, a *pro se* defendant at trial may pay the required fees in advance to request only copies of minutes in the dossier. It fails to provide a defendant with counsel the right to directly access information in the dossier. Compared with Article 33-1, added in 2017, the right to request copies of anything other than the minutes in the dossier at trial was denied by Article 33, Paragraph 2, Clause 1. Whether Article 33, Paragraph 2 of 2007 hindered the defendant from effectively defending the case

was challenged by the following Petitioners.

The Petitioner, Won-Xing CHU (hereinafter Petitioner 1), after his conviction by the Taiwan High Court, Tainan Branch was finalized, claimed that the final judgment made factual errors. To proceed with litigation for remedy, he made a request to the above court for copies of photos in the dossier. The request was denied by court ruling. After exhausting all available measures for seeking relief in appellate review against the ruling, Petitioner 1, on July 20, 2016, filed his petition to this Court for interpretation of the Constitution by arguing that the Clause 1 of Paragraph 2 of Article 33 of the Criminal Procedure Code, stipulating that a *pro se* defendant may pay the necessary fees in advance to request copies of minutes in the dossier at trial, as analogically applied in the final ruling, was in violation of the Constitution.

The Petitioner, Chuan-Chung WANG (hereinafter Petitioner 2), the defendant in Taiwan Taichung District Court Criminal Case Number 106 Yi 3060, submitted a request to the court for the whole dossier, including discs. This was dismissed, and the ruling became final because any interlocutory appeal is forbidden by law. After exhausting all available measures for seeking relief in appellate review, Petitioner 2, on December 12, 2017, filed his petition to this Court for interpretation of the Constitution by arguing that the Stipulation at issue applied in the final ruling was in violation of the Constitution. Petitioner 2 also petitioned for a preliminary injunction to suspend his case.

The abovementioned petitions regarding whether the relevant direct and analogical applications of the Stipulation at issue violate the Constitution were jointly reviewed by this Court.

J.Y. Interpretation No. 490 (October 1, 1999)*

Obligation to Perform Military Service Case

Issue

Article 1 of the Conscription Act provides that all eligible males are to be drafted for military service, and Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act further prescribes that a person sentenced to imprisonment who is eventually given pardon, commutation, probation or parole shall not be relieved from military service if he has served less than four years in prison, with no exception to be made for conscientious objectors. Do the said provisions violate Article 13 of the Constitution guaranteeing the freedom of religious belief, thus rendering null and void?

Holding

Article 20 of the Constitution prescribes that the people shall have the duty to perform military service in accordance with the laws. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding military service are to be specified in laws and solely left to the legislature's discretion with due consideration of national security and needs of social development. Article 13 of the Constitution ensuring that people shall have the freedom of religious belief means that people shall have the freedom to believe in any religion and to participate in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious beliefs. Nonetheless, given the physical differences between males and

* Translation by Jiunn-Rong YEH

females and the derived role differentiation in their respective social functions and lives, the Legislature enacted Article 1 of the Conscription Act indicating that, pursuant to laws, only eligible male citizens have the duty to perform military service. This role differentiation has been made to incarnate both the national goals and constitutionally prescribed basic duties of the people and, thus, is of a legislative policy nature. It does not encourage, endorse, or prohibit any religion, nor does it have such effects. Moreover, prescribing a male citizen's duty to render military service does not violate human dignity, nor does it undermine the fundamental values of the Constitution. Most nations also prescribe such duty in their respective laws. Requiring such duty is a necessary measure to protect the people and to defend national security. As a result, it does not violate the equal protection principle of Article 7 or the protection of freedom of religious belief of Article 13 of the Constitution. In addition, Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act prescribes that those males sentenced to prison according to Paragraph 1 but later given commutation, probation or parole, whose military service has been deferred but who have served less than four years in prison, shall still have to fulfill their military obligation. Thus, eligible males whose duty of rendering military service has been deferred shall not be freed from such service, should they still be within the age limit for such service. Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act thus requires that each judicial organ inform the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also warrant punishment prescribed in the Act Governing the Punishment of Offences against Military Service shall be disposed of accordingly. This does not contradict the guarantee against double jeopardy, nor does it infringe upon the freedom of religious belief prescribed in Article 13 of the Constitution or undermine the principle of proportionality bestowed in Article 23 of the Constitution.

Reasoning

[1] Freedom of religious belief, one of the fundamental rights of the people, shall be protected by the constitution of a modern state governed by the rule of law (Rechtsstaat). Such freedom ensures that the people shall have the freedom to believe in any religion and to participate in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious beliefs. The guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practices and freedom of religious association. Freedom of personal religious beliefs, in which each individual's own ideas, speech, beliefs, and spirit are involved, is an absolute right that shall not be infringed upon. The derived freedoms of religious acts and religious association, which may affect others' freedoms and rights or impair public order, virtuous customs, social morality, or integrity, are, hence, relative rights. Freedom of religious belief, like other fundamental rights, shall be protected in the Constitution while being governed by it. Except for the freedom of personal religious belief that shall be absolutely protected and never be infringed upon or suspended, it is permissible for relevant state laws to constrain, if necessary and to the least restrictive effect, freedoms of religious practices and association. For no one shall renounce the state and laws simply because of his/her religious belief. Thus, because believers of all religions are still people of the state, their basic responsibilities and duties to the state are not to be relieved because of their respective religious beliefs.

[2] Protection of the people's fundamental rights, such as their life and property, is one of the most important functions and purposes of a state. The achievement of such function and purpose lies in the people's rendering of their basic duties to the state. In order to defend national security, it is very common for states with a conscription system to prescribe the people's duty to render military service.

Article 20 of the Constitution requiring the people to perform military service pursuant to laws is precisely such type of enactment. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding people's military service shall be specified in laws and solely left to the Legislature's discretion with due consideration of national security and the needs of social development. Given the physical differences between males and females and the derived role differentiation in their respective social functions and lives, the Legislature enacted relevant Articles in the Conscription Act. Article 1 indicates that only male citizens have the duty to perform military service in accordance with laws. Article 3, Paragraph 1 prescribes that the period of rendering military service starts on January 1 of the year after male citizens reach the age of eighteen and ends on December 31 of the year in which male citizens reach the age of forty-five. Article 4 reads that people with physical abnormalities, disabilities, or diseases that would prevent them from rendering military service shall be relieved from performing military service. Article 5 states that those who have been sentenced to a prison term of more than seven years shall be relieved from military service. These aforementioned Articles have been made to incarnate both national goals and constitutionally prescribed basic duties of the people and, therefore, are of a legislative policy nature. They do not encourage, endorse or prohibit any religions, nor do they have such effects. Moreover, prescribing a male citizen's duty to render military service does not violate human dignity, nor does it undermine the fundamental values of the Constitution. Most nations also prescribe such duty in their respective laws. Requiring such duty is a necessary measure to protect the people and to defend national security. As a result, it does not violate the equal protection principle of Article 7 or the protection of freedom of religious belief of Article 13. Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act prescribes that those sentenced to prison according to Paragraph 1 but later given commutation, probation or parole, whose military service has been deferred but who have served less than four years in prison, shall

still have to fulfill their military obligation. Thus, persons whose duty to render military service has been deferred shall not be freed from military service, should they still be within the age limit of such service. Article 59, Paragraph 2 of the Act thus requires that each judicial organ inform the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also warrant punishment prescribed in the Act Governing the Punishment of Offences against Military Service shall be disposed of accordingly. This does not contradict the guarantee against double jeopardy, nor does it infringe upon the freedom of religious belief prescribed in Article 13 of the Constitution or undermine the principle of proportionality bestowed in Article 23. Moreover, Article 20, Paragraph 1, Subparagraph 2, Second Sentence and Paragraph 2 of the Conscription Act prescribe that, while persons are serving a prison term, their military service shall be deferred. When the causes of the deferment have ended, they must fulfill their military obligation. Regarding the procedure for military recall, Article 25, Paragraph 1, Subparagraphs 1 and 2 of the Conscription Act merely prescribe that a regular captain, sergeant, soldier or member of the supplementary forces whose military service has been deferred shall be transferred to the reserve forces and shall be under the control of the reserves. The said clauses do not primarily address the detailed procedure for military recall. However, military recall, by its nature, is similar to military reserve force that is supplementary to regular service in peacetime and may be drafted on specific occasions according to Article 38, Paragraph 1, Subparagraph 2 of the Conscription Act. Therefore, Article 19, Paragraph 1, Subparagraph 4 of the Regulations Governing the Military Array enacted by the Executive Yuan dictates that the military service of soldiers, whose causes of interrupted military service have been dissolved, shall be recalled, and such soldiers may be drafted on specific occasions. This rule does not go beyond the delegation by Article 38, Paragraph 1, Subparagraph 1 of the Conscription Act, nor does it impose an additional burden on the people; therefore, it is consistent with the principle of

rule of law prescribed in the Constitution. By the same token, it shall also be made clear that Article 19, Paragraph 1, Subparagraph 5 of the Regulations Governing the Military Array with regard to drafting on specific occasions for those who have been recalled does not infringe upon the people's rights ensured in the Constitution.

Background Note by Yun-Ru CHEN

The Petitioners Tsung-Hsien WU, Chien HSU, Chien-Hua CHEN and Tung-Jung LI are all members of the Jehovah's Witnesses. The Petitioners WU, HSU and CHEN refused military training during their military service due to their religion and were respectively sentenced by final Military Court judgments to punishment of imprisonment for committing crimes specified in Article 64, Paragraph 3 of the Criminal Code of the Armed Forces. The Petitioner LI, who also refused military service due to his religion, was sentenced by final court judgment to punishment of imprisonment for committing crimes specified in Article 4, Paragraph 5 of Punishment Act for violation of the Military Service System. After exhausting all remedies at all levels of courts, the Petitioners filed petitions to the Constitutional Court, claiming that Article 1 of the Act of Military Service System and Article 59, Paragraph 2 of the Enforcement Act of Act of Military Service System were not consistent with Articles 7, 13 and 23 of the Constitution.

The Constitutional Court states in J.Y. Interpretation No.490 that the guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practice, as well as freedom of religious association. On the one hand, freedom of personal religious belief, in which each individual's own ideas, speech, belief, and spirit are involved, is an absolute right that shall not be infringed upon. On the other hand, the derived freedoms of religious acts and religious association, which may affect others' freedoms and

rights or impair public order, virtuous customs, social morality, or integrity, are, hence, relative rights, which can be infringed upon by the State. Thus, the existence of secular norms cannot be denied and refused on the grounds of religious belief when involving religious acts and religious association.

However, later, in J.Y. Interpretation No. 573, the Constitutional Court stated that it is impossible to completely separate the religious activities engaged in and religious association formed by the people from the heartfelt, devout religious convictions held by the same. Autonomy should be given to a religious association as far as its internal organization and structure, personnel and financial administration are concerned. Any religious regulations, if not made to maintain the freedom of religion or any significant public interest, or if not made to the minimum extent necessary, should be deemed to be in conflict with the constitutional intent to protect the people's freedom of belief. Thus, the regulations governing certain types of temples' real property were unconstitutional. J.Y. Interpretation No. 573 continued to uphold the principles of religious neutrality and religious equality but made two slightly different interpretations about the extent to which the State can intervene in religious acts. Building upon J.Y. Interpretation No. 490, J.Y. Interpretation No. 573 gave autonomy to a religious association as far as its internal organization and structure, personnel and financial administration were concerned, whereas J.Y. Interpretation No. 490 had only stated that these were merely relative rights that could be infringed upon by the State.

J.Y. Interpretation No. 476 (January 29, 1999)*

Capital Punishment in Drug Control Laws Case

Issue

Are the provisions in the drug control laws that sanction capital punishment or life imprisonment unconstitutional?

Holding

[1] The right to liberty and security of person and the right to life should be guaranteed, as expressed by Articles 8 and 15 of the Constitution. However, fulfilling the state's penal powers requires special/exceptional criminal laws, which are enacted to punish certain offenses in specific fields. They should not be considered a violation of the principle of proportionality as long as they meet the requirements of Article 23 of the Constitution, *i.e.*, the legitimacy of the objectives, the necessity of the measures, and the proportionality of the restrictions (or proportionality *stricto sensu*). Such exceptional criminal laws, which cannot be equated to ordinary criminal laws, should not be deemed unconstitutional merely on the basis of the right to liberty and security of person and the right to life.

[2] The Narcotics Elimination Act, revised and promulgated on July 27, 1992, and the Drug Control Act, revised and promulgated on May 20, 1998, were legislated with the purposes to eliminate narcotics and to control the harm of drugs, thereby protecting the physical and mental health of our nationals, maintaining social order and preventing threats to our national security. To eradicate the scourge of drugs, it is of the utmost importance to cut off their supply; their sources must be intercepted to root out the plague. And the source of the

* Translation by Li-Chih LIN

plague is the manufacture, transport and sale of drugs. If these cannot be eliminated, the harm of drugs will spread widely, endangering not only the lives and well-being of a great number of people but also the legal interests of society and the entire nation. This harm far outweighs the legal interests of an individual's life and personal freedoms. It is therefore in keeping with the principle of proportionality to enact exceptional laws that strictly punish such misconduct, which is highly lawless in nature. In addition, the activities of manufacturing, transporting and selling drugs generate lucrative profits, which inevitably attract many people who are willing to run that risk. To deter these activities merely with a sanction of long-term imprisonment will not only be ineffective but also unfair and unjust. Article 5, Paragraph 1 of the Narcotics Elimination Act provides that "anyone who sells, transports or manufactures narcotics, opium or marijuana shall be sentenced to death or life imprisonment." Article 4, Paragraph 1 of the Drug Control Act provides that "anyone who manufactures, transports or sells first-grade drugs should be sentenced to death or life imprisonment. A fine of no more than TWD 10,000,000 may be imposed on those sentenced to life imprisonment." The legal provisions of capital punishment and life imprisonment were enacted for the purpose of strictly controlling drugs under the exceptional laws and are necessary to maintain national security and social order and promote the public interest. They do not violate Article 23 of the Constitution; nor are they inconsistent with Article 15 of the Constitution.

Reasoning

[1] While Articles 8 and 15 of the Constitution protect the right to liberty and security of person and the right to life, in order to fulfill the state's penal powers, the Legislature may, for certain purposes, enact exceptional criminal laws to punish certain offenses for specific matters. These laws are distinct from ordinary criminal laws in terms of the offenses that they seek to punish. To the extent that

the legislative purposes of such exceptional laws do not depart from the expectations of our nationals and are in keeping with their notions of justice in light of the nation's historical origin, cultural background and social reality, they should be not considered illegitimate. The actions taken to facilitate such goals—the necessary restrictions imposed on people's fundamental rights—are justified, as they are critical to rectifying extraordinary wrongs. They should therefore be deemed consistent with the principle of proportionality under Article 23 of the Constitution. These exceptional laws, which have taken into consideration the balance between the means and ends in assessing specific crimes and determining their punishments, are distinctive, from ordinary criminal laws and the punishments under them. The value system reflected in these exceptional laws should not be negated merely by the value judgment of individuals; they should not be deemed unconstitutional on the basis of the right to liberty and security of person and the right to life.

[2] Since the end of the Qing Dynasty and the founding of the Republic of China, narcotics have done profound damage to our nation for a period of more than a hundred years. Those who once use narcotics become addicted and frail for the rest of their lives. Countless are the cases in which people, due to addiction, lose jobs and families and unscrupulously commit other crimes. Those who manufacture, transport or sell drugs are driven by the singular goal of increasing drug use to generate profits. They entice others to spread drug use and induce addiction. The harm to our national economy and the people's livelihood is appalling, as it leads to the decadence of our productive population. The spread of drugs weakens our people's collective spirit and health; our country cannot be well-armed with a debilitated population. This is not only harm to a few individuals and families, but a great evil for society and the nation, which must be addressed by severe laws and enforcement. To eradicate drugs requires taking action at an early stage, with the urgent task of addressing the very origin of the

problem. If one fells a tree without removing it at the root, it will certainly grow back; if one seeks to stem a tide without eliminating the source of the flood, it will certainly flood again. Once the source of the problem is removed, the rest will dissipate.

[3] In response to the disastrous spread of narcotics through rampant cross-national sales, the Narcotics Elimination Act was revised and promulgated on July 27, 1992, and the Drug Control Act was revised and promulgated on May 20, 1998. The purposes of these Acts are to prohibit narcotics from being imported from other countries, track their flows, and to prevent and punish crimes involving narcotics. In other words, these Acts were enacted to eliminate narcotics and prevent the harm of drugs, thereby protecting the physical and mental health of our nationals, maintain social order and prevent threats to our national security. To eradicate the scourge of drugs, it is of the utmost importance to cut off its supply; by intercepting their sources, the flow can be blocked and the problem eradicated. The manufacture, transport and sale of drugs are the source of the epidemic. An indecisive and wavering approach would only lead to an ever-growing population of drug addicts. The spread of drugs would harm not only the legal interests of a large number of people in their physical well-being, but also the legal interests of society and the entire nation. One need not look far in our history for this lesson. Serious condemnation of and severe punishment for this specific misconduct [in these Acts] is properly based on practical considerations. Such a legal assessment is different from that of homicide, which infringes on individual legal interests. Moreover, in addition to comprising a high degree of lawlessness, the activities of manufacturing, transporting and selling drugs generate lucrative profits, which inevitably attract many people who are willing to run the risk. To deter these activities merely with a sanction of long-term imprisonment will not only be ineffective but also unfair and unjust. Article 5, Paragraph 1 of the Narcotics Elimination Act provides that "anyone who sells,

transports or manufactures narcotics, opium or marijuana, shall be sentenced to death or life imprisonment." Article 4, Paragraph 1 of the Drug Control Act provides that "anyone who manufactures, transports or sells first-grade drugs should be sentenced to death or life imprisonment. A fine of no more than TWD 10,000,000 may be imposed on those sentenced to life imprisonment." These legal provisions of capital punishment and life imprisonment were enacted for the purpose of strictly controlling drugs under these special laws and are necessary to maintain national security and social order and promote the public interest. They do not violate Article 23 of the Constitution; nor are they inconsistent with Article 15 of the Constitution.

[4] The petition also challenged the judicial interpretation (by ordinary courts) of Article 7, Paragraph 1 of the Narcotics Elimination Act on the criminal offense of possessing narcotics with intent to sell and Article 5, Paragraph 1 of the Drug Control Act on how to interpret the term "sale." The former was not included in the facts of the indictment, as demonstrated by the original copy of the indictment on file. As it was not included in the indictment, it did not fall within the scope of the trial. In addition, the petitioner failed to explain how the legal provision in question was a legal question that should be decided at trial, and therefore it should not be subject matter for this Court's interpretation. As to the latter question of how to understand the term "sale," it is a matter for ordinary courts to interpret. Neither of these issues involves the question of whether the law is in contradiction with the Constitution. As these challenges do not accord with the holding of J.Y. Interpretation No. 371, they are therefore dismissed, as noted in the present interpretation.

Background Note by Yu-Jie CHEN

This petition was filed by a judge of Taipei District Court in accordance with the procedure provided for in J.Y. Interpretation No. 371, which allows

judges of lower courts to petition the Constitutional Court if they have reasonable grounds to regard a statute applicable in their trials as unconstitutional. The petitioning judge, who was trying several cases involving the Narcotics Elimination Act (which was replaced by the Drug Control Act in 1998) and the Drug Control Act, contended that the relevant legal provisions in these two Acts that imposed capital punishment or life imprisonment on those who manufacture, transport and sell drugs should be deemed unconstitutional as they appeared disproportionately severe (especially in comparison to the punishment of violent crimes such as murder, which was punishable by no more than ten years of imprisonment, life imprisonment or death). The petitioner also argued that these legal provisions should be deemed unconstitutional by virtue of violating the rights to life and human dignity. The Court disagreed with these claims.

The significance of this interpretation, issued in 1999, was the decision to affirm the constitutionality of the death penalty for non-violent crimes. This was not the first time the Constitutional Court ruled on the constitutionality of capital punishment. In J.Y. Interpretation No. 194, issued in 1985, the Court ruled that the mandatory death penalty imposed on those who sold drugs, as stipulated by Article 5, Paragraph 1 of the Drug Control Act during the Period for Suppression of the Communist Rebellion, was constitutional. In J.Y. Interpretation No. 263, issued in 1990, the Court also ruled that the mandatory death penalty imposed on those who committed kidnapping with the intention of receiving ransom, as stipulated in the Robbery Punishment Act, was constitutional. Over the years, a number of civil society groups and activists have sought to petition to the Court to challenge the death penalty. To date, this interpretation, along with J.Y. Interpretation No. 194 and 263, remain the authoritative opinions of the Constitutional Court on the constitutionality of the death penalty.

J.Y. Interpretation No. 563 (July 25, 2003)*

Expulsion of Graduate Student Case

Issue

Does adoption of a Qualification Exam Outline to expel a student who fails a qualification test twice exceed the scope of university autonomy and violate the Constitution?

Holding

[1] Freedom of teaching under Article 11 of the Constitution bestows upon universities the freedom to instruct, to conduct research and to learn, and the right of autonomy in teaching, research and other academic matters. In supervising universities, the government, according to Article 162 of the Constitution, shall formulate statutes to the extent that they follow the principle of university autonomy. Legislative bodies shall not arbitrarily utilize the law to compel universities to establish particular units and infringe upon their autonomy of internal organization. Administrative agencies shall not utilize ordinances to interfere with the curriculum and syllabi of the universities, thus infringing upon the freedoms of teaching and research. The standard of legislative and administrative policies, to the extent consistent with university autonomy, shall be properly constrained (*see* J.Y. Interpretations Nos. 380 and 450).

[2] According to Article 6, Paragraph 1 of the Degree Conferral Act amended and promulgated on April 27, 1994, "after completing the required courses, presenting a thesis, and passing the final examination given by the Committee on Master's Degree Examination," the graduate student shall receive a degree. This

* Translation and Note by Wei-Feng HUANG

is the basic regulation of degree conferment as part of the government's supervision over universities. Since university autonomy is institutionally protected by the Constitution, fin order to guarantee that the conferment of a degree upholds a certain standard, universities may certainly formulate related qualifications and conditions to earn a degree to the extent reasonable and necessary. On June 14, 1996, National Chengchi University passed a Master's Degree Examination Outline Regulation: Each department could on its own initiative regulate that a graduate student shall pass a qualification exam before presenting his/her thesis (Article 2, Paragraph 1). The Department of Ethnology from this school also amended its Qualification Exam Outline for master's degree candidates on September 19, 1996, and established the subject test for master's degree candidates accordingly. The provisions of this Qualification Exam Outline did not exceed the scope of university autonomy; thus, there exists no issue of applicability of Article 23 of the Constitution.

[3] The University Act, as amended and promulgated on January 5, 1994, does not explicitly regulate expulsion of students and its related matters. To maintain academic quality and nurture students' character, universities have the power and responsibility to examine students' academic achievement and conduct. Formulating the regulations stipulated by the procedures on the expulsion of students whose grades are below a certain standard or whose conduct has significantly deviated from proper behavior is within the scope of university autonomy. Legislative bodies shall formulate statutes to properly regulate, to the reasonable extent that universities are still entitled to the right of autonomy, nation-wide university academic matters. National Chengchi University and its Department of Ethnology followed the above-mentioned specification: A degree candidate for Master of Ethnology who does not pass after taking the subject test twice should be expelled. Such regulation is a matter of self-government of this school and does not contradict the meaning of the aforesaid constitutional

principle. Universities administering the punishment of expulsion have a great influence on the rights of the student. Certainly, the formulation and execution of related regulations is to follow due process, and their content should be reasonably appropriate.

Reasoning

[1] University autonomy is within the scope protected by the freedom of teaching under Article 11 of the Constitution. Universities are entitled to the right of autonomy in teaching, research, learning and other academic matters, such as internal organization, curriculum models, research topics, scholastic aptitude evaluations, examination rules and graduation requirements. In supervising universities, the government, according to Article 162 of the Constitution, shall formulate statutes, to the extent that they follow the principle of university autonomy, in order to prevent improper intervention in university matters, further develop universities' characteristics, and achieve their purposes of increasing knowledge and nurturing talent. Legislative bodies shall not arbitrarily utilize the law to compel universities to establish particular units and infringe upon their autonomy of internal organization. Administrative agencies shall not utilize ordinances to interfere with the curriculum and syllabi of universities, thus infringing upon freedom of teaching and research. The standard of legislative and administrative policies, to the extent consistent with university autonomy, shall be properly constrained. The competent authorities of education may only exercise their supervisory powers over university operations on the legality issues (*see* J.Y. Interpretations Nos. 380 and 450).

[2] The purposes of universities are to conduct academic research, educate individuals, promote culture, serve the society and encourage the nation's development (Article 1, Paragraph 1 of the University Act). As educational institutions, universities have missions to grow national morality and cultivate

students' healthy and sound character (*see* Article 158 of the Constitution and Article 2, Paragraph 2 of the Fundamental Act on Education). The University Act, amended and promulgated on January 5, 1994, does not explicitly regulate the matter of student expulsion. To fulfill the purpose of university education, universities have the power and responsibility to examine students' academic achievement and conduct. Formulating the regulations stipulated by the procedures on the expulsion of students whose grades are below a certain standard or whose conduct has significantly deviated from proper behavior is within the scope of university autonomy. Legislative bodies shall formulate statutes to properly regulate, to the reasonable extent that universities are still entitled to the right of autonomy, nation-wide university academic matters. National Chengchi University and its Department of Ethnology followed the above-mentioned specification: A degree candidate for Master of Ethnology, who fails a subject test twice, should be expelled. Such regulation is a matter of self-government of the school and does not contradict the spirit and meaning of the aforesaid constitutional principle.

[3] According to the Degree Conferral Act, amended and promulgated on May 6, 1983, a graduate student shall "study for more than two years, finish the required classes and thesis, pass all subjects, and be selected as a candidate for a master's degree" (Article 4, Paragraph 1). Moreover, "the candidate must pass the final examination and be qualified by the Ministry of Education" (Article 4, Paragraph 2), and then the university will confer upon him/her a master's degree. The above provision was amended on April 27, 1994, to read: "graduate students from universities' master's degree programs, after completing the required courses, presenting a thesis, and passing the final examination given by the Committee on Master's Degree Examination, shall receive a master's degree" (Article 6, Paragraph 1). The purpose was to preclude a qualification procedure

by the Ministry of Education, enhance universities' right of autonomy to confer a degree, and thus only set a basic regulation on the conferment of a degree. Although such clause "pass all the subjects" has been removed, and "the candidate must pass the final examination" has been amended to "passing the final examination given by the Committee on Master's Degree Examination", university autonomy is institutionally protected by the Constitution, for in guaranteeing that the conferment of a degree maintains a certain standard, universities could certainly formulate related qualifications and conditions of taking a degree to the extent reasonable and necessary. Article 25, Paragraph 2 of the University Act, which states: "For graduate students from Master's or Ph.D. programs, who have fulfilled the course requirements and passed all subjects, such university shall respectively confer a Master's or a Ph.D. degree," follows the same principle. During the Conference of School Affairs in National Chengchi University on June 14, 1996, the school passed a Master's Degree Examination Outline Regulation: Each department could on its own initiative regulate that a graduate student shall pass a qualification exam before presenting his/her thesis (Article 2, Paragraph 1). The Department of Ethnology from this school also amended its Qualification Exam Outline for master's degree candidates on September 19, 1996, and established the subject test for master's degree candidates accordingly. The provisions of this Qualification Exam Outline did not exceed the scope of university autonomy; therefore, there is no issue of applicability of Article 23 of the Constitution.

[4] The students' rights to learn and to be educated shall be protected by the government (Article 8, Paragraph 2 of the Fundamental Act on Education). A university's act of expulsion or of any other similar punishment which alters the status of the student and his or her right to be educated significantly associates with the rights and interests of the student (*see* J.Y. Interpretation No. 382). When

punishing a student with expulsion according to university regulations, the cause of expulsion and rules of related matters shall be reasonably appropriate, and their formulation and execution shall follow due process. Article 17, Paragraph 1 of the University Act states: "To enhance the educational effect of universities, an elected student representative shall attend the Conference of School Affairs and any other conference associated with academics, life, and formulation of rules related to reward and punishment." Paragraph 2 of the same Article states: "Universities shall safeguard and assist students to form autonomous associations, manage any affairs related to students' learning, life and rights in school, and establish a system of petitions for students to protect their rights." Certainly, universities shall follow the rules related to the formulation of regulations and student petitions.

Background Note by the Translator

As a degree candidate for Master of Ethnology at National Chengchi University in 1996, the petitioner was unable to pass after taking the subject test twice in 1996 and 1997, respectively, and was therefore expelled from the university on June 6, 1997, in accordance with Article 2, Paragraph 1 of the National Chengchi University Master's Degree Examination Outline Regulation, promulgated on June 14, 1996, and Article 4 of the Department of Ethnology of National Chengchi University Qualification Exam Outline for Master's Degree Candidates, promulgated on September 19, 1996 (collectively referred to as the "Regulations").

After exhausting ordinary judiciary remedies in 1998, the petitioner brought the case before the Constitutional Court in 1999, challenging the constitutionality of the expulsion. The petitioner alleged the expulsion pursuant to the Regulations added additional restrictions not prescribed by Article 6,

Paragraph 1 of the Degree Conferral Act and infringed upon the petitioner's right to be educated, thereby violating the Gesetzesvorbehalt principle under Article 23 of the Constitution.

The Constitutional Court holds, however, in J.Y. Interpretation No. 563 that the passage of the Regulations by the university is an exercise of university autonomy, which is institutionally protected by the Constitution, in order to guarantee that the conferment of a degree maintains a certain standard; as such, universities could certainly formulate related qualifications and conditions of conferring a degree to the extent reasonable and necessary.

In addition to J.Y. Interpretation No. 563, issues related to "university autonomy" have also been discussed in J.Y. Interpretations No. 380 and 450. The Constitutional Court indicated in J.Y. Interpretation No. 380 that conditions set forth for graduation were to fall within the purview of university autonomy, and the Enforcement Rules of the University Act, authorizing the Ministry of Education to "invite" all universities to jointly design the core curriculum common to those universities, had gone beyond the scope prescribed by the University Act, added restrictions not provided by the University Act and therefore violated the Constitution. A similar doctrine was also illustrated in J.Y. Interpretation No. 450, in which the Constitutional Court reiterated that universities are to enjoy autonomous rights insofar as they fall within the scope related to freedoms of teaching and study; as such, Article 11, Paragraph 1, Subparagraph 6 of the University Act, specifically prescribing that all universities were to establish an Office of Military Training with staff, infringed upon the literal meaning and spirit of "university autonomy" as warranted by the Constitution.

Furthermore, J.Y. Interpretation No. 462 touched on the issue of whether a faculty member in a university who failed in his/her promotion evaluation was entitled to legal remedies and what the due process requirements were for

conducting a faculty promotion evaluation. In both J.Y. Interpretation No. 563 and No. 462, the Constitutional Court emphasizes that maintaining the quality of academic research and teaching is the essence of academic freedom guaranteed by the Constitution. The Constitutional Court elaborates in J.Y. Interpretation No. 563, "When expelling a student according to university regulations, the cause of expulsion and rules of related matters shall be reasonably appropriate. Their formulation and execution shall follow due process requirements". Additionally, in J.Y. Interpretation No. 382, the Constitutional Court held that in light of expulsion's significant impact on the people's right to education guaranteed by the Constitution, such a disciplinary action shall be classified as an administrative act, and the disciplined student is entitled to bring an administrative appeal and litigation after exhausting all remedies available within his/her school.

J.Y. Interpretation No. 644 (June 20, 2008)*

The Prohibition against Associations Advocating Communism or Secession Case

Issue

Are the provisions of the Civil Associations Act that prohibit the establishment of an association that advocates communism or secession from the State unconstitutional?

Holding

Article 2 of the Civil Associations Act stipulates that: "[t]he organization and activities of a civil association shall not advocate Communism or secession from the State." Article 53, First Sentence of the same Act provides that "no permission shall be granted… for those applicants/civil associations that violate Article 2." The foregoing provisions allow the competent authority to conduct a review of the content of a person's political speech to determine whether any statement therein "advocate[s] Communism or secession from the State" prior to the establishment of an association, and as the grounds for disapproval. This has clearly exceeded the scope of necessity and is not in conformity with the purpose of constitutional protection of people's freedom of association and freedom of speech. Therefore, within the scope of this Interpretation, the foregoing provisions shall become null and void from the date of announcement of this Interpretation.

Reasoning

* Translation by Andy Y. SUN

[1] An individual whose constitutional rights are unlawfully infringed upon may, in accordance with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, petition this Court to review the constitutionality of the statutes or regulations applied by a final decision of the court of last resort after the exhaustion of ordinary judicial remedies. The scope of review by this Court is not merely limited to those laws or regulations specifically identified in the petition, and shall entail the laws or regulations being substantially cited as the basis of the final judgment. The present petition only alleges that Article 2 of the Civil Association Act contravenes the Constitution, among other things, with Article 2 stating "[t]he organization and activities of a civil association shall not advocate Communism or secession from the State." It is a provision that is concerned with *actus juridicus* (a juristic or legal act), which must be applied in combination with Article 53, First Sentence of the same Act: "no permission shall be granted… for those applicants/civil associations that violate Article 2", which is concerned the legal effect. Given that the Supreme Administrative Court Judgment 90-Pan-349 (2001), which upheld the competent agency's administrative disposition to deny the petitioners' application for establishing a political organization due to violation of Article 2 of the Civil Associations Act, in substance touches upon the application of the above-mentioned Article 53, First Sentence of the same Act, these two provisions shall be jointly reviewed in this Interpretation.

[2] The purpose of Article 14 of the Constitution, which provides the people with freedom of association, is to protect the right of the people to form associations and participate in their activities based upon mutual consent, and also to ensure the sustenance of the associations, self-determination regarding their internal constitution and affairs as well as freedom to conduct external activities. In addition to the protection of freedom to develop individual character by way of organized format, the freedom of association further encourages those with a

sense of citizenry to actively participate in socio-economic and political affairs through the formation of civil associations. Different associations may be subject to different legal protections and restrictions depending upon their different virtues to individuals, to the whole society or to democratic constitutional systems. Yet each respective protection of the freedom of association is based upon each individual's free will to organize, and the level of restrictions considered the most severe are those designed to control and limit the establishment of an association. Therefore, the grounds for approval or disapproval of the establishment shall be subject to strict scrutiny in determining whether such legal restrictions are compatible with the principle of proportionality under Article 23 of the Constitution so as to conform with the freedom of association protected by the Constitution.

[3] The Civil Associations Act categorizes civil associations into occupational, social and political associations. All of them are non-profit in nature, with an occupational association being formed by the institutions and associations in the same trade or the jobholders of the same occupation with a view to coordinate relationships between colleagues, enhance common benefits and promote social economic construction (Article 35 of the same Act); a social association being composed of individuals or associations for the purpose of promoting culture, academic research, medicine, health, religion, charity, sports, fellowship, social service or other public welfare (Article 39 of the same Act); and a political association being organized by citizens with a view to help form political volition and promote political participation for citizens based on common ideas of democratic politics (Article 44 of the same Act).

[4] Article 2 of the Civil Associations Act stipulates, "[t]he organization and activities of a civil association shall not advocate Communism or secession from the State." The first Sentence of Article 53 of the same Act provides, "no permission shall be granted… for those applicants/civil associations that violate

Article 2." Accordingly, the said Act grants the competent agency the power to disapprove the establishment of a non-profit civil association on the grounds that it advocates Communism or secession from the State.

[5] Freedom of speech is an indispensable mechanism for the normal development of a democratic and diverse society due to its virtues of facilitating self-fulfillment, exchange of ideas, pursuance of truth, realization of people's right to know, formation of consensus on public issues, as well as promoting all kinds of reasonable political and social activities (*see* J.Y. Interpretation No. 509). Any restrictions by law on the freedom of speech must meet the principle of proportionality. Taking the so-called "advocating Communism or secession from the State," which is a kind of political advocacy, as grounds for disapproving the establishment of a civil association amounts to bestowing on the competent authority the power to review the content of the speech itself, and therefore constitutes a direct restriction on the people's basic right of free speech. Article 5, Paragraph 5 of the Additional Articles of the Constitution provides, "[a] political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the free democratic constitutional order." Nevertheless, obtaining prior approval is not a prerequisite for the establishment of a political party; instead, a political party may be disbanded only by the judgment of the Constitutional Court after it has been established and its goals or activities have put the existence of the Republic of China or the democratic constitutional order in jeopardy. Thus, disapproval for the establishment of a civil association based on violation of Article 2 of the Civil Associations Act gives the competent agency the authority to conduct substantive review of the speech's content before the association is established. In this vein, if it is discovered that an association has carried out the above-mentioned advocacies, and the facts collected at the time are sufficient to verify the existence of the aforesaid jeopardy, the competent agency may then withdraw (which has been amended to "revoke"

as of December 11, 2002) the approval in accordance with Article 53, Last Sentence of the same Act (amended and promulgated on January 27, 1989), to achieve the purpose of disbandment. If disapproval is rendered from the outset of an application to form a civil association, it would be no different from the prohibition of establishment of a civil association merely on the ground that it advocates Communism or secession from the State. This has clearly exceeded the scope of necessity under Article 23 of the Constitution and is not in conformity with the purpose of constitutional protection of people's freedom of association and freedom of speech. Hence, within the scope of this Interpretation, Article 2 and Article 53, First Sentence of the Civil Associations Act, as indicated above, shall become null and void from the date of announcement of this Interpretation.

Background Note Ed Ming-Hui HUANG

The petitioner filed an application to the Department of Social Welfare, Taipei City Government to establish a social association called "Taipei Mainlanders Society for Taiwan Independence." The Department of Social Welfare regarded it as an application to organize a political association with the goal of "pushing ahead Taiwan Independence in a peaceful way," and thereby disapproved the application based on its incompatibility with Article 2 of the Civil Association Act.

The Petitioner filed an administrative appeal and initiated proceedings against the decision, which were in turn dismissed by the Appeal Board and Administrative Courts. Then, he petitioned the Constitutional Court for constitutional interpretation, claiming that Article 2 of the Civil Associations Act which was applied in Supreme Administrative Court Judgment 90-Pan-349 (2001) is in violation of the freedom of association under Article 14 and freedom of speech under Article 11 of the Constitution.

This Interpretation is the second time for the Constitutional Court to

adjudicate a case primarily relating to the freedom of association under Article 14 of the Constitution. In J.Y. Interpretation No. 479, for the first time, the Constitutional Court elaborated on the meaning of the freedom of association as "people's right to freely determine the purposes and forms of their associations." In fact, J.Y. Interpretation No. 479 placed more emphasis on the "form" of association, since it struck down a regulation that infringed on the associations' right to choose their own names. By contrast, this Interpretation clearly focuses on the "purpose" of the association, because what the disputed provisions deprived is people's right to establish an association for advocating Communism or secession. As a result, these two Interpretations together form the very basis of the constitutional protection of freedom of association in Taiwan.

J.Y. Interpretation No. 689 (July 29, 2011)*

Freedom of the Press and Its Restraint Case

Issue

Does Article 89, Paragraph 2 of the Social Order Maintenance Act, restricting the act of stalking by a journalist, violate the Constitution?

Holding

Article 89, Paragraph 2 of the Social Order Maintenance Act aims to protect a person's freedom of movement, freedom from bodily and mental harm, freedom from intrusion with reasonable expectation in the public space and the right to autonomous control of personal information, and to punish a stalking behavior which one has been urged to stop yet which continues without any legitimate reason. We find the Provision at issue does not violate the principle of clarity and definitiveness of law. A journalist's following in person shall be considered to have legitimate reasons and is thus not intolerable under the general social standard. Such following shall not be subject to penalty by the aforementioned provision if, judging from the facts, a specific event is of concern to the public, of public interest and newsworthy. Within this scope, although the aforementioned provision places a limit on the behavior of newsgathering, it is appropriate and proportionate and does not contradict the freedom of newsgathering provided by Article 11 of the Constitution or people's right to work guaranteed by Article 15 of the Constitution. Furthermore, the provision at issue delegating the power of sanction to police authorities also does not violate the principle of due process of law.

* Translation and Note by Hsiao-Wei KUAN

Reasoning

[1] Weibo WANG claimed that the application of Article 89, Paragraph 2 of the Social Order Maintenance Act (hereinafter "Provision at issue") in the Ruling of Taipei District Court Bei-Jih-Seng-Tzi No. 16 (2008) raised constitutional doubts. The Constitutional Court granted review of the case, and, pursuant to Article 13, Paragraph 1 of the Constitutional Court Procedure Act, summoned the petitioner and his agent ad litem, as well as the representative and agent ad litem of the agency concerned, the Ministry of Interior, to attend the oral argument session scheduled on June 16th, 2011, in the Constitutional Court; expert witnesses were also subpoenaed for deposition in court.

[2] The petitioner claimed that the Provision at issue violates the principle of clarity and definitiveness of law, the principle of proportionality and the principle of due process of law, infringes people's freedom of the press and the right to work guaranteed by the Constitution. The reasons are summarized as follows: 1. The right of news reporters to gather information freely and the right to conduct interviews in order to verify news information are protected by Article 11 of the Constitution; (1) Based on the stipulated freedom of "publication" in Article 11 of the Constitution as well as on the conclusion of J.Y. Interpretation 613, freedom of the press is one of the fundamental rights guaranteed in Article 11 of the Constitution; (2) The process of news production includes newsgathering, followed by news editing and news reporting. Therefore, freedom of the press shall encompass newsgathering activities which are considered necessary for collecting information and verifying the source; otherwise, the purpose of press freedom would be undermined. (3) The news protected by freedom of the press shall include entertainment news in addition to political and economic news; thus, interviewing for gathering and verifying of materials regarding entertainment news shall also be protected. (4) Every person who works in the profession of journalism, no matter which type of the work he or she does in the process of

news production, shall be the subject of press freedom. Since modern journalism is often managed by corporate organizations, organizations shall as well enjoy the protection of press freedom. 2. The Provision at issue restrains both a journalist's freedom of newsgathering and his right to work: (1) In order to observe, photograph and interview when a news event occurs, it is necessary for a journalist to approach a subject at a short distance for some time. Accordingly, the prohibition on stalking in the Provision at issue constitutes a restraint on the freedom of newsgathering. (2) Since the Provision at issue limits a journalist's act of newsgathering, it likewise restrains a journalist's right to work. 3. The Provision at issue violates the principle of clarity and definitiveness of law: (1) According to the legislative materials of the Provision at issue, one cannot specifically identify which legal interest is intended to be protected. It may be freedom of movement, security of the person or freedom from fear, and this casts doubt on whether the purpose of the limitation can be conceived by ordinary people. (2) The conduct requirements of the Provision at issue include "to follow others", "not stop after being urged to do so" and "without legitimate reason." While focusing on following others, the Provision at issue does not specify by whom, in what way and under what circumstances the following may be urged to stop. The requirement of so-called legitimate reasons shall be determined through a balancing of interests. Nevertheless, it is obviously at odds with the principle of clarity and definitiveness of law, since the protected interests in the Provision at issue are so ambiguous that ordinary people regulated by it would have difficulty to predict what kind of following will be subject to punishment. 4. The Provision at issue violates the principle of proportionality: (1) Based on the present claim, the Provision at issue infringes at least the freedom of the press. (2) Even if the protected interests include freedom of movement, security of the person, and privacy of the person being followed, the law fails to reduce the effects of interference with the freedom of the press to a minimum extent. For instance, failure to distinguish whether the manner of following is highly offensive or

intrusive in order to diminish the scope of punishment has excessively infringed upon freedom of the press and therefore violates the principle of proportionality. 5. The Provision at issue violates the principle of due process of law: compared to anti-stalking laws in other countries, the imposition of penalty in the Provision at issue follows the rules of administrative procedures instead of judicial proceedings. Since the Provision at issue unreservedly delegates to police authorities the power of discretion to balance between the freedom of newsgathering and the rights or interests of the person being followed, it fails to provide sufficient procedural protection and violates the principle of due process of law.

[3] The agency concerned, namely, the Ministry of Interior, has argued summarily that: 1. The petitioner's claim that his following based on the reason of newsgathering shall not be punished under the Provision at issue is a dispute concerning the interpretation and application of the law in a concrete case, not a case regarding the constitutionality of the Provision at issue. The court should dismiss the case as it does not fall under Article 5, Paragraph 1, Item 2 of the Constitutional Court Procedure Act. 2. The Provision at issue is in tune with the rule of proportionality: (1) As can be known from the legislative intent, the legal interests protected by the Provision at issue include individual privacy and personality rights, freedom of movement and freedom of choice, which areprotected by Article 22 of the Constitution. The Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the European Human Rights Convention all guarantee freedom from unwanted interference by others in private life. The State shall have an affirmative duty and provide legal protection to prevent unwanted interference in private life; therefore, the purpose of the Provision at issue is legitimate. (2) The Provision at issue punishes stalking behavior, which was defined as willful, malicious and repeated following and harassing which has caused the stalkee to feel fearful and insecure.

Many countries sanction malicious stalking through criminal punishment if the act of stalking has infringed another's fundamental rights, seriously interfered with another's everyday life, or caused a threat to one's body and life. In contrast, the punishment in the Provision at issue is relatively light, given that it only reprimands the offender or imposes an administrative fine not exceeding 3,000 dollars. Since an individual's right to privacy is given comparatively broad and fundamental protection, it not only conforms with the principle of *ultimum remedium* but also does not exceed the requirement of necessity and appropriateness, and therefore does not violate the principle of proportionality. 3. To protect the liberty and rights of the stalkee, a journalist's act of newsgathering shall be subject to the provision, rather than be exempted. The provision should be ruled constitutional according to the principle of interpretation in conformity with the Constitution because: (1) Freedom of the press is an institutional right to protect the autonomy and independence of news media from governmental interference and also has the function of supervising the government, thus differing from individual fundamental rights safeguarding human dignity. (2) Although news media enjoy the freedom of the press, they must be restrained when infringing on other people's rights for purposes of newsgathering and verification, even if this may be inevitable. (3) Although the freedom of newsgathering aims to report the truth, the method should be legitimate and follow the principle of good faith. The Provision at issue should apply where a journalist's act of newsgathering infringes upon the right to privacy, except in the following situations: (i) when the stalkee explicitly or implicitly gives his consent; (ii) when the stalkee participates in public activity at a public place. (4) The boundary between freedom of newsgathering and the right to privacy should be drawn primarily based on the publicity of the case. We summarize the opinions of the Supreme Court of the United States and conclude that the following criteria shall be considered: (i) whether the matter is newsworthy; (ii) depending on the degree of the nexus between the public figure and to what extent the reported

issue is of public concern, different standards apply. The closer the relationship between the public figure and public affairs is, the smaller the scope of the safeguard of privacy is; (iii) whether the matter is of legitimate concern to the public.

[4] The Judicial Yuan has in its deliberation taken into account all arguments made by the parties and made this interpretation for the following reasons:

[5] Based on the respect for human dignity, we believe that one's autonomy and the free development of personality are safeguarded by the Constitution (*see* J. Y. Interpretation No. 603). In addition to the various freedoms already protected by the Constitution, for the protection of individual autonomy and the free development of personality, an individual's freedom of willful action or inaction should also be safeguarded in Article 22 of the Constitution, under the premise of not jeopardizing public order and interests. The freedom of movement guaranteeing a person's willful movement toward or staying in a place (*see* J. Y. Interpretation No. 535) shall be protected within the scope of freedom of general behavior. Nevertheless, the freedom of movement is not an absolute right that cannot be appropriately restrained by laws or administrative regulations authorized by laws, for instance, if the restriction is necessary for preventing the impediment of another person's freedom or for preserving social order. For purposes of ensuring that news media can provide diverse newsworthy information, promoting full and adequate flow of information to satisfy the people's right to know, facilitating formation of public opinion and achieving public oversight, freedom of the press is an indispensable mechanism for maintaining the healthy development of a democratic and pluralistic society and shall be protected under Article 11 of the Constitution. Newsgathering is essential for providing the contents of news reports and verification and shall be within the scope of the protection of press freedom. The freedom of newsgathering within the freedom of the press not only protects the newsgathering of a journalist who

works for a press institution but also protects an ordinary person who gathers information with the aim of providing newsworthy information to the public or promoting the discussion of public affairs to supervise the government. The freedom of newsgathering is by no means an absolute right, and the State may within the range of Article 23 of the Constitution duly limit it by laws or regulations clearly authorized by law.

[6] Article 89, Paragraph 2 of the Social Order Maintenance Act (the Provision at issue) provides that people who follow others without a legitimate reason and do not stop after being urged to do so can be fined up to TWD 3,000 or be reprimanded. From the records of the legislative process and the wording of the provision, we find that this provision was based on Article 77, Paragraph 1 of the Act Governing the Punishment of Police Offences which was promulgated on September 3, 1943, by the Republic Government, implemented on October 1 in the same year, and repealed on June 29, 1991. The Provision at issue purports to prohibit stalking or tailing others, including women, to protect people's freedom of movement. In addition, the Provision at issue also aims to protect an individual's bodily and mental security, an individual's autonomy over his or her personal information and freedom from unwarranted intrusion in public spheres.

[7] The Provision at issue aims to protect a person's liberty to be free from physical and emotional harm, freedom of movement, freedom from intrusion into one's private sphere and an individual's autonomy over his or her personal information. Among these liberties, the freedom from unwanted intrusion into one's private life and an individual's autonomy over his personal information are recognized as constitutional rights as promulgated by previous Judicial Yuan interpretations (*see* J.Y. Interpretations 585 and 603). Although a person's liberty to be free from physical and emotional harm is not expressly enumerated in the Constitution, it shall, just as the above-mentioned freedom of general behavior is, be protected as a basic right under Article 22 of the Constitution, based on the

concept of human dignity to safeguard personal autonomy and develop one's personality. The protection of an individual's liberties as mentioned above shall not be undermined just because he or she puts himself in the place of the public sphere. In public places, everyone possesses the constitutionally protected freedom of movement. However, when participating in social life, a person's freedom of movement will inevitably suffer interference from other people's movements. To a reasonable extent, it is self-evident that people shall mutually tolerate such interference. If the exercise of one's liberty of movement has exceeded the reasonable extent and has interfered with the free movement of other people, it shall be restricted by law. Where bodily rights or freedom of movement have been infringed upon, such tortious conduct is to be restricted. Likewise, where a person's private sphere or the autonomy over his personal information has been infringed upon in a public space beyond a tolerable extent, it is also necessary to restrict such infringing conduct. If a person's private life and social activities are be constantly watched, monitored, eavesdropped upon or publicly exposed, such a person's words, conduct, and social interactions can hardly be freely carried out, thus hindering free development of personality. Especially as the rapid development of information technology and easy access to related equipment have greatly increased the possibility of intrusion into one's private life and privacy by watching, monitoring, eavesdropping or public disclosure, etc., the necessity of higher protection of privacy has accordingly increased. Even a person in the public sphere should, within the scope of social expectation, enjoy the legal protection of the freedom from the intrusion into his private sphere and the autonomy to control his personal information from being subject to constant watching, monitoring, eavesdropping, approach, etc. However, the liberty to be free from intrusion in the public sphere can only be asserted when it can be reasonably expected; that is, the expectation of non-intrusion must not only be manifested but also deemed reasonable by the general public. The Provision at issue has met the constitutional requirement of the State to guarantee the rights

and liberties as mentioned above.

[8] Stalking in the Provision at issue means to continuously approach another person or to oversee another's whereabouts by following, tailing and keeping watch or other similar methods to the extent of constituting an intrusion on another person's body, activity, private space or autonomy to control his personal information. Whether an instance of stalking can be legally justified depends on whether the stalker has justifiable reasons based on an overall assessment of the factors, including the purpose, the circumstances of the relevant people, time, place and context, the extent to which the stalkee is intruded upon, and whether or not the intrusion caused by the stalking has exceeded the reasonable tolerance of the general public. The requirement of "being urged to stop yet continuing the stalking" has the function of ascertaining that the stalkee has manifested the wish not to be followed or a warning. Only when a perpetrator continues stalking after being urged to stop by the police or the stalkee, does the behavior constitute an illegal act. If a perpetrator continues stalking after he or she has been urged to stop without legitimate reasons, he or she should be punished by the Provision at issue. Whether the meaning and scope of application of the Provision at issue are difficult for the regulated to understand based on everyday life experience and language of ordinary people may be reviewed by the judiciary, and the Provision at issue is not repugnant to the principle of clarity and definitiveness of law.

[9] Although the Provision at issue restricts the freedom of movement of the stalker, the restriction is made to protect the fundamental rights and liberties of the stalkee. Since the restriction of the stalking behavior which is intolerable based on general social rules is reasonably connected with the goals as mentioned above and is considered a less intrusive means weighing all the related interests, we find the restriction does not exceed the scope of appropriateness. Furthermore, the Provision at issue does not punish the stalker unless he continues to stalk after being urged to stop, thus allowing the perpetrator to stop in time to avoid

punishment; therefore, this Provision does not violate the rule of proportionality provided in Article 23 of the Constitution. As to whether the restriction of the Provision at issue affects the stalker's exercise of other constitutional rights and has violated the Constitution needs further examination.

[10] The purpose of enacting the Provision at issue is not to restrict the behavior of newsgathering. If the indirect restriction on freedom of newsgathering aims to pursue important public interests and the applied method is substantively related to achieving the objective, it is not contradictory to the principle of proportionality. Even when the newsgatherer has stalked the subject in order to gather news information, as long as the stalking reaches an intensive degree so as to threaten the physical and mental safety or the freedom of movement for the stalkee without a legitimate cause, the Provision at issue authorizes the police to intervene and stop in time, hence it cannot be considered a violation of the freedom of newsgathering protected by Article 11 of the Constitution. If the stalking of the newsgatherer has intruded upon a person's private liberty and autonomy to control his personal information in the public space which he is enjoying with reasonable expectation, whether this sort of behavior shall be subject to punishment according to the Provision at issue should be decided by balancing the public nature of the news content and the extent to which the private sphere is disturbed. If the disturbance is not intolerable based on general social standards, the stalking shall not be punished by the Provision at issue. If the interviewer has reason to believe the specific event is of public value in nature, which means it is of concern to the public and worth reporting on (for instance, disclosure of a crime or major misconduct, maintenance of public health or safety of public facilities, appropriateness of public policy, competence and performance of public officials, trustworthiness of a politician, conduct of a public figure influencing society, etc.), the stalking shall be deemed justified and not be subject to punishment if it is necessary and is not intolerable based on general social standards. According to

the reasons above, the Provision at issue does not exceed appropriateness and is not repugnant to the freedom of newsgathering provided in Article 11 of the Constitution. Besides, this interpretation has demonstrated that the provision lies within the constitutional scope, since the interests this provision purports to safeguard are important, the restriction is meant to punish the stalking which one has being urged to stop but which continues without legitimate reason, and that this behavior constitutes an intrusion intolerable by social standards. Although the provision restricts the freedom of work by limiting the method of newsgathering from stalking or following as a gathering method, it is not to be deemed a violation of the right to work protected in Article 15 of the Constitution.

[11] According to the principle of due process of law in the Constitution, an opportunity and a system of remedy shall be available whenever people's rights are infringed upon or restricted; it also requires that legislators promulgate corresponding legal procedures taking into consideration all factors, including the type of underlying fundamental rights, intensity and scope of the restrictions, the public interests pursued, proper functions of the decision-making institutions, availability of alternative procedures or possible costs under respective procedures, etc. It is self-evident that when an individual's autonomy of body, movement, private sphere or personal information are invaded, according to the circumstances, that individual may request court remedies to remove the infringement or obtain compensation (*see* Articles 18 and 195 of the Civil Law and Article 28 Computer Processing of Personal Data Protection Act) under relevant provisions on protection of personality rights and on tortious acts against an individual's body, health or privacy under laws such as the Civil Code or the Computer Processing of Personal Data Protection Act (amended and promulgated as the Personal Data Protection Act, May 26, 2010, not yet enforced). Legislators promulgated the Provision at issue to protect people's autonomy of their bodies, movements, private spheres or personal information so as to permit the stalkee to

request from police authorities timely intervention to halt or exclude the hazard or intrusion caused by the stalking, and the police authorities may thus take necessary measures (*e.g.*, necessary investigations for resolving disputes such as identity verification, data collection, and recording facts). In accordance with the Provision at issue, police authorities may sanction the unjustifiable stalking of a stalker disregarding dissuasion. While legislators did not take the approach of direct penalty by a judge, the sanctioned stalker may, if he or she disagrees with the ruling, still file an objection to the sanction via the police authorities which originally made the sanction within five days after the original disposition to the proper court's division of summary judgment in accordance with Article 55 of the Social Order Maintenance Act. For that reason, the Provision at issue is difficult to be said as violating the principle of due process of law. However, as to whether the stalking behavior of a journalist falls within the above-mentioned criteria for sanctions, in addition to the aforementioned circumstances where the stalking has infringed upon the bodily safety and freedom of movement of the stalkee, when the stalking only involves intruding into the private sphere or autonomy to control personal information, it shall not be ruled upon until taking into account the following legal issues, including whether the stalkee may reasonably expect to have an arena of private activity without intrusion in public places, whether the stalking exceeds intolerable boundaries generally recognized by society, whether the event being investigated for newsgathering involves a certain degree of public interests, …etc., and the connotations of freedom of journalism in newsgathering shall be weighed against personal freedom from intrusion. Given the complexity of the judgment and balancing of connotations, and considering the difference in the responsibilities, professional fields and functions of courts and police authorities, to develop the most effective services of state organs, and to ensure the freedom of newsgathering and to maintain the private spheres of individuals and autonomy of personal data, it should be clearly stated whether penalties should be directly rendered by the court is left for the relevant authorities to decide.

The authorities may review and amend the existing law, or promulgate a special law to provide comprehensive and thorough rules.

Background Note by the Translator

The petitioner of this case was a journalist who worked for "the Apple Daily," mainly on reporting entertainment and art performance news. In July 2008, he followed and photographed the Vice President of MiTAC Business Group, Hua-Pin MIAO, and his newly-wed wife, previously a performing artist. They entrusted a lawyer with sending two certified letters by post to dissuade such actions; however, when the applicant again followed the couple on September 7 for an entire day, they informed the police on the same day in the afternoon. Following an investigation of the Taipei City Government Police Office, Zhongshan Branch, a fine of TWD 1,500 was imposed based on the reason that the applicant had violated Article 89, Paragraph 2 of the Social Order Maintenance Act. The petitioner was not satisfied and declared objection in accordance with Article 55 of the stated law. Following dismissal without cause by the Taiwan Taipei District Court in its Decision No. 16 of the year 2008, the entire case was confirmed. The petitioner felt that all disputed regulations applied in the above-mentioned ruling contradicted the Constitution's Article 11 freedom of the press of Article 11 of the Constitution, the right to work of Article 15, clarity of law of Article 23, and raised concerns about the principle of proportionality and due process of law and therefore filed this petition.

J.Y. Interpretation No. 689 is the first interpretation which explicitly recognizes that the safeguarding of freedom of the press is within the scope of Article 11 of the Constitution. The wording in Article 11 stipulates that "the people shall have freedom of speech, teaching, writing and publication", in which freedom of the press is not enumerated. The interpretations before this one showed that the Court held a positive attitude toward expanding the scope of

Article 11 to include protection of free speech in different forms of media. For instance, J.Y. Interpretation No. 364 expanded the scope of freedom of speech in Article 11 to the freedom of expression via radio and television broadcasting; J.Y. Interpretation No. 613 further extended the protection to the freedom of communications to encompass the freedom to operate or utilize broadcasting, television and other communications and mass media networks to obtain information and publish speeches. Although it was reasonable to infer from the past interpretations that the freedom of the press was as well protected by Article 11, it was not until this interpretation that the Court formally recognized the freedom of the press.

In J.Y. Interpretation No. 689, the Court recognizes freedom of the press as an indispensable mechanism for a democratic and pluralistic society. It is particularly pivotal in the context of Taiwan's process of democratization. In the authoritarian time, not only were publications, communications, and broadcasting under comprehensive content-based censorship by the authorities, but also all mass media was controlled by the ruling party. The removal of media's partisan control and de-regulation of the establishment of private-owned media became essential issues on the agenda of the opposition movement. In June 1993, legislators of the opposition party sought the Court's interpretation concerning whether the regulations on radio and television broadcasting in the Radio and Television Act violated people's freedom of speech guaranteed by Article 11 of the Constitution. The Court consequently delivered J.Y. Interpretation No. 364 the next year, which for the first time recognized that people should be entitled to the freedom of expression via radio and television broadcasting. J.Y. Interpretation No. 364 gave the media liberalization endeavor legal legitimacy to urge the government to speed up the opening of the media market. In the subsequent years, Taiwan witnessed a resounding boom of mass media together with the inevitable emergence of paparazzi. Paparazzi's adoption of

newsgathering tactics such as relentless stalking raised severe concerns for the invasion of privacy and to what extent the freedom of press was to be constrained. J.Y. Interpretation No. 689, therefore, dealt with conflicting liberties and gave guidance as to how to strike a balance between relevant freedoms and public interests.

J.Y. Interpretation No. 719 (April 18, 2014)*

Mandatory Requirement to Employ a Certain Percentage of Indigenous Persons Case

Issue

Is the law requiring government procurement winning bidders to employ a certain percentage of indigenous persons unconstitutional?

Holding

Article 12, Paragraphs 1 and 3 of the Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act, requiring that those winning bids for government procurement who have hired more than 100 employees locally shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of their total employees during the term of contract performance, and that in case the winning bidder fails to hire the number of indigenous persons as stipulated under the law, the bidder shall pay a fee as penalty to the employment fund of the Indigenous Peoples Comprehensive Development Fund, are not inconsistent with the equality principle under Article 7 and the proportionality principle under Article 23 of the Constitution and are consistent with the constitutional protections of the right to property and the right of freedom to operate business that is the essence of the right to work under Article 15 of the Constitution.

Reasoning

[1] People's freedom to operate a business falls under the constitutional

* Translation and Note by Wei-Feng HUANG

guarantees of the people's right to work and property rights under Article 15 of the Constitution (*see* J.Y. Interpretations Nos. 514, 606 and 716). Any restriction or limitation imposed by the state on people's freedom to operate a business and property rights shall be in compliance with the equality principle under Article 7 and the proportionality principle under Article 23 of the Constitution. Whether the stipulations of a law are in compliance with the constitutional principle of equality should hinge on whether the purpose of the differential treatment is justifiable, and whether there is a certain degree of relation between the distinctions created and the stated objective of the law (*see* J.Y. Interpretations Nos. 682, 694 and 701). When restraining people's rights for the ends of legitimate interests, it is not inconsistent with the proportionality principle under Article 23 of the Constitution if the means adopted are necessary and the restriction is not excessive.

[2] Article 12, Paragraph 1 of the Indigenous Peoples' Employment Rights Protection Act stipulates: "Those tenderers winning bids according to the Government Procurement Act, and hiring more than 100 employees locally, shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of the total number of employees during the term of contract performance." Paragraph 3 of same Article stipulates: "in the event that the winning bidder fails to hire the number of indigenous persons as required under the law, the bidder shall pay a fee in substitute to the employment fund of Indigenous Peoples' Comprehensive Development Fund." Furthermore, Article 98 of the Government Procurement Act regulates that: "those tenderers winning bids, and hiring more than 100 employees locally, shall employ the physically or mentally disabled or indigenous persons in a number equivalent to a minimum of two percent (2%) of the total number of employees during the term of contract performance; and in the event that the winning bidder fails to hire the number of indigenous persons

as required under the law…, the bidder shall pay a fee in substitute…" Said two percent (2%) consists of at least one percent (1%) of disabled and indigenous persons, respectively (*see* Article 38, Paragraphs 1 and 2 of People with Disabilities Rights Protection Act and Article 107, Paragraph 2 of Enforcement Rules of Government Procurement Act; and with the portion concerning indigenous people, hereinafter, collectively, being referred to as the "regulations in dispute"). The regulations in dispute require that a bidder winning the bid (the "winning bidder") and hiring more than 100 employees locally shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of its total number of employees during the term of contract performance; consequently, the regulations in dispute restrict or limit the winning bidder's freedom to operate their business, such as the freedom to determine whether it should increase the number of employees or who should be hired, and have thus infringed upon the winning bidder's property rights and right to freely operate a business that is the essence of the right to work. Additionally, if the winning bidder fails to hire the number of indigenous persons as required, it is then obligated to pay a fee in substitute, which constitutes an infringement on the winning bidder's property rights.

[3] Article 5 of the Constitution provides for "The various ethnic groups in the Republic of China shall be treated equally." Article 10, Paragraph 12 of the Additional Articles of the Constitution stipulates: "The state shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of indigenous peoples. The state shall also guarantee and provide assistance and encouragement for indigenous peoples' education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare….." The regulations in dispute are set forth by legislators in order to fulfill the objectives contemplated by the Constitution and the Additional Articles

of the Constitution, to promote the employment of indigenous persons and to improve their economic and social conditions by means of a preferential measure to be taken by the winning bidder to hire a certain percentage of indigenous persons, which is in accordance with the spirit of international protection of indigenous people (*see* Article 1 of Indigenous Peoples' Employment Rights Protection Act and Article 21, Paragraph 2, the Forward of United Nations Declaration on the Rights of Indigenous Peoples, 2007, which stipulates: "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions." Article 20, Paragraph 1 of Indigenous and Tribal Peoples Convention, 1989 (No. 169) stipulates: "Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.") Consequently, the objective of the regulations in dispute is to maintain a paramount public interest and therefore is justifiable.

[4] Government procurement is a component of the state's public functions, which not only involves the use of the state's budget but also carries a close relationship with the maintenance of public interests. Although the regulations in dispute restrict or limit the winning bidder's property right and freedom to operate their business, they only require that a winning bidder who hires more than 100 employees locally to employ indigenous persons in a number equivalent to a minimum of one percent (1%) of its total number of employees during the term of contract performance. Said one percent requirement is not burdensome and excessive. If the winning bidder fails to hire the requested number of indigenous persons, it can pay a fee in substitute on a monthly basis in a number equivalent

to the minimum wage as set forth by the government, which does not impose an excessive restriction on the winning bidder's freedom to operate their business. Furthermore, the regulations in dispute do not uniformly require that all the winning bidders pay a fee in substitute, but impose such obligation upon the winning bidders only when the hiring of indigenous persons does not reach the required percentage. Prior to bidders' participating in bids, they should assess whether the amount of the substitution payment is too high to bear. Given that the substitution payment is to replenish the employment fund of the Indigenous Peoples Comprehensive Development Fund to further promote employment of indigenous persons and to improve their economic and social conditions, the regulations in dispute requiring the substitution payment, and therefore the restriction on the winning bidder's property right do not fail to the balance between the restrictions and the safeguarding of public interests. Based on the above, the regulations in dispute are not in conflict with the proportionality principle under Article 23 and are not inconsistent with the protection of the right to property, and the right to freely operate a business, which is the essence of the right to work, under Article 15 of the Constitution.

[5] Based upon the meaning and purpose of the above-mentioned provisions under the Constitution and Additional Articles of the Constitution, the state is obligated to protect, assist and promote the development of indigenous peoples. Under the government procurement system, the regulations in dispute, using whether the number of the locally hired employees exceeds one hundred as the standard of classification, require a winning bidder hiring more than one hundred employees locally to employ a certain percentage of indigenous persons during the term of contract performance and make the substitution payment for not being able to meet the percentage, thus creating a differential treatment among the different sizes of the winning bidders within the government procurement market.

The reason why the regulations in dispute create such a differential treatment is because the bidders who hire more than one hundred employees have a larger business scale, greater hiring flexibility and better capability to further hire indigenous persons. Therefore, they are more capable of undertaking a part of the state's obligations by recruiting indigenous persons. Furthermore, given the regulations in dispute, using whether the number of the locally hired employees by the bidder exceeds one hundred as the dividing line for differential treatment simply requires that the award-winning bidder employ indigenous people in a number equivalent to a minimum of one percent (1%) of the total number of employees, this regulation intends to lower the impact of the differential treatment while realizing the above-stated objectives. There should be a reasonable connection between the differential treatment and the achievement of the objectives thereof. Since the level of the indigenous people's education and professional skill is by and large relatively less developed as opposed to the competitiveness of the job market, their living conditions are thus affected. The classification adopted by the regulations in dispute has therefore established a reasonable connection with the objectives anticipated to be achieved. Consequently, the regulations in dispute are not in conflict with the equality principle under Article 7 of the Constitution.

[6] While there are several alternative measures the state may take to achieve the objectives to protect, assist and promote the development of indigenous peoples, the measure adopted by the regulations in dispute to require that the winning bidder shall employ a certain percentage of indigenous persons during the term of contract performance also constitutes one among such measures. Nevertheless, given that most of the available jobs are short-term or require non-technical skills, these may be difficult to enhance long-term, stable employment opportunity and professional skills. Consequently, the state shall actively realize

the objective contemplated by the above-mentioned Additional Articles of the Constitution to protect indigenous peoples' right to work via substantive policies and measures and regularly review and revise such policies and measures based on the time and environment of the state and the society, as well as the need for the protection of the indigenous peoples' right to work. Moreover, when the winning bidder fails to hire a certain percentage of indigenous persons, the bidder is obligated to pay a fee in substitute. If the amount of the fee paid in substitute exceeds that of the government procurement, there should be an appropriate mitigating mechanism by which the amount can be adjusted. Consequently, pursuant to this interpretation, the relevant government agencies shall promptly review and improve the relevant provisions under the Government Procurement Act and Indigenous Peoples' Employment Rights Protection Act.

[7] The petitioners (#1 and #3 as listed in the attachment) also alleged that Articles 107 and 108 of the Enforcement Rules of Government Procurement Act as amended and promulgated on November 27, 2002, violate the equality principle, the Gesetzesvorbehalt principle, the proportionality principle and the principle of clarity of authorization of law, but the petitions did not present concrete reasons to pinpoint which parts of the above-mentioned regulations were unconstitutional. Furthermore, petitioners (#1 and #3) alleged that in regard to Article 24, Paragraphs 2 and 3 of Indigenous Peoples' Employment Rights Protection Act, petitioner 2 asserted in regard to Paragraph 1 of same Article, and petitioner 4 claimed in regard to Paragraph 2 of same Article, that their right to equality and right to property protected by the Constitution were violated; however, upon examination, the regulations alleged to be unconstitutional were not actually applied in rendering in the final judgement of each of petitioners' cases, and as such they were not eligible for petitioners to file the petitions for interpretation. Pursuant to Article 5, Paragraph 3 of the Constitutional Court

Procedure Act, these parts of the petitions shall be dismissed for failing to meet the requirements as set forth in Article 5, Paragraph 1, Subparagraph 2 of the same Act.

Background Note by the Translator

The petitioners Sinon Corporation, Next Media Ltd., Apply Daily Ltd., and Taiwan High Speed Rail Corporation each participated in government procurement bidding. Having won their respective bids, they all failed, however, to recruit indigenous persons in a number equivalent to a minimum of one percent (1%) of the total number of employees during the term of contract performance in accordance with Article 12, Paragraph 1 of Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act. Consequently, each and every petitioner was ordered by the Council of Indigenous Peoples under the Executive Yuan ("the Council of Indigenous Peoples") to pay the fees in substitution of employment, ranging from TWD 500,000 to TWD 4,000,000, in accordance with Article 12, Paragraph 3 of the Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act. Considering that the amount of the fees they paid in substitution of employment constituted a quite significant portion of their income generated from their contract performance, all of the four petitioners appealed their cases, respectively, but eventually they all lost. After exhausting ordinary judicial remedies, all four petitioners filed their petitions with the Constitutional Court for constitutional interpretation (four cases in total), asserting that the above-mentioned regulations were unconstitutional and thus infringed upon their right to equality, freedom to operate their businesses and right to property. The Constitutional Court granted review of all of four petitioners' cases.

J.Y. Interpretation No. 719 might be the first case in Taiwan's constitutional

interpretations to uphold the constitutionality of "affirmative action" (also known as "preferential treatment"). Nevertheless, the first case related to Affirmative Action was J.Y. Interpretation No. 649, in which the Constitutional Court held it was unconstitutional to provide preferential treatment to vision-impaired individuals, requiring that "those who were not vision-impaired were not to engage in the practice of massage business" under the Physically and Mentally Disabled Citizens Protection Act as amended and promulgated in November, 2001; because by giving such a preferential treatment to vision-impaired individuals, it also restricted others' freedom to choose occupations, and the category of above restriction was based on objective conditions (being vision-impaired) that people could do nothing to change, which fell into the category of strict scrutiny under the standard of constitutional review. Thus, upon applying strict scrutiny, there needed to be a compelling government end to sustain, and the means could only be necessary and directly related to the relevant end and needed to be the least restrictive means. In the end, the Act in dispute could not pass the examination of strict scrutiny, was inconsistent with the proportionality principle under Article 23 of the Constitution and was thus declared unconstitutional.

Furthermore, the equality principle prescribed by Article 7 of the Constitution does not refer to equality that is absolute, mechanical, or formal. The equality principle rather protects "substantive equal status" or "substantive equality" under the law, which can be defined as "Similar matters shall be treated similarly, but differential treatment shall be justified by appropriate reasons." Therefore, whether a particular legal rule is consistent with the equality principle depends on whether the purpose of the differential treatment is constitutional and whether there is a certain level of nexus between the classification and the purpose that the classification seeks to achieve (*see* J.Y. Interpretations Nos. 682, 694, and 701).

Insofar as the standard of Constitutional review is concerned, J.Y. Interpretation No. 719 falls, however, into the category of rational-basis review, because the regulations in dispute merely restrict the bidding winners by requiring them to hire a certain percentage of indigenous persons, or alternatively, to pay a fee in substitution of employment. The restriction does not infringe upon the right to operate a business, and the regulations in dispute have a legitimate end (improving the socioeconomic conditions of indigenous people), and the means is reasonably related to the end above; meanwhile, there is no less restrictive alternative among any feasible means that reaches the same effect. Consequently, the regulations in dispute are not inconsistent with the equality principle and proportionality principle protected by Articles 7 and 23 of the Constitution.

J.Y. Interpretation No. 472 (January 29, 1999)*

Compulsory National Health Insurance Case

Issue

Are compulsory national health insurance and the imposition of an overdue charge both unconstitutional?

Holding

[1] According to Article 155 of the Constitution: "The State, in order to promote social welfare, shall establish a social insurance system." Article 157 of the Constitution also specifies: "The State, in order to improve national health, shall establish extensive services for sanitation and health protection, and a system of public medical service." Furthermore, Article 10, Paragraph 5, of the Additional Articles of the Constitution provides: "The State shall promote national health insurance..." The National Health Insurance Act, promulgated on August 9, 1994, and implemented on March 1, 1995, is for the realization of the aforesaid provisions of the Constitution. Provisions in Article 11-1, Paragraph 1, Article 69-1, Paragraph 1, and Article 87 of the Act regarding compulsory subscription of insurance and premium payment are based on considerations of mutual social support, risk-sharing and the public interest, and therefore conform to the constitutional purpose of promoting national health insurance. The overdue charge prescribed in Article 30 of the Act is necessary to oblige a group insurance applicant or the insured to make a premium payment. The aforesaid Article of the Act does not contradict Article 23 of the Constitution. However, for those who cannot afford to pay the premium, the State shall give appropriate assistance and

* Translation and Note by Ching-Yuan HUANG

relief and shall not refuse to pay benefits, in order to fulfill the constitutional purposes of promoting national health insurance and protecting senior citizens, the infirm and the financially disadvantaged.

[2] The inclusion of those already covered, in accordance with law, by insurance for government employees, labor insurance, and insurance for farmers in the compulsory national health insurance system is necessary to promote the public interest, and therefore it is hard to argue that such decision contradicts the principle of trust and protection. Nonetheless, the authorities concerned shall, based on the provisions of Article 85 of the Act regarding presenting improvement proposals within a prescribed time period and this J.Y. Interpretation No. 472, conduct at an appropriate time a full-scale evaluation and implement improvement measures in aspects of insurance operations (including diversification of the insurers), categories of the insured, the insured amount, premium rates, payment of medical insurance, austerity measures and the appropriateness of temporary suspension of insurance benefits.

Reasoning

[1] The Legislative Yuan is responsible for the promulgation and amendment of laws. According to the Constitution, the Executive Yuan may only propose legislation bills to the Legislative Yuan. Article 89 of the National Health Insurance Act stipulates: "Two years after the implementation of the Act, the Executive Yuan shall amend the Act within half a year; otherwise, the Act shall cease to be effective upon such expiration," meaning that the Executive Yuan shall evaluate problems facing implementation of the Act and submit improvement proposals to the Legislative Yuan. Accordingly, the Executive Yuan submitted to the Legislative Yuan on July 23, 1997, a Draft Amendment Bill to the National Health Insurance Act. The legal effect of the Act is therefore beyond doubt.

[2] "The State, in order to promote social welfare, shall establish a social

insurance system"; "The State, in order to improve national health, shall establish extensive services for sanitation and health protection, and a system of public medical service"; and "The State shall promote national health insurance" are all basic national policies, according, respectively, to Articles 155 and 157 of the Constitution and Article 10, Paragraph 5, of the Additional Articles of the Constitution. The Legislative Yuan may therefore promulgate relevant laws and regulations conforming to the aforesaid constitutional purposes. The design of a national insurance system belongs to the discretionary power of the legislative branch. The National Health Insurance Act, promulgated on August 9, 1994, and implemented on March 1, 1995, is for the realization of the aforesaid provisions of the Constitution. Provisions in Article 11-1, Paragraph 1, Article 69-1, Paragraph 1, and Article 87 of the Act regarding compulsory subscription of insurance are necessary to enable the State to include the whole population in health insurance coverage, so as to perform the responsibility to provide health care for the general public, and therefore conform to the constitutional purpose of promoting national health insurance. Provisions in Article 30 of the Act regarding overdue charges are for the purpose of obliging a group insurance applicant or the insured to submit monetary payment in accordance with public laws. This and the compulsory subscription of insurance are reasonable measures to realize the system of national health insurance. Hence, there is no overstepping of Article 23 of the Constitution. However, for those who cannot afford to pay premiums, the State shall give appropriate assistance and relief and shall not refuse to pay benefits, in order to fulfill the constitutional purposes of promoting national health insurance and protecting senior citizens, the infirm and the financially disadvantaged.

[3] Those already covered, respectively, in accordance with the Public Functionaries Insurance Act, the Labor Insurance Act and the Farmers Health Insurance Act, by the insurance for government employees, labor insurance and

the insurance for farmers, must still join the National Health Insurance program. This is for the purposes of integrating medical insurance payment under the respective insurance plans for government employees, laborers and farmers, and establishing a single and fair health insurance system, so as to facilitate reasonable distribution of medical resources and provide social insurance. The terms and conditions of this compulsory social insurance are prescribed by the laws for national implementation, and therefore this differs from an insurance policy selectively purchased by individuals. There is no resulting question of contradiction with trust and protection of interests where the legislative body, in consideration of the needs of social development, makes or amends the laws and changes various social insurance regulations so as to establish the social security system in conformance with constitutional purposes. Nonetheless, the authorities concerned shall, based on the provisions of Article 85 of the Act regarding presenting an improvement proposal within a prescribed time period and this J.Y. Interpretation No. 472, conduct at an appropriate time a full-scale evaluation and implement improvement measures in aspects of insurance operations (including diversification of the insurers), categories of the insured, the insured amount, premium rates, payment of medical insurance, austerity measures and the appropriateness of the temporary suspension of insurance benefits. With respect to the provisions regarding medical insurance as set forth in the Farmers Health Insurance Act, they have become inappropriate as a result of the implementation of the National Health Insurance Act, because the said provisions are temporary measures based on the letter issued by the Executive Yuan. Therefore, the authorities concerned shall pay special attention in this regard.

Background Note by the Translator

This J.Y. Interpretation No. 472 arose from the petitions by (i) HUANG, an individual against whose company a final judgment was rendered, (ii) the

Legislative Yuan, and (iii) individual legislators.

Petitioner HUANG was the responsible person of Company X. After the National Health Insurance Act (the "NHI Act") entered into force on March 1, 1995, the National Health Insurance Administration ("NHI Administration") requested Company X to pay NHI premiums, and Company X declined. The NHI Administration then brought an action against Company X to demand payment of the NHI premiums and overdue charges based on the NHI Act. A judgment was rendered against Company X at the first instance, and the appeal of Company X was denied, which decision was final. Subsequently, petitioner Huang brought this case before the Constitutional Court to challenge the constitutionality of the NHI Act provisions that obliged nationals to participate in the NHI program.

The Legislative Yuan and individual legislators also filed petitions for J.Y. interpretation on grounds of their doubts as to the constitutionality of the NHI Act that emerged as they exercised their functions. The Legislative Yuan questioned whether it was constitutional for the NHI Act to require those who were already covered by the insurance for government employees, labor insurance and the insurance for farmers to join the NHI program. Individual legislators questioned whether it was constitutional to mandatorily include all nationals in the NHI program and require them to pay NHI premiums.

J.Y. Interpretation No. 472 is one of the leading cases in NHI-related disputes and appears in the context of many later related decisions, including J.Y. Interpretation No. 550. In J.Y. Interpretation No. 550, the Constitutional Court was asked to decide whether it was constitutional for the NHI Act to require local governments to pay a certain portion of the government-borne premium. In support of the majority conclusion that both the central and local governments are responsible for the government-borne premium, the concurring opinion of Tung-Hsiung TAI, then-Justice of the Constitutional Court, stressing the social purposes of NHI, cites the ruling of J.Y. Interpretation No. 472 that "the State shall give

appropriate assistance and relief and shall not refuse to pay benefits, in order to fulfill the constitutional purposes of promoting national health insurance, protecting senior citizens, the infirm and the financially disadvantaged."