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(Grand Justices Council)
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President of Judicial Yuan
Compiled and Executed by
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Justice Tzu-Yi Lin
Justice Vincent Sze
Justice Syue-Ming Yu
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Article 6 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law limits its application to "those who had been detained or subjected to execution of sentences but affirmatively found innocent." Without extending its application to other similar victims, does this provision contradict the principle of equal protection under Article 7 of the Constitution?

No. 478 719

Is the Ministry of Finance directive unconstitutional in making "approval of the tax collection agency for payment of land value tax at the rate applicable to residential land for the owner's use" a requirement for refund of the land value increment tax?

No. 479 726

Section 4 of the Regulation for Registration of Social Entities promulgated by the Ministry of the Interior requires that any social organization must be named in accordance with the administrative district where it is located. Does the said Regulation surpass the permissible bounds of the relevant Law's details and technicalities, thus constituting an infringement on the people's freedom of association guaranteed by the Constitution and being null and void?

No. 480 733

Does the 6-month period for application for a completion certificate under Article 32-1, Paragraph 2, Subparagraph 8, of the Enforcement Rules of

the Act for Upgrading Industries exceed the scope of the enabling statute, thus violating Articles 19 and 23 of the Constitution?

No. 481 ····· 740

Shall Fukien Province hold gubernatorial and representative body elections as Taiwan province does?

No. 482 ····· 745

Is the precedent of the Supreme Court stating that "pertinent to the peremptory period of a retrial prescribed by the Code of Civil Procedure the court in conducting inquiry may take into account the specific circumstances of the case and order the party to produce the required evidence" in conformity with the provision of the Code of Civil Procedure and constitutional protection of the right of instituting legal proceedings?

No. 483 ····· 751

Are the provisions of Article 18, Paragraph 1, Subparagraph 3, of the Public Functionaries Appointment Act, which allows the transfer of a legally appointed official to a lower rank or lower grade position, and Article 13, Paragraph 2, of the Public Functionaries Remuneration Act and Article 7 of the Enforcement Rules of said Act, which have the effect of capping the annual salary increase of the transferred official once he/she reaches the cap in his/her new position, consistent with Article 18 of the Constitution, which protects the people's right to hold public office?

No. 484 ····· 758

Does the Directive T.T.S.T. No. 36889 of the Ministry of Finance exceed the legislative intent of Article 2 of the Deed Tax Act, and is it thus unconstitutional?

No. 485 ····· 764

Do the public housing benefits for military personnel and their families provided according to the Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents and its Enforcement Rules violate Article 7 of the Constitution guaranteeing the principle of equality?

No. 486 ····· 772

Is Article 37 of the Trademark Act, which provides that a trademark logo bearing the name of another group may not be registered unless such other group gives its consent, in violation of the Constitution?

No. 487 778

Is the first sentence of Article 2, Subparagraph 2, of the Act of Compensation for Wrongful Detentions and Executions inconsistent with the constitutional principle of proportionality in regard to its exclusion of the right of a wrongfully imprisoning person to claim state compensation, due to the mere fact that his or her was against the public order or morality, without differentiating the degree of gravity or considering whether the act was beyond the standards acceptable to the society in general?

No. 488 785

Do Articles 11 and 14 of the Regulation Governing the Supervision and Taking-Over of Financial Institutions concerning purchase and assumption exceed the scope of authority as delegated by the Credit Cooperatives Act and Banking Act, thus violating Article 15 of the Constitution for the protection of property right and being void?

No. 489 794

What is the meaning of the term "other necessary actions" in Article 62-I and -II of the Banking Act and Article 27-I of the Credit Cooperatives Act?

No. 490 801

Article 1 of the Conscription Act provides that all eligible males shall be drafted for military service, and Article 59, Paragraph 2, of the Enforcement Act of the Conscription Act further prescribes that the 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 being null and void?

No. 491 812

Should the grounds for disciplinary actions against civil servants be stipulated by law, or can they be prescribed by the competent administrative agency with administrative regulations? Should due process of law be followed in making a discharge decision?

No. 492 ····· 820

Does the directive issued by the Ministry of Economic Affairs, which states that an entity whose business registration has been dissolved or revoked under the Company Act is deemed as a "terminated business," violate the people's property rights protected under Article 15 of the Constitution?

No. 493 ····· 828

Is it unconstitutional to use income ratio as the apportionment basis for costs and expenses of taxable and tax-free income?

No. 494 ····· 834

The Labor Standards Act provides that the minimum standard regarding an increase of overtime pay specified by Article 24 of the said Act is applicable to the types of business specified in Article 3 of the said Act. Is the said standard applicable as well to supervisory, intermittent or other special types of jobs not within the categories of the aforesaid Article 24?

No. 495 ····· 840

Is Article 31-1 of the Customs Smuggling Control Act unconstitutional by providing that, where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contract and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake?

No. 496 ····· 845

Are the Ministry of Finance’s Directive Ref. No. TTSF-2665 dated September 2, 1970, and No. TTS-770656151 dated May 18, 1988, which provide that “where the non-operating income is less than non-operating losses, such income shall be considered as zero,” unconstitutional?

No. 497 852
Is the regulation enacted by the Ministry of the Interior constitutional in specifying the qualifications, conditions, permission procedure, and length of stay for people from mainland China who apply for entry into the Taiwan area?
No. 498 859
Is the public functionary of a local self-governing body obligated to appear before the various committees of the Legislative Yuan for purpose of interpellation?

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J. Y. Interpretation No.393（January 5, 1996）*

ISSUE: Is the Supreme Administrative Court Precedent, which holds that no petition for a retrial is admissible unless the act of forgery or fraudulent alternation has been deemed culpable by an irrevocable judgment or the commencement or continuance of a criminal proceeding involving such an act has been made impossible by causes other than insufficiency of evidence, in conflict with the Constitution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 28, Subparagraph 7, of the Administrative Proceedings Act（行政訴訟法第二十八條第七款）; Article 496, Paragraph 1, Subparagraph 9, and Paragraph 2 of the Code of Civil Procedure（民事訴訟法第四百九十六條第一項第九款、第二項）; Article 24 of 1969 the Administrative Proceedings Act（五十八年舊行政訴訟法第二十四條）; Supreme Administrative Court's Precedent P.T. 1451(Supreme Administrative Court, 1987)（行政法院七十六年判字第一四五一號判例）.

KEYWORDS:

judicial remedy（訴訟救濟）, article produced as evidence（證物）, forgery（偽造）, fraudulent alteration（變造）, action for a retrial（再審之訴）, reopen the proceeding（重

* Translated by Raymond T. Chu.

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

開訴訟程序）, plaintiff petitioning for new trial（再審原告）, to allege unilaterally（片面主張）, insufficiency of evidence（證據不足）, weight of evidence（證明力）, extraordinary remedial proceeding（非常救濟程序）, stability of the order of law（法律秩序之安定）, binding force of judgment（判決之確定力）.**

HOLDING: While Article 16 of the Constitution guarantees the people the right to sue, the level of court having jurisdiction, the procedure to be followed, and the elements required when seeking judicial remedies shall be properly and reasonably prescribed by law to be enacted by the legislature by taking into account the nature of the action. The provision of Article 28, Subparagraph 7, of the Administrative Proceedings Act where "an article produced as evidence on which the judgment was based is found to have been forged or fraudulently altered" may serve as a ground for the institution of an action for a retrial refers to the situation where the article produced as evidence is positively found to have been forged or fraudulently altered. It does not mean that

解釋文：憲法第十六條規定，人民訴訟權應予保障，至訴訟救濟應循之審級、程序及相關要件，應由立法機關衡量訴訟之性質，以法律為正當合理之規定。行政訴訟法第二十八條第七款規定「為判決基礎之證物係偽造或變造者」得據以提起再審之訴，係指該證物確係偽造或變造而言，非謂僅須再審原告片面主張其為偽造或變造，即應重開訴訟程序而予再審。而所謂證物確係偽造或變造，則又以其偽造或變造經宣告有罪之判決已確定，或其刑事訴訟不能開始或續行，非因證據不足者為限。此乃因再審係對確定裁判之非常救濟程序，影響法秩序之安定，故對其提起要件應有所限制。行政法院七十六年判字第一四五一號判例，符合上開意旨，與憲法第十六條保障人民訴訟權之規定尚無牴觸。

the proceeding must be reopened for a retrial so long as the plaintiff petitioning for the retrial alleges unilaterally that such article is forged or fraudulently altered. And the element where the article produced as evidence is positively found to have been forged or fraudulently altered is limited to the situation where the act of such forgery or fraudulent alteration has been found culpable, with an irrevocable judgment pronounced by court, or where it has been impossible, rather than because of insufficiency of evidence, to commence or to proceed with a criminal action in connection with such act. The reason that the condition on which an action for a retrial may be instituted must necessarily be made subject to specific restriction is because the retrial is a proceeding for extraordinary remedy in respect of an irrevocable judgment, with an impact on the stability of the order of law. Accordingly, the Supreme Administrative Court's Precedent P.T. 1451 (Supreme Administrative Court,1987) is consistent with our opinion given above and is not contrary to the provision of Article 16 of the Constitution for the protection of the

right of action of the people.

REASONING: The procedure to be followed and the elements required for the exercise of the right of action of the people under Article 16 of the Constitution are subject to proper and reasonable prescription of law to be enacted by the legislature by taking into account the nature of the action. Judicial procedures are designed to discover truth and to do justice, and evidence is the source by which the facts are brought to light and is thus of great importance. For that reason, the parties must present during the course of the litigation appropriate and extensive arguments on the weight of evidence as well as the truthfulness of the article produced as evidence so that the court may base its findings of the facts on positive evidence and make judgment in light of the truth of the case. Once a judgment has become irrevocable, the dispute is thereby resolved, and the order of law is thus stabilized. Although an action for a retrial may be brought even after a judgment has become irrevocable on the ground that the article produced as evidence on the basis

解釋理由書：憲法第十六條所保障人民之訴訟權，其實現所應遵循之程序及所應具備之要件，應由立法機關衡量訴訟之性質，以法律為正當合理之規定。訴訟程序之目的即在發見真實，實現正義。而證據為使事實明顯之原因，關係重大。故提出於訴訟之證物，其真偽與證明力，當事人應於訴訟程序進行中，為適當完全之辯論，使法院判斷事實所憑之證據臻於確實，而達裁判合於真實之目的。惟判決一經確定，紛爭即因之而解決，法律秩序亦賴之而安定。雖於判決確定後，有為判決基礎之證物係偽造或變造之情形者，仍得據以提起再審之訴，但此係指該證物確係偽造或變造而言，非謂僅須再審原告片面主張其係偽造或變造，即應重開訴訟程序而予再審。而所謂證物確係偽造或變造，則又以其偽造或變造經宣告有罪之判決已確定，或其刑事訴訟不能開始或續行，非因證據不足者為限，此在民事訴訟法第四百九十六條第一項第九款、第二項設有明文規定，使提起再審之訴不致漫無限制，藉以確保判決之確定力，維護法律秩序之安定。上開再審之要件係立法機關為平衡法律之安定性與

of which the judgment was made is found to have been forged or fraudulently altered, there must be present that the article produced as evidence is positively found to have been forged or fraudulently altered. It does not mean that the proceeding must be reopened for a retrial so long as the plaintiff petitioning for a retrial alleges unilaterally that such article was forged or fraudulently altered. And the element that the article produced as evidence is positively found to have been forged or fraudulently altered is limited to the situation where the act of such forgery or fraudulent alteration has been found culpable, with an irrevocable judgment pronounced by court, or where it has been impossible, rather than because of lack of sufficient evidence, to commence or to proceed with a criminal action in connection with such act. This is explicitly set forth in the Code of Civil Procedure , Article 496, Paragraph 1, Subparagraph 9, and Paragraph 2 of the same article, and the purpose of such provisions is to avoid abuse of the retrial proceeding, thereby ensuring the binding force of the judgment and maintaining the stability of the

裁判之正確性所作之決定，應無違憲可言。

order of law. The aforesaid elements required for institution of action for a retrial reflect the decision made by the legislature in an effort to maintain balance between stability of the order of law and the rightness of judgments, and should not be deemed to be unconstitutional.

The 1969 Administrative Proceedings Act, i.e., the Act before the amendment made on December 12, 1975, provided in Article 24: "Under one of the circumstances specified in subparagraphs of Article 496 of the Code of Civil Procedure , a party may, in respect of a judgment of the Administrative Court, bring before said Court an action for a retrial." The fact that the entire Article 496 of the Code of Civil Procedure, not just Paragraph 1 thereof, was incorporated by reference in the Administrative Proceedings Act, showed that the prerequisites for an action for a retrial in administrative proceedings were identical to those for an action for a retrial in civil suits. Upon amendment, said article of the Act, renumbered Article 28, with the causes for a retrial enumerated by subparagraphs, now

行政訴訟法於中華民國六十四年十二月十二日修正前，即五十八年之舊法，其第二十四條原亦規定：「有民事訴訟法第四百九十六條所列各款情形之一者，當事人對於行政法院之判決，得向該院提起再審之訴。」既係引用民事訴訟法第四百九十六條之全條條文，而不限於該條之第一項，足見行政訴訟之再審要件與民事訴訟之再審要件相同。嗣該條文修正為現行法之第二十八條，雖將再審原因改為分款列舉方式，但其中第七款：「為判決基礎之證物，係偽造或變造者」，仍為民事訴訟法第四百九十六條第一項第九款之原文，而當時提案修正之理由，亦僅為「參照民事訴訟法第四百九十六條及斟酌行政訴訟之性質，改為列舉規定，俾資適用。且免將來民訴法修正變更條次或內容時，本法即須隨同修正」等語，不具刪除證物之偽造或變造須經有罪判決確定等有關

reads in Subparagraph 7: "a forged or fraudulently altered article produced as evidence on the basis of which a judgment is made," the text being identical to that of the Code of Civil Procedure, Article 496, Paragraph 1, Subparagraph 9. Furthermore, the reason for the then proposed amendment was stated to be: "revising the text to the enumerative form in light of the textual style of Article 496 of the Code of Civil Procedure and taking into consideration the nature of administrative actions in order to ensure easy application and to avoid further amendment in the future along with the revision of the article number or substance of the Code of Civil Procedure ." It does not carry any implication with reference to the deletion of the prerequisite that the act of forgery or alternation of the article produced as evidence must have been deemed culpable by an irrevocable judgment. Accordingly, the Supreme Administrative Court's Precedent P.T. 1451 (Supreme Administrative Court, 1987) holding that "the element where the article produced as evidence on the basis of which the judgment was made is found to have been forged or fraudulent

限制之意涵。行政法院七十六年度判字第一四五一號判例謂：「所謂為判決基礎之證物係偽造或變造者，係指其偽造或變造構成刑事上之犯罪者而言，且此種偽造或變造之行為，應以宣告有罪之判決已確定，或其刑事訴訟不能開始或續行，非因證據不足者為限。」符合上開意旨，與憲法第十六條保障人民訴訟權之規定尚無牴觸。

lently altered refers to the situation where the act of such forgery or fraudulent alteration has constituted a criminal offense and such act has been found culpable upon the declaration of an irrevocable judgment, or where it has been impossible, rather than because of lack of sufficient evidence, to commence or to proceed with a criminal action in connection with such act" is consistent with our opinion given above and is not contrary to the provision of Article 16 of the Constitution for the protection of the right of action of the people.

Justice Chi-Nan Chen filed concurring opinion, in which Justice Tong-Schung Tai joined.

Justice Young-Mou Lin filed concurring opinion.

Justice Jyun-Hsiung Su filed dissenting opinion.

Justice Tze-Chien Wang filed dissenting opinion.

本號解釋陳大法官計男、戴大法官東雄共同提出協同意見書；林大法官永謀提出協同意見書；蘇大法官俊雄、王大法官澤鑑分別提出不同意見書。

J. Y. Interpretation No.394（January 5, 1996）*

ISSUE: Is it constitutional for the Regulation on the Supervision of the Construction Business and the Ministry of the Interior directive to provide for punitive administrative action against construction companies?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 15, Paragraph 2 of the Construction Act（建築法第十五條第二項）; Article 31, Paragraph 1, Subparagraph 9 of the Regulation on the Supervision of the Construction Business（營造業管理規則第三十一條第一項第九款）; Ministry of the Interior Directive (74) Tai-Nei-Ying-Tze No. 357429 (December 17, 1985)（內政部七十四年十二月十七日（七四）台內營字第三五七四二九號函）; J. Y. Interpretation Nos. 313 & 367.（司法院釋字第三一三號、第三六七號解釋）.

KEYWORDS:

act in breach of duty under administrative law（違反行政法上義務之行為）, punitive administrative action（懲罰性行政處分）, restraint on the right of the people（人民權利限制）, principle of reservation of law（法律保留原則）, principle of clear and specific authorization（授權明確性原則）, general authorization（概括授權）, interpretation of the law as a

* Translated by Raymond T. Chu.

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whole（法律整體解釋）, relevant meaning of the law as a whole（法律整體之關聯意義）, details and technical matters（細節性及技術性事項）, construction industry（營造業）, constituent elements（構成要件）, legal consequence（法律效果）, cancellation of certificate of registration（撤銷登記證書）.**

HOLDING: The Construction Act, by providing in Article 15, Paragraph 2, that "regulations governing the construction industry shall be established by the Ministry of the Interior," enables in general terms the establishment of regulations to govern the construction industry. While no specific prescription is made in such enabling clause with respect to the matters authorized and the scope of authorization, it may be presumed from the interpretation of the law as a whole that it is the intention of the legislators to enable the competent authority to establish, as it deems appropriate from the view of administrative specialization, rules and ordinances to regulate such matters as the requisites for the registration of construction companies, code of conduct of con-

解釋文：建築法第十五條第二項規定：「營造業之管理規則，由內政部定之」，概括授權訂定營造業管理規則。此項授權條款雖未就授權之內容與範圍為明確之規定，惟依法律整體解釋，應可推知立法者有意授權主管機關，就營造業登記之要件、營造業及其從業人員之行為準則、主管機關之考核管理等事項，依其行政專業之考量，訂定法規命令，以資規範。至於對營造業者所為裁罰性之行政處分，固與上開事項有關，但究涉及人民權利之限制，其處罰之構成要件與法律效果，應由法律定之；法律若授權行政機關訂定法規命令予以規範，亦須為具體明確之規定，始符憲法第二十三條法律保留原則之意旨。營造業管理規則第三十一條第一項第九款，關於「連續三年內違反本規則或建築法規規定達三次以上者，由省

struction business operators and persons engaged in such business, and the performance appraisement and supervision to be carried out by the competent authority. Punitive administrative actions to be taken against construction companies, which, although related with the foregoing matters, do involve, nonetheless, restraints to be imposed on the right of the people, must therefore be made subject to prescription by law so far as the elements required for imposing such punishment and the legal consequences of the punishment are concerned. If the law authorizes administrative agencies to establish regulatory rules or ordinances for such purpose, the authorization must be clear and specific so as to be conformable with the essence of the principle of reservation of law (Gesetzesvorbehalt) embodied in Article 23 of the Constitution. It is prescribed by the Regulation on the Supervision of the Construction Business, Article 31, Paragraph 1, Subparagraph 9, that "a construction business which has acted in violation of the Regulation or any construction law three times within a period of three consecutive years may be pun-

（市）主管機關報請中央主管機關核准後撤銷其登記證書，並刊登公報」之規定部分，及內政部中華民國七十四年十二月十七日（七四）臺內營字第三五七四二九號關於「營造業依營造業管理規則所置之主（專）任技師，因出國或其他原因不能執行職務，超過一個月，其狀況已消失者，應予警告處分」之函釋，未經法律具體明確授權，而逕行訂定對營造業者裁罰性行政處分之構成要件及法律效果，與憲法保障人民權利之意旨不符，自本解釋公布之日起，應停止適用。

ished by cancellation of its certificate of registration subject to approval to be given by the central competent authority upon a report submitted by a provincial (or municipal) competent authority, and notice of such cancellation shall be published in the government gazette" and by the Ministry of the Interior Directive (74) Tai-Nei-Ying-Tze No. 357429 (December 17, 1985) that "where the chief (or full-time) technician employed by a construction company under the Regulation on the Supervision of the Construction Business is unable to perform his duties for a period of over one month due to being abroad or any other reason and the circumstance is no longer in existence, the company shall be subject to disciplinary admonition." Such provisions, in the absence of clear and specific authorization granted by law, dictating elements and legal consequences for punitive administrative action to be taken against construction companies, are against the Constitutional intention of protecting the right of the people, and must cease to be operative as of the date of issue of this Interpretation.

REASONING: A punitive administrative action taken against a person for an act in breach of his duty under administrative law involves a restraint on his right, and the constituent elements required for and the legal consequence of such punishment must be prescribed by law. Where the law authorizes the establishment of supplementary rules in the form of administrative ordinances with respect to such constituent elements, such authorization must be made in a clear and specific manner insofar as the substance and scope of such authorization is concerned, before an administrative ordinance may be issued on the basis of such authorization, so as to be conformable with the essence of Article 23 of the Constitution whereby the right of the people may be restrained by prescription of law. (See our Interpretation No. 313.) Thus, to conform to the principle of reservation of law (Gesetzesvorbehalt), all matters related to restraint to be imposed on the freedom or right of the people must be regulated either by law or by ordinances issued by authorization of law. It follows that where the law authorizes the issue of

解釋理由書：對於人民違反行政法上義務之行為科處裁罰性之行政處分，涉及人民權利之限制，其處罰之構成要件及法律效果，應由法律定之。若法律就其構成要件，授權以命令為補充規定者，授權之內容及範圍應具體明確，然後據以發布命令，始符憲法第二十三條以法律限制人民權利之意旨，本院釋字第三一三號解釋可資參照。準此，凡與限制人民自由權利有關之事項，應以法律或法律授權命令加以規範，方與法律保留原則相符。故法律授權訂定命令者，如涉及限制人民之自由權利時，其授權之目的、範圍及內容須符合具體明確之要件；若法律僅為概括授權時，固應就該項法律整體所表現之關聯意義為判斷，而非拘泥於特定法條之文字；惟依此種概括授權所訂定之命令祇能就執行母法有關之細節性及技術性事項加以規定，尚不得超越法律授權之外，逕行訂定制裁性之條款，此觀本院釋字第三六七號解釋甚為明顯。

ordinances involving restraint to be imposed on the freedom or right of the people, the purpose, scope and substance of such authorization must be clear and specific; and where the law grants general authorization, the ordinances issued by such general authorization of law may, aside from taking into consideration the relevant meaning expressed by the law as a whole rather than adhering rigidly to the language of any particular clause thereof, set forth therein only such details and technical matters as relating to the implementation of the enabling statute and shall not go beyond the scope of authority granted by the law by setting forth therein any punitive clause. This has been made distinctly clear in our Interpretation No. 367.

The Construction Act, by providing in Article 15, Paragraph 2, that "regulations governing the construction industry shall be established by the Ministry of the Interior," enables in general terms the establishment of regulations to govern the construction industry. While no specific prescription is made in such enabling

建築法第十五條第二項規定：「營造業之管理規則，由內政部定之」，概括授權內政部訂定營造業管理規則。此項授權條款並未就授權之內容與範圍為明確之規定，惟依法律整體解釋，應可推知立法者有意授權主管機關，就營造業登記之要件、營造業及其從業人員之行為準則、主管機關之考核

clause with respect to the matters authorized and the scope of authorization, it may be presumed from the interpretation of the law as a whole that it is the intention of the legislators to enable the competent authority to establish, as it deems appropriate from the view of administrative specialization, rules and ordinances to regulate such matters as the requisites for the registration of construction companies, code of conduct of construction business operators and persons engaged in such business, and the performance appraisement and supervision to be carried out by the competent authority. The provision of the Regulation on the Supervision of the Construction Business, Article 30, Paragraph 1, Subparagraph 11, as amended by the Ministry of the Interior on May 11, 1983 (changed to Article 31, Paragraph 1, Subparagraph 9, in the amended version of April 30, 1986, and unchanged to date) that "a construction business which has acted in violation of the Regulation or any construction law three times within a period of three consecutive years may be punished by cancellation of its certificate of registration sub-

管理等事項，依其行政專業之考量，訂定法規命令，以資規範。內政部於中華民國七十二年五月十一日修正發布之營造業管理規則第三十條第一項第十一款（七十五年四月三十日修正條次為第三十一條第一項第九款，迄至現行規則規定之條次相同），關於「連續三年內違反本規則或建築法規規定達三次以上者，由省（市）主管機關報請中央主管機關核准後撤銷其登記證書，並刊登公報」之規定，及內政部七十四年十二月十七日（七四）臺內營字第三五七四二九號關於「營造業依營造業管理規則所置之主（專）任技師，因出國或其他原因不能執行職務，超過一個月，其狀況已消失者，應予警告處分」之函釋，雖係基於公共利益之考量，屬行政主管機關行使監督權之範疇；但已涉及人民權利之限制，揆諸前開說明，仍有法律保留原則之適用。蓋「撤銷登記證書之處分」，係指對於違反管理規則所定義務之處罰，將其已享有之權益，予以不利之處分；而警告處分既發生撤銷登記證書之法律效果，亦屬行政處罰種類之一，均應以法律或法律具體明確授權之規定為依據，方符憲法保障人民權利之意旨。

ject to approval to be given by the central competent supervising authority upon a report submitted by a provincial (or municipal) competent authority, and notice of such cancellation shall be published in the government gazette" and the Ministry of the Interior directive (74) Tai-Nei-Ying-Tze No. 357429 (December 17, 1985) that "where the chief (or full-time) technician employed by a construction company under the Regulation on the Supervision of the Construction Business is unable to perform his duties for a period of over one month due to being abroad or any other reason and the circumstance is no longer in existence, the company shall be subject to disciplinary admonition." Such clauses, albeit designed for the public interest and are within the scope of the supervisory power of the competent administrative agency, do involve restraints on the right of the people, to which the principle of reservation of law is applicable as we have explained above. It must be pointed out that the "punishment of cancellation of the certificate of registration" is a punishment for breach of duty defined by said regulations in the form of a penalty detri-

mental to the right and interest already acquired by the violator, and the disciplinary admonition, which leads to the legal consequence of cancellation of the certificate of registration, is also a type of administrative penalty, and that both must be based either on law or on clear and specific authorization of law to be conformable with the intent of the Constitution in safeguarding the right of the people.

In conclusion, Article 15 of the Construction Act only enables the establishment of the Regulation on the Supervision of the Construction Business, without granting any authority to cancel the certificate of registration, and the elements required for and the method of punishment for other acts in breach of duty are explicitly prescribed by Article 85 and Article 95 of the Act. Therefore, the Regulation on the Supervision of the Construction Business, Article 31, Paragraph 1, Subparagraph 9, and the Ministry of the Interior directive (74) Tai-Nei-Ying-Tze No. 357429 (December 17, 1985), in the absence of clear and specific authorization

綜上所述，建築法第十五條僅概括授權訂定營造業管理規則，並未為撤銷登記證書之授權，而其他違反義務應予處罰之構成要件及制裁方式，該法第八十五條至第九十五條已分別定有明文，是上開營造業管理規則第三十一條第一項第九款及內政部七十四年十二月十七日（七四）臺內營字第三五七四二九號函，均欠缺法律明確授權之依據，逕行訂定對營造業裁罰性行政處分之構成要件及法律效果，與憲法保障人民權利之意旨不符，自本解釋公布之日起，應停止適用。

granted by law, dictating elements and legal consequences for punitive administrative action to be taken against construction companies, are in conflict with the Constitutional intention to protect the right of the people, and must cease to be operative as of the date of issue of this Interpretation.

J. Y. Interpretation No.395（February 2, 1996）*

ISSUE: Is the term "decision of disciplinary sanctions" used in Article 33, Paragraph 1 of the Public Functionaries Disciplinary Act meant to include the decision handed down after a rehearing?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; J. Y. Interpretation No. 154（司法院釋字第一五四號解釋）; Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）; Articles 33, Paragraph 1 ; 34 and 39 of the Public Functionaries Disciplinary Act（公務員懲戒法第三十三條第一項、第三十四條、第三十九條）; Articles 28 and 30 of the Administrative Proceedings Act（行政訴訟法第二十八條、第三十條）; Articles 496 and 505 of the Code of Civil Procedure（民事訴訟法第四百九十六條、五百零五條）; Articles 424, 425, 436 and 437 of the Code of Criminal Procedure（刑事訴訟法第四百二十四條、第四百二十五條、第四百三十六條、第四百三十七條 ）.

KEYWORDS:

civil servant; public functionary（公務員）, disciplinary sanction（懲戒）, motion（移請）, petition （聲請）, rehear（再審議）, right to institute legal proceedings（訴訟權）,

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* Translated by Professor Chun-Jen Chen.

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

exceed（逾越）, doctrine of reservation to law（法律保留原則）, final and binding judgment（確定終局裁判）, Commission on the Disciplinary Sanctions of Functionaries（公務員懲戒委員會）, precedent（案例）, legal procedure（法定程序）, proceeding to redress grievance（訴訟救濟）, retrial（再審）, ruling（裁定）, irrevocable（確定）, extraordinary appeal（非常上訴）, fair trial（公平審判）, peremptory period（不變期間）, erroneous application of law and regulation（法規適用錯誤）, reject（駁回）, reverse（推翻）.**

HOLDING: Articles 33, Paragraph 1 of the Public Functionaries Disciplinary Act prescribes that the civil servant who is subject to disciplinary sanctions or the institution which originally transfers the case to the Commission on the Disciplinary Sanctions of Functionaries may file a motion or petition to rehear the decision of disciplinary sanctions where at least one of the conditions set forth in Subparagraphs 1-6 is met. The terms “decision of disciplinary sanctions” used in Article 33, Paragraph 1 of the above-mentioned law are meant to include the decision handed down after a rehear-

解釋文：懲戒案件之議決，有法定事由者，原移送機關或受懲戒處分人得移請或聲請再審議，公務員懲戒法第三十三條第一項定有明文。其中所謂「懲戒案件之議決」，自應包括再審議之議決在內。公務員懲戒委員會再審字第三三五號案例及其他類此案例，與上開解釋意旨不符，對公務員訴訟上之權利為逾越法律規定之限制部分，有違憲法第二十三條法律保留原則之規定，應自本解釋公布之日起不再援用。

ing. Precedent No. 335 (Zai-Shen-Tze 335) and other similar precedents are in contravention to this Interpretation, and for the part of limiting civil servants' rights to institute legal proceedings exceeding limitations provided by law, to the constitutional mandate of the doctrine of reservation to law pursuant to Article 23 of the Constitution. Consequently, those precedents shall no longer be applicable after the issuance of this Interpretation.

REASONING: According to J. Y. Interpretation No. 154, the terms, "law and regulation applied in final and binding judgments", used in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act refer to the governing law and regulation or their equivalents in final and binding judgments. Pursuant to Article 78 of its Administrative Regulation, the Commission on the Disciplinary Sanctions of Functionaries (the Commission) forms the "Editorial Board of Precedents" to select cases with representative facts or legal reasoning as precedents to be used as im-

解釋理由書：司法院大法官審理案件法第五條第一項第二款所稱：「確定終局裁判所適用之法律或命令」，乃指確定終局裁判作為裁判依據之法律或命令或相當於法律或命令者而言，業經本院釋字第一五四號解釋理由書釋示在案。公務員懲戒委員會依其處務規程第七十八條，設立「案例編輯委員會」，負責案例之編輯，就審議之案件，擇其案情或法律見解足以為例者，選輯為案例，作為案件審議之重要參考。其所選輯之「案例」與最高法院或行政法院之判例或決議相當，既經公務員懲戒委員會援引其案號或其具體內容為審議之依據，依本院釋字第一五四號

portant reference for the deliberations of future cases. Before entering into discussions of the above, there is one matter needed to be clarified that since those precedents, which are equivalents to their Supreme Court's and Supreme Administrative Court's counterparts, are cited and utilized as governing law by the Commission in disciplinary sanction cases, J. Y. Interpretation No. 154 is applicable to those precedents.

解釋之意旨，仍有首開規定之適用，合先說明。

The right to institute legal proceedings under Article 16 of the Constitution is a constitutional guarantee to ensure people's rights to bring lawsuits according to legal procedures and for fail trials. With respect to legal procedures, they fall into the domain of the legislative branch, which in turn may evaluate the nature of lawsuits and enact proper procedural laws accordingly, subject to the constitutional mandate of the doctrine of reservation to law pursuant to Article 23 of the Constitution. Although civil servants' constitutional rights may be subject to certain limitations concerning duties of obedience associated with their public service, ex-

憲法第十六條規定人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權益。至於訴訟救濟應循之相關程序，則由立法機關衡量訴訟性質以法律妥為合理之規定，而有憲法第二十三條法律保留原則之適用。公務員憲法上保障之權利，雖基於公法上之職務關係，在其職務上服從義務範圍內，受有相當之限制。惟除此情形外，公務員因權益受損害而尋求法律救濟之權，如有必要加以限制時，應以法律為之，尚不得以「案例」為逾越法律之限制。公務員懲戒委員會關於公務員懲戒案件之議決，若有公務員懲戒法第三十三條第一項所列舉各款情形之一者，於第三十四條各款所定期間內，原移送機

cept for these limitations, their rights to seek for legal remedies when there is an infringement cannot be limited simply by precedents. If it should be necessary to impose limitations, they shall be prescribed by written law. Articles 33, Paragraph 1 of the Public Functionaries Disciplinary Act prescribes that the civil servant who is subject to disciplinary sanctions or the institution which originally transfers the case to the Commission may file a motion or petition to rehear the decision of disciplinary sanctions where at least one of the conditions set forth in Subparagraphs 1-6 is met, provided the motion or petition is filed within the periods specified in Article 34 of the same law. This specific appellate proceeding to redress grievance for the decisions of the Commission is designed to discover material facts and to ensure the proper application of law. Moreover, the Commission shall provide a written decision following the procedure delineated in the Public Functionaries Disciplinary Act on every disciplinary sanction case, on both hearing and rehearing levels. The nature of the Commission's decisions made on differ-

關或受懲戒人得移請或聲請再審議，係對公務員懲戒委員會之議決所設之特定救濟程序，用以發見實體之真實及妥當適用法規。惟公務員懲戒委員會無論審議或再審議懲戒案件，均應依公務員懲戒法所定程序作成議決書，其議決之性質並不因議決之先後而有不同。類此，在刑事訴訟案件，依刑事訴訟法第四百三十六條規定，開始再審之裁定確定後，法院應依其審級之通常程序，更為審判，其所為之判決，除同法第四百三十七條第三項所規定者外，得依法上訴，判決確定者亦得依法聲請再審；在民事訴訟案件，依民事訴訟法第五百零五條規定，再審之訴訟程序準用關於各該審級訴訟程序之規定，其所為判決，得依法上訴，對於確定裁判得依民事訴訟法第四百九十六條以下之規定，提起再審之訴或聲請再審；在行政訴訟案件，依行政訴訟法第二十八條及第三十條規定，行政法院裁判具備同條各款所定再審原因者，得向行政法院提起再審之訴或聲請再審，而再審裁判如有上述再審理由者，仍得請求再審。是公務員懲戒法第三十三條第一項所稱「懲戒案件之議決」，並不以原第一次議決為限，苟再審議之議決仍具備再審議之原因者，除該法第三十九條第二項有不得

ent levels remains unchanged. Similarly, in criminal cases, according to Article 436 of the Code of Criminal Procedure, when the ruling of a retrial becomes irrevocable, the courts shall retry the case following their respective trial level's ordinary procedure. Except for those circumstances delineated in Article 437, Paragraph 3 of the same law, the court's judgment is subject to appellate review; a grieving party may also file a petition for a retrial once the judgment becomes irrevocable, if there is a legal ground to do so. Likewise, according to Article 505 of the Code of Civil Procedure, the procedure of a retrial shall follow respective trial level's procedural rules. The courts' judgments are subject to appellate reviews; grieving parties may also file petitions for retrials once the judgments become irrevocable, provided the requirements set forth in Article 496 and articles thereunder of the same law are met. Also, in administrative cases, according to Articles 28 and 30 of the Administrative Proceedings Act, where judgments of administrative courts meet the causes of retrials set forth in subparagraphs thereof, grieving parties may file

更以同一原因提出再審議聲請之限制外，尚非不得就再審議之議決以不同原因提出再審議之聲請。蓋懲戒案件之議決，未若刑事訴訟法有裁定與判決之分；而其得予再審議之事由，因公務員懲戒法第三十三條第一項第一款之規定，其適用法規顯有錯誤者，既亦其中之一，顯已於刑事訴訟法之純為事實認定錯誤救濟之再審外，加上法令適用錯誤得為非常上訴之救濟事由。茲此款之所謂「法規適用錯誤」，本包括實體法與程序法，因是，移請或聲請再審議之議決，即令以不合法予以駁回，亦非均無實質之內容，更非完全不能達成救濟之目的。至若以無理由而駁回者，大多涉及實體，即以同條項第六款之足以影響原議決之重要證據漏未斟酌而論，其是否「影響」，即是否足以「推翻」再審議之議決，判斷上多與實體有關，尤不能謂其不具救濟之效果。何況因移請或聲請再審議之期間，同法第三十四條均有三十日不變期間之限制，與刑事訴訟法不盡相同（參看刑事訴訟法第四百二十四條、第四百二十五條），且如上述，公務員懲戒法第三十九條第二項復有不得更以同一原因移請或聲請再審議之規定，是以對「原議決」之移請或聲請再審議，實質上自不可能不受次數之

petitions for retrials. Grieving parties may also file petitions for re-retrials on judgments of retrials, provided there is an appropriate cause of action. Thus, the term "decision of disciplinary sanctions" used in Article 33, Paragraph 1 of the Public Functionaries Disciplinary Act is not limited to the decision of first hearing. If there is a cause of action for a rehearing, except for the limitation prescribed in Article 39 of the same law barring a rehearing for the same cause of action, a petition for a rehearing may be filed under different causes of action. This is so because the decisions of disciplinary sanctions of the Commission do not make the distinction between judgments and rulings under the Public Functionaries Disciplinary Act as do their criminal sanction counterparts under the Code of Criminal Procedure, and since Articles 33, Paragraph 1, Subparagraph 1 of the same law includes "the erroneous application of law and regulation" as one of the cause of action for a retrial, the law obviously goes beyond the scope of the criminal retrial, which is design to redress errors in fact, and adds up the relief of extraordinary appeal, which is

限制，如其以適用法規顯有錯誤為由移請或聲請再審議，經議決無理由予以駁回者，倘此一議決之法律上適用仍有錯誤，但因受三十日不變期間暨不得更以同一原因移請或聲請再審議之限制，其對「原議決」、即「第一次議決」，殊無從移請或聲請再審議；惟若准其對該「再審議之議決」為再審議之移請或聲請，當可獲得救濟。又如以影響原議決之重要證據漏未斟酌為由移請或聲請者，倘因其對該「證據」之存否此一事實，觀察有所過誤，經議決無理由予以駁回時，亦將因上述法條之規定致生相同之結果，如此尤謂不准其為再審議之移請或聲請，顯失公平。

designed to redress errors in law, under the Code of Criminal Procedure. Namely, the terms "law and regulation" used in Article 33, Paragraph 1, Subparagraph 1 of the Public Functionaries Disciplinary Act include both substantive and procedural law and regulation. Therefore, even the Commission's decisions to reject the motion or petition for a rehearing due to procedural defects cannot be said to infer that such motion or petition contains no substantive content and is completely unsuitable for a rehearing. As to the decision rejecting a motion or petition for a rehearing for failing to state a claim, it mostly involves substantive deliberations. For example, Article 33, Paragraph 1, Subparagraph 6 of the above-mentioned law provides a cause of action for a rehearing for the Commission's failure to consider material evidence which is important enough to affect its decision during the original hearing. The determination on whether the evidence is important enough to "affect" the decision is to determine whether there are enough grounds to reverse the original decision, and mostly involves substantive deliberations, and

cannot be said not suitable to serve the purpose of redressing grievance. Moreover, unlike those of the Code of Criminal Procedure, Article 34 of the same law prescribes a thirty-day peremptory period for filing a motion or petition for a rehearing. Furthermore, Article 39, Paragraph 2 of the same law bars a motion or petition for a rehearing for the same cause of action. Hence, putting these together, the number of times a motion or petition may be filed is limited. For instance, if a motion or petition for a rehearing is filed for erroneous application of law and regulation and is rejected for failing to state a claim, and if the decision to reject the motion or petition is itself erroneous application of law and regulation, the grieving party can no longer be able to file a motion or petition for rehearing the original decision, i.e., "the first decision", because of the thirty-day peremptory period and because of the limitation barring a motion or petition for a rehearing for the same cause of action. Of course, the grieving party may seek for remedy by filing a motion or petition for rehearing the decision rejecting her previous motion or petition. Likewise, if a mo-

tion or petition for a rehearing is filed due to the Commission's failure to consider material evidence, and if the Commission wrongly determines that there is no such evidence and rejects the motion or petition for failing to state a claim, the result will be the same because of the applications of the above-mentioned peremptory period and the bar. Accordingly, it will be unfair to say that the Commission's decision of rejecting a motion or petition for a rehearing is not subject to rehear.

Precedents No. 335, 351, 411, 452, 478, 486, 489, and 497 (Zai-Shen-Tze 335, 351, 411, 452, 478, 486, 489, and 497) of the Commission all state in principle that, "The Commission's decision of rejecting a motion or petition for a rehearing is not subject to rehear because the Public Functionaries Disciplinary Act is silent in this regard. It is self-evident that Articles 33, 34, and 35 all explicitly prescribe the proceedings to rehear the 'original decision'. The terms 'petition for a rehearing' used in Article 33 of the same law shall be construed as meaning to rehear the original decision." These quoted

公務員懲戒委員會再審字第三三五號、第三五一號、第四一一號、第四五二號、第四七八號、第四八六號、第四八九號及第四九七號等案例要旨謂：公務員懲戒法對於駁回再審議之議決，並無更行再審議之規定，此觀同法第三十三條、第三十四條、第三十五條有關聲請再審議之規定均明定係對「原議決」為之甚明，同法第三十三條規定之聲請再審議，應對第一次之議決即原議決為之等語，一概不許對於再審議之議決聲請再審議，與上開解釋意旨不符，而對公務員訴訟上之權利為逾越法律規定之限制部分，有違憲法第二十三條法律保留原則之規定，自本解釋公布之日

languages bar absolutely any motion or petition for rehearing the Commission's decision to reject a motion or petition for a rehearing; therefore, are in contravention to this Interpretation and, for the part of limiting civil servants' rights to institute legal proceedings exceeding limitations provided by law, to the constitutional mandate of the doctrine of reservation to law pursuant to Article 23 of the Constitution. As a result, those precedents shall no longer be applicable after the issuance of this Interpretation.

起，應不再援用。

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。

J. Y. Interpretation No.396（February 2, 1996）*

ISSUE: Does the Public Functionaries Disciplinary Act violate Article 16 of the Constitution since it lacks an appellate system and cannot fully protect the people's right to initiate legal proceedings, and shall it therefore be amended accordingly?

RELEVANT LAWS:

Articles 16 and 82 of the Constitution（憲法第十六條、第八十二條）; J. Y. Interpretation Nos.162 and 243（司法院釋字第一六二號及第二四三號解釋）.

KEYWORDS:

disciplinary measures（懲戒處分）, disciplinary authority（懲戒機關）.**

HOLDING: Article 16 of the Constitution stipulates that the people have the right to initiate legal proceedings, and such right may be prescribed by the legislative authority taking into account the nature of each type of litigation case for the purpose of safeguarding the right of litigation under the judicial system. Where a public servant is subject to disciplinary measures for violation of law

解釋文：憲法第十六條規定人民有訴訟之權，惟保障訴訟權之審級制度，得由立法機關視各種訴訟案件之性質定之。公務員因公法上職務關係而有違法失職之行為，應受懲戒處分者，憲法明定為司法權之範圍；公務員懲戒委員會對懲戒案件之議決，公務員懲戒法雖規定為終局之決定，然尚不得因其未設通常上訴救濟制度，即謂與憲法第十六條有所違背。懲戒處分影響憲法上人

* Translated by BAKER & McKENZIE.

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

whilst discharging his/her duties as public servant or for failure to discharge his/her duties properly as public servant, the disciplinary measures whereof are clearly stipulated by the Constitution to fall within the jurisdiction of the judiciary. Although the Public Functionaries Disciplinary Act provides that determination made by the Commission on the Disciplinary Sanctions of Functionaries shall be final as regards disciplinary cases, Article 16 of the Constitution shall not be considered violated where no ordinary appellate system of relief is created. Since the disciplinary measures affect the right to hold public office granted by the Constitution and the members of the disciplinary authority are judges as construed under the Constitution, according to Article 82 of the Constitution and the intent under this Yuan Interpretation No.162, the authority itself shall adopt the mechanism of a court and the determination of disciplinary cases shall comply with the principle of due process of law so as to provide sufficient procedural safeguards to the disciplined persons. For example, the systems of direct trial, oral arguments, cross-

民服公職之權利，懲戒機關之成員既屬憲法上之法官，依憲法第八十二條及本院釋字第一六二號解釋意旨，則其機關應採法院之體制，且懲戒案件之審議，亦應本正當法律程序之原則，對被付懲戒人予以充分之程序保障，例如採取直接審理、言詞辯論、對審及辯護制度，並予以被付懲戒人最後陳述之機會等，以貫徹憲法第十六條保障人民訴訟權之本旨。有關機關應就公務員懲戒機關之組織、名稱與懲戒程序，併予檢討修正。

examination, and defense may be adopted to provide the disciplined persons with a last opportunity to expound, etc., so as to implement the intent under Article 16 of the Constitution in relation to the safeguarding of the people's right to litigation. Review and amendment should be made by the relevant authorities with respect to the organization, name, and disciplinary procedure of the public servants' disciplinary authority.

REASONING: The right of the people to institute legal proceedings under Article 16 of the Constitution is an entitlement to systematic safeguard of relief which is available when their rights are violated. The actual content of such right can only be affected through stipulation of laws relating to the organization of courts and the litigation procedures by the legislative authorities. Since the safeguarding of the people's right to litigation lies at the core of the Constitution, and is a basic prerequisite for the right to litigation, any lack whereof shall conflict with the intent of Article 16 of the Constitution in relation to safeguarding of the people's right

解釋理由書：憲法第十六條所定人民之訴訟權，乃人民於其權利遭受侵害時，得訴請救濟之制度性保障，其具體內容，應由立法機關制定法院組織與訴訟程序有關之法律，始得實現。惟人民之訴訟權有其受憲法保障之核心領域，為訴訟權必備之基本內容，對其若有欠缺，即與憲法第十六條保障人民訴訟權之意旨不符。本院釋字第二四三號解釋所謂有權利即有救濟之法理，即在指明人民訴請法院救濟之權利為訴訟權保障之核心內容，不容剝奪。保障訴訟權之審級制度，得由立法機關視各種訴訟案件之性質定之。公務員因公法上職務關係而有違法失職之行為，應受懲戒處分者，憲法明定為司法權之範圍；公

to litigation. The general principle of law contained in this Yuan Interpretation No. 243, which provides that rights are accompanied with relief, aims to elucidate that the people cannot be deprived of the right to request relief from the court which lies at the heart of the safeguarding of the right to litigation. The judicial system with various proceedings which provides for the safeguarding of the right to litigation shall be established by the legislative authority having consideration of the nature of each type of litigation case. Where a public servant is subject to disciplinary measures for violation of law whilst discharging his/her duties as public servant, or for failure to discharge his/her duty properly as public servant, the disciplinary measures whereof are clearly stipulated by the Constitution to fall within the jurisdiction of the judiciary. Although the Public Functionaries Disciplinary Act provides that determination made by the Commission on the Disciplinary Sanctions of Functionaries shall be final as regards disciplinary cases, Article 16 of the Constitution shall not be considered violated where no ordinary appellate

務員懲戒委員會對懲戒案件之議決，公務員懲戒法雖規定為終局之決定，然尚不得因其未設通常上訴救濟制度，即謂與憲法第十六條有所違背。

system of relief is created.

Strictly speaking, the so-called judicial authority under the Constitution refers to the Judicial Yuan and the courts of law (including tribunals), and the officials exercising the judicial right are the grand justices and the judges. Disciplinary matters pertaining to the discipline of public servants by the Commission on the Disciplinary Sanctions of Functionaries fall within the ambit of the exercise of judicial rights and are exercised by the judges under the Constitution. Since the disciplinary measures affect the right to hold public office granted by the Constitution and the members of the disciplinary authority are judges as construed under the Constitution, according to Article 82 of the Constitution and the intent under this Yuan Interpretation No.162, the authority itself shall adopt the mechanism of a court and the determination of disciplinary cases shall comply with the principle of due process of law so as to provide sufficient procedural safeguards for the disciplined persons. For example, the systems of direct trial, oral arguments, cross- examina-

憲法所稱之司法機關，就其狹義而言，係指司法院及法院（包括法庭），而行使此項司法權之人員為大法官與法官。公務員懲戒委員會掌理公務員之懲戒事項，屬於司法權之行使，並由憲法上之法官為之。惟懲戒處分影響憲法上人民服公職之權利，懲戒機關之成員既屬憲法上之法官，依憲法第八十二條及本院釋字第一六二號解釋意旨，則其機關應採法院之體制，包括組織與名稱，且懲戒案件之審議，亦應本正當法律程序之原則，對被付懲戒人予以充分之程序保障，例如採取直接審理、言詞辯論、對審及辯護制度，並予以被付懲戒人最後陳述之機會等，以貫徹憲法第十六條保障人民訴訟權之本旨。有關機關應就公務員懲戒機關之組織、名稱與懲戒程序，併予檢討修正。

tion, and defense may be adopted to provide the disciplined persons with a last opportunity to expound, etc., so as to implement the intent under Article 16 of the Constitution in relation to the safeguarding of the people's right to litigation. Review and amendment should be made by the relevant authorities with respect to the organization, name, and disciplinary procedure of the public servants' disciplinary authority.

J. Y. Interpretation No.397（February 16, 1996）*

ISSUE: Is the directive issued by the Ministry of Finance, setting forth the methods of calculating the amount of business tax payable by a person concurrently running different businesses, in line with the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 15 and 19, Paragraph 3, of the Business Tax Act（營業稅法第十五條、第十九條第三項）.

KEYWORDS:

sales tax; business tax（營業稅）, dual-status（兼營）, business operator（營業人）, principle of taxation by law（租稅法律主義）, tax due（應納稅額）, input tax（進項稅額）, output tax（銷項稅額）, dividend（股利）, deduct（扣抵）, value-added sales tax; value-added business tax（加值型營業稅）, cumulative turnover tax（累積型轉手稅）, added value（附加價值）, proportional deduction method（比例扣抵法）, direct deduction method（直接扣抵法）, levy（稽徵）, pay tax（納稅）, taxing authority（稽徵機關）, statutory authorization（法律授權）, tax evasion（逃稅）, goods（貨物）, service（勞務）.**

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* Translated by Professor Spenser Y. Hor.

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HOLDING: The "Regulation for the Computation of Sales Tax for Dual-Status Business Entities" issued by the Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 7521435, February 20, 1986, were promulgated under the clear and concrete authorization of Article 19, Paragraph 3, of the Business Tax Act, do not exceed the purpose and scope of the statutory authorization, and are not in contravention to the principle of taxation by law. Besides, according to the Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 761153919, July 8, 1987, dual-status business entities that engage in investment business shall add dividends received during the tax year to the tax-exempt sales item when filing the year-end sales tax return and pay the tax due calculated and adjusted following the ratio of input tax and non-deductible output tax provided by the abovementioned Regulation. This Directive only illustrates how a dual-status business operator's dividend income should be computed into the legally non-deductible input tax when applying the above Regulation and does not recognize dividend incomes as sales tax taxable;

解釋文：財政部中華民國七十五年二月二十日台財稅字第七五二一四三五號令發布之「兼營營業人營業稅額計算辦法」係基於營業稅法第十九條第三項具體明確之授權而訂定，並未逾越法律授權之目的及範圍，與租稅法律主義並無牴觸。又財政部七十七年七月八日台財稅字第七六一一五三九一九號函釋稱兼營投資業務之營業人於年度中取得之股利，應於年度結束時彙總列入當年度最後乙期免稅銷售額申報，並依兼營營業人營業稅額計算辦法之規定，按當期或當年度進項稅額不得扣抵銷項稅額之比例計算調整應納稅額，併同繳納，僅釋示兼營營業人股利所得如何適用上開辦法計算其依法不得扣抵之進項稅額，並未認股利收入係營業稅之課稅範圍，符合營業稅法意旨，與憲法尚無違背。惟不得扣抵比例之計算，在租稅實務上既有多種不同方法，財政部雖於八十一年八月二十五日有所修正，為使租稅益臻公平合理，主管機關仍宜檢討改進。

therefore, it is consistent with the Business Tax Act and is not in contravention to the Constitution. However, there are various ways in tax practices to compute the non-deductible ratio; though amendments were made by the Ministry of Finance on August 25, 1992, in order to make taxation more fair and reasonable, further reviews and efforts to make improvements by the agency-in-charge are advised.

REASONING: Under the current Business Tax Act, the levy of sales tax combines value-added sales tax and cumulative turnover tax. According to Section 1, Chapter 4, of the Business Tax Act, the former levies sales tax on the difference between a business operator's input tax and output tax; the latter, on the other hand, levies sales tax on a business operator's total sales amount according to Section 2, Chapter 4, of the same law. Article 15, Paragraph 1, stipulates that the amount of sales tax payable or overpaid by a business operator will be the difference between the output tax and the input tax in the current tax period. (The output

解釋理由書：現行營業稅法對於營業稅之課徵係採加值型營業稅及累積型轉手稅合併立法制，前者依營業稅法第四章第一節規定，係按營業人進、銷項稅額之差額課稅；後者依同法第四章第二節規定，係按營業人銷售總額課徵營業稅。依營業稅法第十五條第一項規定，營業人當期銷項稅額（指營業人銷售貨物或勞務、或依規定所應收取之營業稅額）扣減進項稅額（指營業人購買貨物或勞務時，依規定支付之營業稅額）之餘額，即為當期應納或溢付營業稅額。營業人得以購買貨物或勞務所支付之進項稅額申報扣抵銷售貨物或勞務之銷項稅額，應以其所銷售之貨物或勞務屬於應稅者為限。依營業稅法第十九

tax is the amount of sales tax to be collected by the business operator at the time of selling goods or services as prescribed by laws or regulations. The input tax is the sales tax paid by a business operator at the time of purchasing goods or services as prescribed by laws and regulations.) A business operator may file a tax return deducting the amount of input tax on purchased goods or services from the amount of output tax on sold goods or services; however, his or her deductible input tax is limited to those sold goods or services which are taxable. Article 19, Paragraph 1, of the Business Tax Act delineates items that shall not be deducted from the output tax; Paragraph 2 prescribes that for business entities engaged solely in the business of exempted goods or services, the input tax shall not be refunded. However, it is difficult to draw a clear distinction between the deductible input tax and that of purchased goods or services of a dual-status business operator whose sales of goods or services provided in Article 8, Paragraph 1, of the same law represent only a portion of his or her business, or that of purchased goods or services of a

條第一項規定同條項所定之進項稅額，不得扣抵銷項稅額，又同條第二項規定專營免稅貨物或勞務者，其進項稅額不得申請退還。但就兼營營業稅法第八條免稅貨物或勞務者，其購進所營免稅貨物或勞務，或營業人非供本業及附屬業務使用之貨物或勞務等第十九條第一項所列之進項稅額，因與得扣抵之進項稅額，有不易明確劃分之情形，為合理計算應納稅額，營業稅法第十九條第三項乃授權財政部就兼營營業稅法第八條第一項免稅貨物或勞務，或因本法其他規定而有部分不得扣抵情形者，其進項稅額不得扣抵銷項稅額之比例與計算辦法，由財政部定之，作為稽徵或納稅之依據。此種法律基於特定目的，而以內容具體、範圍明確之方式，就徵收稅捐所為之授權規定，並非憲法所不許（釋字第三四六號解釋參照）。

business operator not to be used for major business or ancillary business uses. In order to reasonably compute the amount of sales tax dues, Article 19, Paragraph 3, of the Business Tax Act authorizes the Ministry of Finance to prescribe the ratios and methods of computation as bases of levying and paying sales taxes with regard to dual-status business entities' tax exempt goods or services under Article 8, Paragraph 1, of the same law or other non-deductible input taxes because of other provisions of the same law. Such a statutory authorization of levying tax based on special purposes, with concrete contents and clear scope, is constitutional. (See J.Y. Interpretation No. 346)

The "Regulation for the Computation of Sales Tax for Dual-Status Business Entities" issued by the Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 7521435, February 20, 1986, were promulgated under the clear and concrete authorization of Article 19, Paragraph 3, of the Business Tax Act, and the adopted proportional deduction method was prescribed with a view to provided convenience of levying

財政部七十五年二月二十日台財稅字第七五二一四三五號令發布之「兼營營業人營業稅額計算辦法」係基於營業稅法第十九條第三項具體明確之授權而訂定，其所採之比例扣抵法，旨在便利徵納雙方徵繳作業，並未逾越授權之目的及範圍。加值型營業稅係對貨物或勞務在生產、提供或流通之各階段，就銷售金額扣抵進項金額後之餘額（即附加價值）所課徵之稅，涉及稽徵技術、

and paying sales taxes to both taxpayers and the agencies-in-charge; therefore, the Regulation does not exceed the purpose and scope of the statutory authorization. The value-added sales tax, involving levying techniques, costs and fairness and having its own revolutionary process, levies from the difference (i.e., the added value) between the amount of the sales of goods or services in various stages of production, provision and distribution and the amount of input tax. With regard to how to compute a business operator's sale tax due, most nations adopt the proportional deduction method; some nations adopt or also adopt the direct deduction method when business entities have complete books and records that are easily examined and computed for the tax purpose and are approved by the competent tax authorities. The above mentioned Regulation was amended by the Ministry of Finance on August 25, 1992, prescribing that beginning on September 1, 1992, if a dual-status business operator has complete books and records of which the actual uses of purchased goods or services are identifiable, he or she may apply to the

成本與公平，有其演進之過程。關於如何計算兼營營業人之應納稅額，各國多採比例扣抵法，亦有規定帳載完備，得明確劃分勾稽，而經核准者，得採直接扣抵法。財政部於八十一年八月二十五日修正上開辦法，規定自八十一年九月一日起，兼營營業人帳簿記載完備，能明確區分所購買貨物或勞務之實際用途者，得向稽徵機關申請核准採用直接扣抵法，按貨物或勞務之實際用途計算其進項稅額可扣抵銷項稅額之金額，使兼營營業人有所選擇，係在因應我國營業稅制之發展，兼顧實情與公平所為之改進。查主管機關基於法律授權所訂定之各種命令，於不違反法律授權意旨之限度內，並非不得增刪修訂或變更其見解（釋字第二八七號解釋參照），故不能因而認財政部修改前開辦法，兼採直接扣抵法，即謂原本所採之比例扣抵法為違法。

taxing authority for permission to use the direct deduction method for computing input tax that may be deducted from the output tax based on the actual use of purchased goods and services. The amendment, conferring on the dual-status business operator the option between the proportional deduction method and the direct deduction method, is an improvement which is in response to the development of Taiwan's sales tax system and which takes reality and fairness into account. The agency-in-charge may promulgate ordinances and regulations under statutory authorizations, and it may add, delete, amend or change its position with regard to those promulgated ordinances and regulations as long as it does so within the scope of the statutory authorization. (See J.Y. Interpretation No. 287) Therefore, the Ministry of Finance's above-mentioned amendments adding the direct deduction method to the methods of computing sales tax do not render the original proportional deduction method unlawful.

According to Article 1 of the Business Tax Act, the sales tax applies to

營業稅係以在中華民國境內銷售貨物或勞務及進口貨物為課徵對象，營

goods and services sold in and goods imported to the territory of the Republic of China, excluding dividend incomes. The Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 761153919, July 8, 1987, prescribes that dual-status business entities that engage in investment business shall add dividends received during the tax year to the tax-exempt sales items when filing the year-end sales tax return, and pay the tax dues calculated and adjusted following the ratio of input tax and non-deductible output tax provided by the abovementioned Regulation. This Directive only illustrates how a dual-status business operator's dividend income is to be computed into the legally non-deductible input tax when applying the above Regulation and does not recognize dividend incomes as sales tax taxable; therefore, it is consistent with the Business Tax Act. It is so because if such dividend incomes are excluded from the computation of the non-deductibles, then the input tax on all dividend-related expenditures will be viewed as deductible input tax and be used to deduct payable sale taxes; therefore, all dividend-related ex-

業稅法第一條設有規定，股利收入不在營業稅課徵範圍。財政部七十七年七月八日台財稅字第七六一一五三九一九號函釋謂，兼營投資業務之營業人於年度中取得之股利，應於年度結束時彙總列入當年度最後乙期免稅銷售額申報，並依兼營營業人營業稅額計算辦法，按當期或當年度進項稅額不得扣抵銷項稅額之比例計算調整應納稅額，併同繳納，僅釋示兼營營業人股利所得如何適用上開辦法計算其依法不得扣抵之進項稅額，非在增加其銷項稅額，亦非認股利收入係屬營業稅課稅範圍，而對股利收入課徵營業稅，符合營業稅法之意旨。蓋如許股利收入免予列入計算依法不得扣抵比例，則此項與股利收入有關之各項費用之進項稅額，均將併作應課徵營業稅之進項稅額，而予全數扣抵，使其相關進項費用完全無租稅負擔，相較於專營投資業務者之此等進項稅額完全不能扣抵，有失公平，且將誘使專營投資業務者藉銷售少數應稅貨物或勞務而成為兼營投資業之營業人，將投資業務之進項稅額得以悉數扣抵，規避稅負，自非合理。

penditures are tax free. Compared to those business entities whose businesses are solely based on investment yet are unable to deduct dividend-related expenditures, the tax-free result of dual-status business entities is unfair and will entice those business entities whose businesses are solely based on investment to sell few taxable goods or services in order to be qualified as dual-status business entities and thus to evade paying tax by having all investment-related input tax sales tax deductible. This is, of course, would not be a fair outcome.

To sum up, the abovementioned Directive issued by the Ministry of Finance illustrating the computation method of dual-status business entities' sales tax dues is consistent with the purpose and scope of the Business Tax Act and not in contravention to the constitutional mandate of the principle of taxation by law under Article 19 of the Constitution. However, the Directive uses the dividend income as the basis of computing non-deductible input tax and may create a misunderstanding that dividends are sales-

綜上所述，上開財政部發布之兼營營業人營業稅額計算辦法及函釋，符合營業稅法意旨，與憲法第十九條所定租稅法律主義尚無牴觸。惟上開函釋，以「股利」收入作為計算進項稅額不得扣抵之比例基礎，文義上易滋將股利擴張解釋為營業稅之課稅適用範圍之誤解；又不得扣抵比例之計算，在租稅實務上既有多種不同方法，財政部雖於八十一年八月二十五日有所修正，為使租稅益臻公平合理，主管機關仍宜檢討改進。

tax taxable if it is read literally. Moreover, there are various ways in tax practices to compute the non-deductible ratio; though amendments were made by the Ministry of Finance on August 25, 1992, in order to make taxation more fair and reasonable, further reviews and efforts to make improvements by the agency-in-charge are advised.

Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋孫大法官森焱提出部分不同意見書。

J. Y. Interpretation No.398（March 22, 1996）*

ISSUE: Article 18, Subparagraph 4, of the Farmers Association Act provides that moving out of an area where a farmers association [the term 'cooperative' is often used in the U.S.] is located will result in termination of membership. May said provision be adopted as a basis for suspending the comprehensive farmers health insurance coverage for the person who continues to maintain his status as a farmer and to pay his premium when due but moves away from the area where his farmers association is located? If so, does it conflict with Article 6 of the Farmers Health Insurance Act and Articles 7 and 10 of the Constitution?

RELEVANT LAWS:

Articles 7 and 10 of the Constitution（憲法第七條、第十條）; Articles 1, 12, 14 and 18, Subparagraph 4, of the Farmers Association Act（農會法第一條、第十二條、第十四條、第十八條第四款）; Article 6 of the Farmers Health Insurance Act（農民健康保險條例第六條）.

KEYWORDS:

Farmers Association（農會）, domicile（住所）, health insurance for farmers（農民健康保險）.**

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* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

HOLDING: A farmers association aims to protect the rights and interests of farmers, to increase their knowledge and skills, to promote modernization of agriculture, to increase income generated by production, to improve living standards for farmers, and to develop the economy in farming communities. Therefore, people living in an area where a farmers association is located and who actually engage in agricultural activities may join the association as members in accordance with the laws. Since a farmers association serves the farmers living in an area where the association is located, prerequisite for membership should naturally be "domicile in an area where an agricultural association is located" and "actual engagement in agricultural activities." Article 18, Subparagraph 4, of the Farmers Association Act provides that moving out of an area where a farmers association is located will result in termination of membership. Such provision is natural for legal effect and does not contradict Articles 7 and 10 of the Constitution. However, with reference to Article 6 of the Farmers Health Insurance Act, if a member of a

解釋文：農會係以保障農民權益、提高農民知識技能、促進農業現代化、增加生產收益、改善農民生活、發展農村經濟為宗旨，得由居住農會組織區域內，實際從事農業之人依法參加為會員。農會既以其組織區域內之農民為服務對象，其會員資格之認定自以「居住農會組織區域內」及「實際從事農業」為要件。農會法第十八條第四款規定農會會員住址遷離原農會組織區域者為出會之原因，係屬法律效果之當然規定，與憲法第七條及第十條亦無牴觸。惟農會會員住址遷離原農會組織區域者，如仍從事農業工作，參酌農民健康保險條例第六條規定，其為農民健康保險被保險人之地位不應因而受影響，仍得依規定交付保險費，繼續享有同條例所提供之保障。主管機關發布有關命令應符合此意旨，以維護農民健康保險條例保障農民健康之目的。

farmers association moves away from the area where the farmers association to which he/she has been a member is located but still engages in agricultural work, his/her status as the insured under the health insurance for farmers shall not be affected. Accordingly, he/she may continue to pay premiums in accordance with regulations for coverage of the said insurance. Relevant decrees issued by the competent authority shall correspond with the aforesaid intention to uphold the purpose of the Farmers Health Insurance Act, which is to safeguard the health of farmers.

REASONING: As stipulated in Articles 1, 12 and 14 of the Farmers Association Act, a farmers association aims to protect the rights and interests of farmers, to increase the knowledge and skills of farmers, to promote modernization of agriculture, to increase income generated by production, to improve living standards for farmers, and to develop the economy in farming communities. Therefore, people living in an area where a farmers association is located and who actually engage

解釋理由書：農會係以保障農民權益、提高農民知識技能、促進農業現代化、增加生產收益、改善農民生活、發展農村經濟為宗旨，得由居住農會組織區域內，實際從事農業之人依法參加為會員，農會法第一條、第十二條、第十四條分別定有明文。農會既以其組織區域內之農民為其服務對象，其會員資格之認定，自以「居住農會組織區域」內及「實際從事農業」為要件。農會法第十八條第四款規定農會會員住址遷離原農會組織區域者為出會之原

in agricultural activities may join the association as members in accordance with the laws. Since a farmers association serves the farmers living in an area where the association is located, a prerequisite for membership should naturally be "domicile in an area where a farmers association is located" and "actual engagement in agricultural activities." Article 18, Subparagraph 4, of the Farmers Association Act provides that moving out of an area where a farmers association is located will result in termination of membership. Such provision is natural for legal effect. Since registration of domicile change is done out of the free will of the party concerned, hence, there shall be no contradiction with Article 10 of the Constitution: "The people shall have freedom of domicile and freedom to change domicile." Furthermore, since a person who actually engages in agricultural work is not prohibited by regulations relevant to the Farmers Association Act from applying for membership at a grass-roots farmers association located in the area to which he/she has recently moved, hence, there shall also be no contradiction with

因，係屬法律效果之當然規定。況辦理戶籍遷徙登記，係出於當事人之自願，應無違反憲法第十條人民有居住遷徙之自由；而實際從事農業工作者，又非不得依農會法之有關規定申請加入其新居住區域之基層農會為會員，亦無違反憲法第七條平等權之可言。惟農民健康保險係社會保險之一種，參酌農民健康保險條例第六條之規定，乃農民基於身分當然享有之權益。農民健康保險條例第五條第一項及第二項雖規定：「農會法第十二條所定之農會會員應參加本保險為被保險人，並以其所屬基層農會為投保單位。」「非前項農會會員，年滿十五歲以上從事農業工作之農民，參加本保險為被保險人者，應以其戶籍所在地之基層農會為投保單位。」僅係對基層農會受託辦理農民健康保險時應負責任範圍之特別規定，不得因而認為農民健康保險權益之享有，以維持農會會員或在原投保單位所在地設有戶籍為要件。是以農會會員住址遷離原農會組織區域，如仍從事農業工作，其為農民健康保險被保險人之地位不應因而受影響，仍得依規定交付保險費，繼續享有同條例所提供之保障。主管機發布有關命令應符合此意旨，以維護農民健康保險條例保障農民健康之目的。

the right of equality under Article 7 of the Constitution. Health insurance for farmers is one type of social insurance. With reference to Article 6 of the Farmers Health Insurance Act, farmers, based squarely on such status, shall be entitled to farmers health insurance. The Farmers Health Insurance Act stipulates: "A member of a farmers association as defined in Article 12 of the Farmers Association Act shall take out this insurance to become a policyholder, and choose the grass-roots farmers association to which he/she belongs as group insurance applicant" (Article 5, Paragraph 1); and "A farmer aged fifteen and above, who is not a member of the aforesaid farmers association but enrolls in this insurance plan, shall choose the grass-roots farmers association located in the same area as his/her domicile to be the group insurance applicant" (Article 5, Paragraph 2) merely provide the responsible scope for a grass-roots farmers association regarding arrangement of health insurance for farmers, and it shall not be interpreted that maintaining membership in a farmers association or domicile registration in an area where the group insur-

ance applicant took out the original insurance is the prerequisite for entitlement to the rights and interests of health insurance for farmers. Therefore, if a member of a farmers association moves away from the area where the farmers association in which he/she has been a member is located but still engages in agricultural work, his/her status as the insured under the health insurance for farmers shall not be affected. He/she may continue to pay premiums in accordance with regulations for coverage of the said insurance. Relevant decrees issued by the competent authority shall correspond with the aforesaid intention to uphold the purpose of the Farmers Health Insurance Act, which is to safeguard the health of farmers.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.399（March 22, 1996）*

ISSUE: A person's right to select his own name is fully protected under Article 22 of the Constitution. Is the Ministry of the Interior's directive prohibiting the change of one's name in conflict with the said constitutional safeguard?

RELEVANT LAWS:

Article 22 of the Constitution（憲法第二十二條）; J. Y. Interpretation Nos. 137 and 216（司法院釋字第一三七號、第二一六號解釋）; Article 6, Paragraph 1, Subparagraph 6, of the Act of Naming（姓名條例第六條第一項第六款）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

the right of an individual to select one's own name（姓名權）, right of personality（人格權）, administrative agency（行政機關）, agency-in-charge（主管機關）, Administrative Court（行政法院）.**

HOLDING: The right of an individual to select his/her own name is a type of personal right. The name of an individ-

解釋文：姓名權為人格權之一種，人之姓名為其人格之表現，故如何命名為人民之自由，應為憲法第二十二

* Translator by Nigel N. T. Li.

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

ual signifies an aspect of his/her personality. Therefore, the right to choose one's own name is a physical freedom safeguarded under Article 22 of the Constitution. Article 6, Paragraph 1, Subparagraph 6, of the Act of Naming provides for an application procedure requiring approval from the agency-in-charge in order to change one's name on the grounds of indecent pronunciation of character(s) in the name or other identified special reasons. Whether identified special reasons exist for the change of one's name must be determined by the agency-in-charge on a case-by-case basis, in accordance with concrete facts. Characters used in names, their pronunciations and meanings are all interrelated factors. Indecency in the pronunciations or euphemistic secondary meanings fall within the category of other identified special reasons stated in the above referenced Act. The Interpretation Letter by the Ministry of Interior, dated April 19, 1976, Ref. No. Tai-Nei-Hu-Tze-682266, that reads, "the legislative term 'indecent names' allows no expanded definition through their pronunciations or euphemistic secondary meanings," is con-

條所保障。姓名條例第六條第一項第六款規定命名文字字義粗俗不雅或有特殊原因經主管機關認定者，得申請改名。是有無申請改名之特殊原因，由主管機關於受理個別案件，就具體事實認定之。姓名文字與讀音會意有不可分之關係，讀音會意不雅，自屬上開法條所稱得申請改名之特殊原因之一。內政部中華民國六十五年四月十九日臺內戶字第六八二二六六號函釋「姓名不雅，不能以讀音會意擴大解釋」，與上開意旨不符，有違憲法保障人格權之本旨，應不予援用。

trary to the constitutional safeguard of personal rights, and therefore shall not be followed or applied.

REASONING: As stated in Interpretation No. 137 by this Yuan, any administrative agency may issue interpretive rulings concerning the laws and regulations that it undertakes to enforce, which rulings may in turn be applied by judges in adjudicating cases, but will not necessarily bind them as the judges may adopt opinions different from such rulings when they apply the law. Interpretive rulings of laws by the administrative agency-in-charge are for the reference of judges in adjudication, who, however, are not bound thereby. On the other hand, any administrative ruling that has been cited by a court as the basis of its judgment is subject to our review, as Interpretation No. 216 of this Yuan has inferred. We are able to ascertain from the dictum of the Administrative Court Judgment, 83-Pan-Tze-948, although not clearly stated so therein, that the administrative ruling of the Ministry of Interior, dated as of April 19, 1976, Ref. No. Tai-Hu-Nei- Tze-

解釋理由書：按行政機關依其職掌就有關法規為釋示之行政命令，法官於審判案件時，固可予以引用，但得依據法律，表示適當之不同見解，並不受其拘束，本院釋字第一三七號解釋即係本此意旨；主管機關依其職掌就有關法規所為釋示，固可供法官於審判案件時參考，但不受其拘束。惟如經法院引用為裁判之基礎者，參照本院釋字第二一六號解釋，得為違憲審查之對象。本案行政法院八十三年度判字第九四八號判決理由中雖未明確指出具體適用何項法令，但由其所持法律見解，可判斷該項判決係以內政部六十五年四月十九日臺內戶字第六八二二六六號函釋為判決基礎。依司法院大法官審理案件法第五條第一項第二款之規定，應予受理。

682266 was implicitly referred to as the basis of the referenced judgment, and therefore, take the matter according to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act.

The right to choose a name is a type of personal right. The name of an individual signifies an aspect of his personality. Therefore, the right to choose one's own name is a physical freedom safeguarded under Article 22 of the Constitution. Article 6, Paragraph 1, of the Act of Naming sets forth several restrictions upon application by private citizens for a name change; Subparagraph 6 further provides for an application procedure requiring approval from the agency-in-charge in order to change one's name on the grounds of indecent pronunciation of character(s) in the name or other identified special reasons. The agency-in-charge shall apply objective criteria to determine what constitutes indecent pronunciation of character(s) in a name. As for the identified special reasons, this term involves an indefinite concept of law, and the agency-

姓名權為人格權之一種，人之姓名為其人格之表現，故如何命名為人民之自由，應為憲法第二十二條所保障。姓名條例第六條第一項就人民申請改名，設有各種限制，其第六款規定命名文字字義粗俗不雅或有特殊原因經主管機關認定者得申請改名，命名文字字義粗俗不雅者，主管機關之認定固有其客觀依據，至於「有特殊原因」原亦屬一種不確定法律概念，尤應由主管機關於受理個別案件時，就具體事實認定之，且命名之雅與不雅，繫於姓名權人主觀之價值觀念，主管機關於認定時允宜予以尊重。姓名文字與讀音會意有不可分之關係，讀音會意不雅，自屬上開法條所稱得申請改名之特殊原因之一。內政部六十五年四月十九日臺內戶字第六八二二六六號函釋「姓名不雅，不能以讀音會意擴大解釋」，與上開意旨不符，有違憲法保障人格權之本旨，應不予援用。

in-charge must accordingly make its decision on a case-by-case basis, in accordance with concrete facts. Whether or not the characters chosen in giving names are decent hinges upon the subjective value judgment of the person who enjoys the right to a name, such naming process deserves deference from the agency-in-charge in making its own decisions thereof. Characters used in names, their pronunciations and meanings are all interrelated factors. Indecency in the pronunciations or euphemistic secondary meanings fall within the category of other identified special reasons stated in the above referenced law. The Interpretation Letter by the Ministry of Interior, dated April 19, 1976, Ref. No. Tai-Nei- Hu-Tze-682266, that reads "the legislative term 'indecent names' allows for no expanded definition through their pronunciations or euphemistic secondary meanipngs," is contrary to the constitutional safeguard of personal rights, and therefore shall not be followed or applied.

J. Y. Interpretation No.400（April 12, 1996）*

ISSUE: Does the government ruling, which orders the owners of private preexisting roads to be burdened with public easement without receiving compensation, constitute an infringement upon said owners' property rights as protected by Article 15 of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 851 and 852 of the Civil Code（民法第八百五十一條、第八百五十二條）; Articles 14, 208, and 209 of the Land Act（土地法第十四條、第二百零八條、第二百零九條）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）; Directive T.67.N.No.6301 (Executive Yuan, 1978)（行政院六十七年台六十七內字第六三〇一號函）; Directive T.69.N.No.2072 (Executive Yuan, 1980)（行政院六十九年台六十九內字第二〇七二號函）.

KEYWORDS:

property right（財產權）, fair compensation（相當補償）, preexisting road（既成道路）, public easement（公共地役權）, principle of fairness（平等原則）.**

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* Translated by Dr. Tze-Shiou Chien, Associate Research Fellow, Sun Yat-Sen Institute for Social Sciences and Philosophy, Academia Sinica.

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

HOLDING: The purpose of Article 15 of the Constitution, which provides that the people's property right shall be protected, is to guarantee each individual the freedom to exercise his/her rights to use, profit and dispose for the duration of the property, and to prevent the infringements from public power and other parties to allow him/her to realize his/her freedoms, to develop his/her personality and to maintain his/her dignity. To be consistent with this constitutional protection of property right, state organizations, for the necessity for public use or other public interests, might expropriate people's property according to law, but should give a fair compensation in return. In the case where roads already exist on which public easement has been established due to some specific criteria, the owners of those roads have been deprived of their freedom to use and make profits from the lands. Their interests on the property have been specifically sacrificed for the general interest. To act fairly, the state should expropriate those lands according to law and provide compensation. If central or local governments, due to financial difficulties,

解釋文：憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害，俾能實現個人自由、發展人格及維護尊嚴。如因公用或其他公益目的之必要，國家機關雖得依法徵收人民之財產，但應給予相當之補償，方符憲法保障財產權之意旨。既成道路符合一定要件而成立公用地役關係者，其所有權人對土地既已無從自由使用收益，形成因公益而特別犧牲其財產上之利益，國家自應依法律之規定辦理徵收給予補償，各級政府如因經費困難，不能對上述道路全面徵收補償，有關機關亦應訂定期限籌措財源逐年辦理或以他法補償。若在某一道路範圍內之私有土地均辦理徵收，僅因既成道路有公用地役關係而以命令規定繼續使用，毋庸同時徵收補償，顯與平等原則相違。至於因地理環境或人文狀況改變，既成道路喪失其原有功能者，則應隨時檢討並予廢止。行政院中華民國六十七年七月十四日台六十七內字第六三〇一號函及同院六十九年二月二十三日台六十九內字第二〇七二號函與前述意旨不符部分，應不再援用。

can not completely expropriate those lands and make compensation, relevant organizations should set a deadline for compensation on annual installment or by other means. It is obviously contrary to the principle of equality that the state is not required to expropriate those lands and make compensation on which public easement has already been established and maintained by ordinances given that other privately owned lands within the same road plan have been expropriated and compensated for. Those parts of Directive T.67.N.No.6301 (Executive Yuan, 1978) and Directive T.69.N.No.2072 (Executive Yuan, 1980) which are inconsistent with the abovementioned reasons shall no longer apply.

REASONING: Firstly, it should be said that the final and binding judgment concerned in this petition has been made on the premise that Directive T.67.N.No.6301 (Executive Yuan, 1978) and Directive T.69.N.No.2072 (Executive Yuan, 1980) are not in conflict with Article 14 of the Land Act, although the petitioner has explicitly asserted those two

解釋理由書：本件確定終局判決係以行政院六十七年七月十四日台六十七內字第六三〇一號函及同院六十九年二月二十三日台六十九內字第二〇七二號函並未違反土地法第十四條規定為前提論據，上開函件既經聲請人具體指陳有牴觸憲法之疑義，應依司法院大法官審理案件法第五條第一項第二款規定，予以受理，合先說明。

ordinances might be in violation of the Constitution. According to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act, therefore, this petition should be granted.

The purpose of Article 15 of the Constitution, which provides that the people's property right shall be protected, is to guarantee each individual the freedom to exercise his/her rights to use, profit and dispose for the duration of the property, and to prevent the infringements from public power and other parties upon his/her freedoms, so that he/she may develop his/her personality and maintain his/her dignity. However, individuals' freedom to exercise their property rights should be restrained by their social or ecological responsibilities according to the law. Those individuals whose property rights have been restrained due to the abovementioned responsibilities and have been specifically sacrificed for public benefits shall have the right to be fairly compensated. To be consistent with the abovementioned constitutional protection of property rights, although the state, for

憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害，俾能實現個人自由、發展人格及維護尊嚴。惟個人行使財產權仍應依法受社會責任及環境生態責任之限制，其因此類責任使財產之利用有所限制，而形成個人利益之特別犧牲，社會公眾並因而受益者，應享有相當補償之權利。至國家因興辦公共事業或因實施國家經濟政策，雖得依法律規定徵收私有土地（參照土地法第二百零八條及第二百零九條），但應給予相當之補償，方符首開憲法保障財產權之意旨。

setting up public enterprises or implementing national economic policies, according to law (See Articles 208 and 209 of the Land Act), might expropriate privately owned lands, it should compensate them fairly.

The public easement, distinguished from the easement of the Civil Code, is a legal relationship in which those privately owned lands inherently should be for public use. This has long been established in our legal institutions (See J.Y. Interpretation No. 255; Judgment P.T. No. 8 [Ad. Ct., 1956] and Judgment P.T. No. 435 [Ad. Ct., 1972]). To determine if the owners of preexisting roads have been burdened by public easement, the following requirements should be met: first, it has to be a necessity, not just a convenience or a time-saving measure, for the unspecified public to use it as a crossing; second, owners did not stop the public from crossing when it began; third, this status has remained uninterrupted for a long time, although this does not mean it should have a definite period, it does mean that, except for some vague recollections (e.g.,

公用地役關係乃私有土地而具有公共用物性質之法律關係，與民法上地役權之概念有間，久為我國法制所承認（參照本院釋字第二五五號解釋、行政法院四十五年判字第八號及六十一年判字第四三五號判例）。既成道路成立公用地役關係，首須為不特定之公眾通行所必要，而非僅為通行之便利或省時；其次，於公眾通行之初，土地所有權人並無阻止之情事；其三，須經歷之年代久遠而未曾中斷，所謂年代久遠雖不必限定其期間，但仍應以時日長久，一般人無復記憶其確實之起始，僅能知其梗概（例如始於日據時期、八七水災等）為必要。至於依建築法規及民法等之規定，提供土地作為公眾通行之道路，與因時效而形成之既成道路不同，非本件解釋所指之公用地役關係，乃屬當然。私有土地因符合前開要件而存在公用地役關係時，有關機關自應依據法律辦理徵收，並斟酌國家財政狀況給予相當補

beginning in the Japanese Occupation Era or around the time of the flood of August 7), the exact beginning of this significantly lengthy period could not be remembered by ordinary persons. As regards those lands provided to be roads for public transportation under construction laws and the Civil Code, being different from preexisting roads which derive from prescription, logically, their owners should not be burdened by public easement as mentioned in this Interpretation. In the circumstances in which the owners of private lands are burdened by public easement due to the abovementioned criteria, the relevant organizations should, according to the law, expropriate the lands and, based on the government's financial resources, give fair compensation. If the central or local governments, due to financial difficulties, can not completely expropriate and compensate for those lands, they should consult Directive T.84. N.T. No. 38493 (Executive Yuan, 1995) and Directive T.84.N.I.T.No.8480481 (Ministry of the Interior, 1995) and set a feasible plan to appropriate financial resources to give compensation on annual

償。各級政府如因經費困難不能對前述道路全面徵收補償，亦應參酌行政院八十四年十月二十八日發布之台八十四內字第三八四九三號函及同年十月十一日內政部台八十四內營字第八四八〇四八一號函之意旨，訂定確實可行之期限籌措財源逐年辦理，或以其他方法彌補其損失，諸如發行分期補償之債券、採取使用者收費制度、抵稅或以公有土地抵償等以代替金錢給付。若在某一道路範圍內之私有土地均辦理徵收，僅因既成道路有公用地役關係而以命令規定繼續使用毋庸同時徵收補償，顯與平等原則相違。又因地理環境或人文狀況改變，既成道路喪失其原有功能者，則應隨時檢討並予廢止。行政院六十七年七月十四日台六十七內字第六三〇一號函所稱：「政府依都市計畫主動辦理道路拓寬或打通工程施工後道路形態業已改變者，該道路範圍內之私有土地，除日據時期之既成道路目前仍作道路使用，且依土地登記簿記載於土地總登記時，已登記為『道』地目之土地，仍依前項公用地役關係繼續使用外，其餘土地應一律辦理徵收補償。」及同院六十九年二月二十三日台六十九內字第二〇七二號函所稱：「查台六十七內字第六三〇一號院函說明二第二項核釋日據時期既成

installment or use other means, such as issuing bonds maturing at various dates, setting up user-pay systems, rendering it tax-deductible or giving publicly owned lands to substitute for monetary payments. It is obviously against the principle of equality that the state is not required to expropriate and compensate for those lands on which public easement has already been established and maintained by ordinances given that other privately owned lands within the same road project have been expropriated and compensated for. Furthermore, once geographic or social environments have changed to such an extent that the necessity for preexisting roads no longer exists, the public easement should be immediately reviewed and repealed. Executive Yuan's Directive T.67.N.No.6301 (1978) stated that "after governments, according to urban planning, take actions to broaden or lengthen roads and change the type of roads, those privately owned lands within the scope of the road project, except for those preexisting roads from the Japanese Occupation Era which are still used and were registered in the 'road' category in the land

道路仍依公用地役關係繼續使用乙節，乃係顧及地方財政困難，一時無法籌措鉅額補償費，並非永久不予依法徵收，依土地法第十四條：『公共交通道路土地不得為私有……其已成為私有者，得依法徵收。』之原旨，作如下之補充規定：『今後地方政府如財政寬裕或所興築道路曾獲得上級專案補助經費，或依法徵收工程受益費，車輛通行費者，則對該道路內私有既成道路土地應一律依法徵收補償。』」與前述意旨不符部分，應不再援用。

registration book remaining burdened by public easement as mentioned before, shall be expropriated and compensated for." The Executive Yuan's Directive T.69.N.No.2072 (1980) further clarified that "The reason for the Executive Yuan's Directive T.67.N.No.6301 (1978) which said that preexisting roads from the Japanese Occupation Era could still be used based on public easement takes into account governments' financial difficulties in providing a large sum of compensation, which definitely does not allow governments to take any action to expropriate those lands legally. Accordingly, considering that Article 14 of the Land Act provides that "public roads for transportation should not be privately owned...those privately owned lands might be expropriated according to law", the Directive should be modified as follows: "Local governments, once relieved of financial difficulties, subsidized by higher level governments for the specific road project, or having levied a benefit tax or user's fee, should compensate those owners of private lands of preexisting roads within the road project according to law." Those parts of these

two Directives which are inconsistent with the abovementioned reasoning shall no longer apply.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋孫大法官森焱提出不同意見書。

J. Y. Interpretation No.401（April 26, 1996）*

ISSUE: Does the privilege of immunity conferred by Articles 32 and 73 of the Constitution upon the elected representatives for opinions expressed and votes cast whenever in session extend to criminal, civil and administrative liability possibly arising therefrom, but not including the recall taken by their constituencies?

RELEVANT LAWS:

Articles 25, 32, 62, 73 and 133 of the Constitution（憲法第二十五條、第三十二條、第六十二條、第七十三條、第一百三十三條）; Article 69 of the Public Officials Election and Recall Act（公職人員選舉罷免法第六十九條）.

KEYWORDS:

delegates of the National Assembly（國民大會代表）, members of the Legislature（立法委員）, suffrage rights（參政權）, right of recall（罷免權）, privilege of immunity（免責權）.**

HOLDING: The privilege of immunity, in respect of the speech and votes of delegates of the National Assembly (hereinafter referred to as "dele-

解釋文：憲法第三十二條及第七十三條規定國民大會代表及立法委員言論及表決之免責權，係指國民大會代表在會議時所為之言論及表決，立法委

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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gates") and members of the Legislature (hereinafter referred to as "legislators"), provided in Articles 32 and 73 of the Constitution means that delegates and legislators shall not be subject to criminal charges or civil liabilities, nor bear any administrative responsibilities, for opinions expressed and/ or votes cast in their respective houses, unless they are disciplined for contraventions of the respective internal disciplinary rules. Further, rights to recall are a form of the people's suffrage rights. Article 133 of the Constitution stipulates that elected representatives may be recalled, by the constituencies they represent, pursuant to the law. Delegates and legislators shall be responsible to electors in their constituencies for their speech and votes in the exercise of their offices. Thus, electors of a constituency may recall, pursuant to the law, delegates and legislators elected by the constituency, for reasons of improper speech and/or vote. The foregoing shall not be restricted by provisions in Articles 32 and 73 of the Constitution.

員在立法院內所為之言論及表決，不受刑事訴追，亦不負民事賠償責任，除因違反其內部所訂自律之規則而受懲戒外，並不負行政責任之意。又罷免權乃人民參政權之一種，憲法第一百三十三條規定被選舉人得由原選舉區依法罷免之。則國民大會代表及立法委員因行使職權所為言論及表決，自應對其原選舉區之選舉人負政治上責任。從而國民大會代表及立法委員經國內選舉區選出者，其原選舉區選舉人得以國民大會代表及立法委員所為言論及表決不當為理由，依法罷免之，不受憲法第三十二條及第七十三條規定之限制。

REASONING: Article 25 of the

解釋理由書：憲法第二十五條

Constitution stipulates that the National Assembly shall, in accordance with the provisions of the Constitution, exercise political powers on behalf of the whole body of citizens. Further, it is stipulated in Article 26 that the Legislature shall be the highest legislative organ of the State, and be constituted of legislators elected by the people, and shall exercise legislative power on behalf of the people. The National Assembly and the Legislature are both representative bodies constituted of popularly elected delegates or legislators. As a general rule of democratic states with constitutional order, the constitution grants delegates and legislators the privilege of immunity for their speech and votes, so that they may express the will of the people liberally and fully, properly perform their duty to oversee the government, and to make decisions for representative bodies on behalf of the people without hesitation. Article 32 of the Constitution stipulates that delegates shall not be held responsible outside the National Assembly for opinions expressed and/or votes cast at meetings of the Assembly; and Article 73 stipulates that legislators

規定國民大會依本憲法之規定，代表全國國民行使政權。又憲法第六十二條規定立法院為國家最高立法機關，由人民選舉之立法委員組織之，代表人民行使立法權。二者均屬由人民直接選舉之代表或委員所組成之民意機關。憲法依民主憲政國家之通例，乃賦予國民大會代表及立法委員言論及表決之免責權，俾其能暢所欲言，充分表達民意，善盡監督政府之職責，並代表人民形成各該民意機關之決策，而無所瞻顧。憲法第三十二條規定國民大會代表在會議時所為之言論及表決，對會外不負責任；第七十三條規定立法委員在院內所為之言論及表決，對院外不負責任。其目的係為保障國民大會代表及立法委員不因其行使職權所為言論及決議而負民事上之損害賠償責任或受刑事上之訴追，除其言行違反內部所訂自律之規則而受懲戒外，並不負行政責任，此乃憲法保障國民大會代表及立法委員之言論及表決對外不負法律上責任。而憲法第一百三十三條規定被選舉人得由原選舉區依法罷免之，則係憲法基於直接民權之理念所設之制度。依上述條文，國民大會代表及立法委員於就任一定期間後，選舉人得就其言行操守、議事態度、表決立場予以監督檢驗，用示對選舉人應負政治

shall not be held responsible outside the Legislature for opinions expressed and/or votes cast within the Legislature. The aim of the foregoing Articles is to protect delegates and legislators from civil compensatory liabilities or criminal charges for opinions expressed or votes cast in the exercise of their offices, and unless they are to be disciplined pursuant to internal disciplinary rules, they shall not bear any administrative responsibility. This is a privilege granted to delegates and legislators so they will not be held responsible outside of their respective offices. Article 133 of the Constitution provides that elected representatives may be recalled by the constituencies they represent pursuant to the law. This system of the Constitution is founded on the notion of the direct exercise of rights by the people. According to the foregoing Article, once delegates and legislators have been in office for a specified period, electors may monitor and analyze such representatives' demeanor, attitude and voting stance, so as to exercise the electors' political responsibility. As to the reasons for proposing a recall, there is no need for their restriction.

上責任。至提議罷免之理由，自無限制之必要。其由全國不分區及僑居國外國民產生之當選人，因無原選舉區可資歸屬，自無適用罷免規定之餘地。民國八十年八月二日修正公布之公職人員選舉罷免法第六十九條規定：「公職人員之罷免，得由原選舉區選舉人向選舉委員會提出罷免案。但就職未滿一年者，不得罷免。」「全國不分區、僑居國外國民選舉之當選人，不適用罷免之規定。」即係本上開意旨而制定。綜上所述，國民大會代表及立法委員經國內選舉區選出者，其原選舉區選舉人認為國民大會代表及立法委員所為言論及表決不當者，得依法罷免之，不受憲法第三十二條、第七十三條規定之限制。

The recall provisions do not apply to representatives elected through legislative selections or by citizens residing overseas because they belong to no constituency. The Public Officials Election and Recall Act promulgated on August 2, 1991, provides in Article 69 that: "Recall of public officials may only be initiated by electors of the relevant constituency through presentation of a recall application to the Elections Committee. However, those who have not been in office for at least one year may not be recalled. Recall provisions have no application to persons elected through legislative selection or by citizens residing overseas." The said Article is enacted pursuant to this Interpretation. In summary, electors of a constituency may recall, pursuant to the law, delegates and legislators elected by the constituency, for improper speech and/or vote, without being restricted by Articles 32 and 73 of the Constitution.

J. Y. Interpretation No.402（May 10, 1996）*

ISSUE: Does the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters by imposing such punitive administrative sanction violate Article 23 of the Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 8-1, 9, 163, 167-1 and 177 of the Insurance Act（保險法第八條之一、第九條、第一百六十三條、第一百六十七條之一、第一百七十七條）; Articles 15, 48, Paragraph 1, Subparagraph 11, 49, 50 and 51 of the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters（保險代理人經理人公證人管理規則第十五條、第四十八條第一項第十一款、第四十九條、第五十條、第五十一條）.

KEYWORDS:

insurance（保險）, insurance agents（保險代理人）, brokers and adjusters（經理人及公證人）.**

HOLDING: For any punitive administrative sanction on the person who violates the obligation imposed by the administrative law, which concerns the

解釋文：對人民違反行政法上義務之行為予以裁罰性之行政處分，涉及人民權利之限制，其處分之構成要件與法律效果，應由法律定之，法律雖得

* Translated by Assistant Professor Y. K. Huang.

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restriction of the people's rights, its component and legal effects shall be prescribed by statutory law. Although the statutory law may authorize power to the supplementary ordinances, in order to comply with the intent of Article 23 of the Constitution, the purpose, scope and content of that authorization should be concrete and definite and then the ordinances should be promulgated based on that authorization. Article 177 of the Insurance Act prescribes that the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters should be enacted by the Ministry of Finance. Though the competent authority of the said Article may enact ordinances or regulations prescribing the conduct of those professionals, due to the lack of concrete and definite authorization of the Insurance Act on the components and legal effects of the punishment applicable to the abovementioned persons acting in violation of the obligation, the punitive administrative sanction on the insurance agents, brokers, adjusters and other respective professionals violated the obligation as prescribed in Article 48, Paragraph 1,

授權以命令為補充規定，惟授權之目的、範圍及內容必須具體明確，然後據以發布命令，方符憲法第二十三條之意旨。保險法第一百七十七條規定：「代理人、經紀人、公證人及保險業務員管理規則，由財政部另訂之」，主管機關固得依此訂定法規命令，對該等從業人員之行為為必要之規範，惟保險法並未就上述人員違反義務應予處罰之構成要件與法律效果為具體明確之授權，則其依據上開法條訂定發布之保險代理人經紀人公證人管理規則第四十八條第一項第十一款，對於保險代理人、經紀人及公證人等從業人員違反義務之行為，訂定得予裁罰性之行政處分，顯與首開憲法保障人民權利之意旨不符，應自本解釋公布日起，至遲於屆滿一年時，失其效力。

Subparagraph 11, of the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters, and was apparently enacted against the abovementioned intent of protecting the people's rights under the Constitution; hence, from the date of this Interpretation, said provision shall become void within one years.

REASONING: In order to comply with the intent of Article 23 of the Constitution, for any punitive administrative sanction on persons, which violates the obligation imposed by the administrative law that concerns the restriction of the people's rights, its component and legal effects shall be prescribed by statutory law. Hence, for any enactments of ordinances authorized by the law concerning the restriction of the freedom and rights of the people, the components and legal effects of such authorization shall comply with the requirements of concretization and definitude. For the law which merely provides general authorization, its determination may be based on the related meaning in the entirety of the law and not be limited to the wording of any particular

解釋理由書：對於人民違反行政法上義務之行為予以裁罰性之行政處分，涉及人民權利之限制，其處罰之構成要件及法律效果，應由法律定之，方符憲法第二十三條之意旨。故法律授權訂定命令，如涉及限制人民之自由權利時，其授權之目的、範圍及內容須符合具體明確之要件；若法律僅為概括之授權者，固應就該項法律整體所表現之關連意義為判斷，而非拘泥於特定法條之文字，惟依此種概括授權所訂定之命令，祇能就母法有關之細節性及技術性事項加以規定，尚不得超越法律授權之外，逕行訂定裁罰性之行政處分條款，迭經本院解釋有案。

provisions. The ordinances, enacted in accordance with this kind of general authorization, may provide detailed or technical regulations related to its parent law but shall in no event straightforwardly enact any punitive administrative sanction beyond the scope of authorization of the law. This issue has been interpreted several times by this Yuan.

Article 177 of the Insurance Act prescribes that the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters shall be enacted by the Ministry of Finance. The competent authority may enact ordinances or regulations prescribing the conduct of the insurance agents, brokers, adjusters and other related professionals. However, regarding the conduct of the abovementioned professionals who violated the obligation, except for the punishment expressed in Article 167, Paragraph 1, of the same Act, the said authorization article did not actually concretely and definitively provide the components and legal effects to be punished. Article 48, Paragraph 1, Subparagraph 11, of the Regulation Govern-

保險法第一百七十七條規定：「代理人、經紀人、公證人及保險業務員管理規則，由財政部另訂之」，主管機關固得依此訂定法規命令，對保險業代理人、經紀人及公證人等相關從業人員之行為為必要之規範，惟對上述人員違反義務之行為，除已於同法第一百六十七條之一明定罰則外，上開授權法條並未就其應予處罰之構成要件與法律效果為具體明確之規定。財政部於中華民國八十二年十一月四日依據上開授權法條修正發布之保險代理人經紀人公證人管理規則第四十八條第一項第十一款規定：代理人、經紀人或公證人違反財政部命令或核定之保險業務規章者，除法令另有規定外，財政部得按其情節輕重，予以警告、一個月以上三年以下之停止執行業務或撤銷其執業證書之處

ing the Supervision of Insurance Agents, Brokers and Adjusters, which was enacted and promulgated by the Ministry of Finance on November 4, 1993, in accordance with the abovementioned authorization, prescribes that for the insurance agents, brokers and adjusters acting in violation of the related insurance ordinances or regulations enacted or approved by the Ministry of Finance, except as provided otherwise by the laws, the Ministry of Finance may, subject to the degree of severity, impose a sanction of a warning, interdict their business for more than one month but not more than three years, or revoke their license to practice. Such punishment, interdiction of business or revocation of license, even though regulated by the Ministry of Finance on the basis of public welfare, is a kind of punitive administrative sanction and shall be prescribed by the statutory law or the ordinance with concrete and definite authorization by law in order to comply with the intent to protect the people's rights. The said Article 48, Paragraph 1, Subparagraph 11, of the Regulation Governing the Supervision of Insurance Agents, Brokers

分，雖係財政部基於公共利益之考量所為之規定，惟各該警告、停止執行業務或撤銷其執業證書之處分，均屬裁罰性行政處分之一種，已涉及人民權利之限制，本應以法律或法律具體明確授權之法規命令為依據，方符憲法保障人民權利之意旨。上開管理規則第四十八條第一項第十一款於超越法律授權之外，逕行訂定對上述從業人員裁罰性行政處分之構成要件及法律效果，顯與憲法保障人民權利之意旨不符。又審酌各該規定之必要性及修改法律所需時間，上開管理規則第四十八條第一項第十一款應自本解釋公布日起，至遲於屆滿一年時，失其效力。又該管理規則涉及限制人民權利之其他裁罰性行政處分，亦應從速一併檢討修正。

and Adjusters, which prescribes the components and legal effects of the punishment for the abovementioned professionals, overrode the authorization of the law and was also contrary to the abovementioned intent to protect the people's rights under the Constitution. In considering the necessity of such regulation and the time needed for the amendment of the regulations, the said Article 48, Paragraph 1, Subparagraph 11, of the Regulation Governing the Supervision of Insurance Agents, Brokers and Adjusters shall become void within one years from the date this Interpretation. Any other punitive administrative sanctions contained in the said Regulation of administration concerning the restriction of the people's rights shall be promptly examined and amended.

J. Y. Interpretation No.403（May 24, 1996）*

ISSUE: Does Article 18, Paragraph 2, of the Compulsory Enforcement Act requiring the debtor to post adequate bond in case of application for suspension of compulsory enforcement violate the constitutional protection of equality?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Articles 4 and 18, Paragraph 2, of the Compulsory Enforcement Act（強制執行法第四條、第十八條第二項）.

KEYWORDS:

legislative power（立法權）, principle of equality（平等原則）, compulsory enforcement（強制執行）, handling（處理）, enforcement title（執行名義）.**

HOLDING: Compulsory enforcement must be carried out in accordance with enforcement titles. Once the enforcement process commences, unless otherwise provided by law, the process shall not cease, as provided clearly in Article 4, Paragraph 1, and Article 18, Paragraph 1, of the Compulsory Enforcement

解釋文：民事強制執行須依執行名義為之。強制執行程序開始後，除法律另有規定外，不停止執行，強制執行法第四條第一項、第十八條第一項定有明文。同法第十八條第二項規定，於一定情形下，法院因債務人聲請，定相當並確實之擔保，得為停止強制執行之裁定，債務人本此裁定所供擔保，係以

* Translated by BAKER & McKENZIE.

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

Act. Article 18, Paragraph 2, of the same Act provides that under certain circumstances, the court, where the debtor makes an application, after posting adequate bond, can determine by a ruling that the enforcement process be suspended. The bond posted by the debtor pursuant to the ruling serves to guarantee the recovery of damages incurred by the creditor due to the debtor's application for suspension of the enforcement process. This protects the rights of both the creditor and debtor and does not increase the debtor's obligations. This is different than a creditor applying for compulsory enforcement which requires an enforcement title and, hence, we found no conflict with Article 7 of the Constitution.

擔保債權人因債務人聲請停止強制執行不當可能遭受之損害得獲賠償為目的，已兼顧債權人與債務人之權益，並非增加債務人之額外負擔，此與債權人聲請民事強制執行須依執行名義為之有所不同，與憲法第七條規定，尚無牴觸。

REASONING: Compulsory enforcement must be carried out in accordance with enforcement titles. Once the enforcement process commences, unless otherwise provided by law, the process shall not cease until the execution has been fully carried out. It is expressly provided for by Article 4, Paragraph 1, and Article 18, Paragraph 1, of the Compul-

解釋理由書：強制執行須依執行名義為之。強制執行程序開始後，除法律另有規定外，不停止執行，必至執行名義實現而後已。此觀強制執行法第四條、第十八條第一項規定自明。惟於債務人有回復原狀之聲請，或提起再審或異議之訴，或對於和解為繼續審判之請求，或提起宣告調解無效之訴、撤銷調解之訴，或對於第四條第一項第五款

sory Enforcement Act. However, where a debtor files an application for restitution, appeals or disputes the judgment, requests for continuation of litigation after settlement, files a suit for voiding a mediation, files a suit for cancellation of mediation, or appeals a ruling under Article 4, Paragraph 1, Subparagraph 5, in accordance with enforcement titles to prevent damages to the debtor from the continuance of the compulsory enforcement process on the one hand, and to ensure that the creditor is compensated for damages due to the debtor applying for suspension of the enforcement process on the other hand, Article 18, Paragraph 2, of the Compulsory Enforcement Act provides that the court can, in necessary circumstances or based on applications by debtors, after the posting of adequate bond, cease the compulsory enforcement process to ensure the interests of both creditor and debtor. The provision of such bond does not guarantee the performance of the original debt and therefore does not increase the obligation of the debtor. As to whether applications made by creditors for compulsory enforcement must be carried out in accor-

之裁定提起抗告時，一方面為避免債務人因繼續強制執行而有受害之虞；一方面為確保債權人因債務人聲請停止強制執行不當可能遭受之損害得獲賠償，強制執行法第十八條第二項乃規定法院因必要情形或依債務人之聲請定相當並確實之擔保，得為停止強制執行之裁定，以兼顧債權人與債務人雙方之權益。此項擔保之提供，既非擔保債務人所負之原債務得予履行，自未增加債務人額外之負擔。至於債權人聲請民事強制執行須依執行名義為之，此與法院因債務人聲請定相當並確實之擔保裁定准予停止強制執行較之，一為債權人本於執行名義聲請強制執行，一為債務人主張有停止強制執行之原因而命供擔保，二者主張之原因事實不同，難謂與憲法第七條規定有違。

dance with enforcement titles, compared to the case where the court, due to applications by the debtor, after the posting of adequate bond and suspending the enforcement process, one being a compulsory execution filed by the creditor in accordance with enforcement titles, and the other being that of the debtor contending the causes for suspension of compulsory enforcement and providing bond, the two contentions and facts are distinct and, hence, there is no conflict with Article 7 of the Constitution.

Justice Young-Mou Lin filed concurring opinion.

本號解釋林大法官永謀提出協同意見書。

J. Y. Interpretation No.404（May 24, 1996）*

ISSUE: Does a disciplinary action under Article 25 of the Physician Act taken against a Chinese herbal doctor who does not have a medical doctor's license but treats patients with prescription drugs violate the right of work guaranteed by Article 15 of the Constitution, thus being null and void?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Article 41 of the Medical Service Act（醫療法第四十一條）; Articles 3 and 25 of the Physician Act（醫師法第三條、第二十五條）; Article 15 of the Pharmacist Act（藥師法第十五條）; Article 9 of the Pharmaceutical Affairs Act（藥事法第九條）.

KEYWORDS:

work right（工作權）, principle of specialization（專業原則）, Chinese herbal doctor（中醫師）, Chinese medicine（中藥）, medical service（醫療服務）, prescription drugs（西藥處方）, over-the-counter medicine（限醫師指示使用）, western medicine（西藥）.**

HOLDING: Article 15 of the Constitution provides that the people's right of work should be protected so that

解釋文：憲法第十五條規定人民之工作權應予保障，故人民得自由選擇工作及職業，以維持生計。惟人民

* Translated by Li-Chih Lin, Esq., J.D.

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

people can freely choose their work and professionsto maintain their livelihood. Because people's work is closely related to the public welfare, and is necessary to improve the public interest, work engaged in and qualifications or other requirements possessed by people should be properly restricted by law. This is evident in Article 23 of the Constitution. To strengthen specialization and task sharing, protect patients' rights and improve the nationals' health, the Physician's Act provides for three categories of physicians-- doctors, Chinese herbal doctors, and dentists--so that physicians from different areas of medicine can provide medical services to patients in accordance with their medical specialties. Article 41 of the Medical Service Act provides that physicians who are in charge of a medical institution should supervise the institution's medical personnel in the performance of medical services in accordance with the specific law governing their areas of medicine. Both regulations are necessary to improve the public interest. Chinese herbal doctors should provide treatments according to traditional Chinese medical methods. If a

之工作與公共福祉有密切關係，為增進公共利益之必要，對於人民從事工作之方法及應具備之資格或其他要件，得以法律為適當之限制，此觀憲法第二十三條規定自明。醫師法為強化專業分工、保障病人權益及增進國民健康，使不同醫術領域之醫師提供專精之醫療服務，將醫師區分為醫師、中醫師及牙醫師。醫療法第四十一條規定醫療機構之負責醫師應督導所屬醫事人員依各該醫事專門職業法規規定執行業務，均屬增進公共利益所必要。中醫師之醫療行為應依中國傳統之醫術為之，若中醫師以「限醫師指示使用」之西藥製劑或西藥成藥處方，為人治病，顯非以中國傳統醫術為醫療方法，有違醫師專業分類之原則及病人對中醫師之信賴。行政院衛生署七十一年三月十八日衛署醫字第三七〇一六七號函釋：「三、中醫師如使用『限醫師指示使用』之西藥製劑，核為醫師業務上之不正當行為，應依醫師法第二十五條規定論處。四、西藥成藥依藥物藥商管理法之規定，其不待醫師指示，即可供治療疾病。故使用西藥成藥為人治病，核非中醫師之業務範圍。」要在闡釋中醫師之業務範圍，符合醫師法及醫療法之立法意旨，與憲法保障工作權之規定，尚無牴觸。

Chinese herbal doctor does not have a medical doctor's license but treats patients with prescription drugs or over-the-counter medicines, he obviously is not providing medical treatment according to traditional Chinese medical methods, and thus violates the principle of specialization and task sharing and the trust patients have in him. Directive No. 370167 issued by the Department of Health in the Executive Yuan stated: "(3) If a Chinese herbal doctor without a medical doctor's license treats patients with prescription drugs, it is deemed to be improper conduct within the scope of medical service, and he thus should be disciplined based upon Article 25 of the Physician Act. (4) Pursuant to the Drugs and Pharmacists Management Act (now the Pharmaceutical Affairs Act), over-the-counter medicines can be dispensed for the treatment of illness by those without a physician's license. Therefore, the dispensing of over-the-counter medicines for patients is not within the scope of a Chinese herbal doctor's medical service." The interpretation of a Chinese herbal doctor's scope of medical service provided by the Depart-

ment of Health in the Executive Yuan complies with the legislative intent of the Physician Act and the Medical Service Act, and is consistent with the right of work guaranteed by the Constitution.

REASONING: Article 15 of the Constitution provides that the right of work of the people should be protected so that people can freely choose their work and professions to maintain their livelihood. Because people's work is closely related to the public welfare, and is necessary to improve the public interest, thus Article 23 of the Constitution explicitly provides that work engaged in and qualifications or other requirements possessed by people should be properly restricted by law. Medical doctors provide medical services for the purpose of maintaining patients' lives and health. To strengthen specialization and task sharing, protect patients' rights and improve the nationals' health, the Physician Act provides for three categories of physicians-- doctors, Chinese herbal doctors, and dentists--so that physicians from different areas of medicine can provide medical services to

解釋理由書：憲法第十五條規定人民之工作權應予保障，故人民得自由選擇工作及職業，以維持生計。惟人民之工作與公共福祉有密切關係，為增進公共利益之必要，對於人民從事工作之方法及應具備之資格或其他要件，得以法律為適當之限制，為憲法第二十三條所明定。醫師執行醫療業務，以維護病人之生命、身體、健康為目的，醫師法為強化專業分工、保障病人權益及增進國民健康，使不同醫術領域之醫師提供其專精之醫療服務，將醫師區分為醫師、中醫師及牙醫師，其資格之取得要件各有不同。醫療法第四十一條亦規定醫療機構之負責醫師應督導所屬醫事人員依各該醫事專門職業法規規定執行業務，均屬增進公共利益所必要。中醫師執行業務，自應依中國傳統醫術，為病人診治，以符病人信賴。倘中醫師兼具醫師資格，為診治疾病需要，併用醫學及中國傳統醫學之醫療方法，為病人診斷及處方者，既在各該專業範圍，自為

patients in accordance with their medical specialties. Under the Physician Act, respective qualifications for doctors, Chinese herbal doctors, and dentists are different. Article 41 of the Medical Service Act also provides that physicians who are in charge of a medical institution should supervise the institution's medical personnel in the performance of medical services in accordance with the specific law governing their areas of medicine. Both regulations are necessary to improve the public interest. To merit patients' trust, Chinese herbal doctors should provide treatments according to traditional Chinese medical methods. If a Chinese herbal doctor, who also has a medical doctor's license, in the treatment of a disease or illness, applies methods of western medicine and traditional Chinese medicine, it is within the scope of his expertise and is thus a proper conduct of medical service. It is clearly evident by Article 3, Paragraph 1, Subparagraph 2, of the Physician Act which provides that a person who has graduated from a medical school, and has taken required courses in Chinese medicine, and has passed the Chinese herbal

業務上之正當行為。此觀醫師法第三條第一項第二款後段規定醫學系科畢業，並修習中醫必要學科者，得應中醫師檢覈，是同一人得兼具醫師及中醫師雙重資格，法意至明。除此情形外，中醫師若以「限醫師指示使用」之西藥製劑或西藥成藥處方，為人治病，即違背醫師專業分類之原則及病人對中醫師基於傳統醫術診治疾病之信賴。縱中醫師兼具藥師資格，亦同。藥師業務依藥師法第十五條第一項規定為「一、藥品販賣或管理。二、藥品調劑。三、藥品鑑定。四、藥品製造之監製。五、藥品儲藏、供應與分裝之監督。六、含藥化粧品製造之監製。七、依法律應由藥師執行之業務。」準此，藥師不得自行調劑藥品為病人診治。至於西藥製劑「限醫師指示使用」者，所稱「醫師」不包括中醫師，自非中醫師於處方上所得指示使用。又所謂成藥，依藥事法第九條規定，係指原料藥經加工調製，不用其原名稱，其摻入之麻醉藥品、毒劇藥品不超過中央衛生主管機關所規定之限量，作用緩和，無積蓄性，耐久儲存，使用簡便，並明示其效能、用量、用法、標明成藥許可證字號，其使用不待醫師指示，即供治療疾病之用之藥品。中醫師如以西藥成藥處方為病人治療疾病，顯

doctor's qualification exam, is a person who possesses both a medical doctor's and Chinese herbal doctor's licenses. Except for the abovementioned situation, if a Chinese herbal doctor treats patients with prescription drugs, or over-the-counter medicines which should not be given to patients by those without a medical doctor's license, he violates the principle of specialization and task sharing and the trust patients have in him for treatments in accordance with traditional Chinese medical methods. This restriction is applicable to a Chinese herbal doctor who also has a pharmacist's license. Article 15 of the Pharmacist Act states: "Services provided by pharmacists are: (1) sales or administration of pharmaceutical products, (2) prescription and preparation of pharmaceutical products, (3) appraisal of pharmaceutical products, (4) supervision of the manufacture of pharmaceutical products, (5) supervision of the storage, supply, and packaging of pharmaceutical products, (6) supervision of the manufacture of cosmetics containing medicine, and (7) those which should be performed by pharmacists under the law." Therefore,

非以擅長之傳統醫術施醫。行政院衛生署七十一年三月十八日衛署醫字第三七〇一六七號函釋：「三、中醫師如使用『限醫師指示使用』之西藥製劑，核為醫師業務上之不正當行為，應依醫師法第二十五條規定論處。四、西藥成藥依藥物藥商管理法（已修正為藥事法）之規定，其不待醫師指示，即可供治療疾病。故使用西藥成藥為人治病，核非中醫師之業務範圍。」要在闡釋中醫師之業務範圍，符合醫師法及醫療法之立法意旨，與憲法保障工作權之規定，尚無牴觸。

a pharmacist should not treat patients with pharmaceutical products he himself prescribes. As to some prescription drugs which should not be given to patients by those without a medical doctor's license, the "doctor" therein does not include the Chinese herbal doctor. Thus, Chinese herbal doctors should not treat patients with prescription drugs. In addition, Article 9 of the Pharmaceutical Affairs Act provides that over-the-counter medicines should be processed and produced from raw herbs. However, the original names of the raw herbs should not be used for labeling purposes. Below restrictive amount of anesthetic or poison regulated by the central health authority is added to over-the-counter medicines. Thus, their treatment effects are mild and without residue. They can be stored for a long period of time and are easy to use. Their treatment effects, dosage, usage, and permit numbers should all be clearly labeled. They can be taken by patients to treat diseases/illnesses without the requirement of a medical doctor's prescription. If a Chinese herbal doctor treats patients with over-the-counter medicines, he obviously does not treat patients with

traditional Chinese medical methods. Directive No. 370167 issued by the Department of Health in the Executive Yuan stated: "(3) If a Chinese herbal doctor without a medical doctor's license treats patients with prescription drugs, his conduct is deemed to be improper within the scope of medical service, and he thus should be disciplined under Article 25 of the Physician Act. (4) Pursuant to the Drugs and Pharmacists Management Act (now the Pharmaceutical Affairs Act), over-the-counter medicines can be used to treat illnesses without the requirement of a medical doctor's prescription. Therefore, treating patients with over-the-counter medicines is not within the scope of a Chinese herbal doctor's medical service." The interpretation of a Chinese herbal doctor's scope of medical service provided by the Department of Health in the Executive Yuan complies with the legislative intent of the Physician Act and the Medical Service Act, and is consistent with the right of work guaranteed by the Constitution.

Justice Geng Wu filed dissenting opinion.

本號解釋吳大法官庚提出不同意見書。

J. Y. Interpretation No.405（June 7, 1996）*

ISSUE: Does Article 21, Paragraph 2, of the Educators Appointment Act, which grants to those who have not been qualified through examination the same status for appointment to public offices as those who have been so qualified, contravene the Constitution?

RELEVANT LAWS:

Articles 7, 78, 85 and 171 of the Constitution（憲法第七條、第七十八條、第八十五條、第一百七十一條）; Article 4 of the Amendment of the Constitution（憲法增修條文第四條）; Article 21, Paragraph 2, of the Educators Appointment Act（教育人員任用條例第二十一條第二項）.

KEYWORDS:

open competitive examination（公開競爭之考試）, appointment by examination（考試用人）, qualification for employment as school staff（學校職員之任用資格）, principle of equality（平等資格）.**

HOLDING: Pursuant to Article 85 of the Constitution, a system of open competitive examination shall be put into operation in the selection of public func-

解釋文：憲法第八十五條規定，公務人員之選拔，應實行公開競爭之考試制度，非經考試及格者不得任用，明示考試用人之原則。學校職員之

* Translated by Spenser Y. Hor.

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

tionaries, and no person shall be appointed to a public office without being qualified through such examination, which explicitly sets forth the principle of appointment by examination. Qualification for employment as school staff shall be subject to the passing of the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects. The language "the original relevant laws and regulations shall apply" in Article 21 of the Educators Appointment Act, as amended and promulgated on December 19, 1990, does not grant to those who have not been qualified through examination the same status for appointment to public offices as those who have been so qualified, and therefore such persons may only remain employed at their original schools, as held in J.Y. Interpretation No. 278. In Article 21, Paragraph 2, of the Educators Appointment Act, as amended and promulgated on July 1, 1994, the language "may additionally be transferred among schools" grants to those who have not been qualified through examination nearly the same status for appointment as civil servants as

任用資格，自應經學校行政人員考試或經高等、普通考試相當類科考試及格。中華民國七十九年十二月十九日修正公布之教育人員任用條例第二十一條所稱「適用各該原有關法令」，並不能使未經考試及格者取得與考試及格者相同之公務人員任用資格，故僅能繼續在原學校任職，亦經本院釋字第二七八號解釋在案。八十三年七月一日修正公布之教育人員任用條例第二十一條第二項中，關於「並得在各學校間調任」之規定，使未經考試及格者與取得公務人員任用資格者之法律地位幾近相同，與憲法第八十五條、第七條及前開解釋意旨不符，應自本解釋公布之日起失其效力。

those who have otherwise qualified, which contradicts Articles 7 and 85 of the Constitution and the above-referred holding. Consequently, it shall become null and void from the publication date of this Interpretation.

REASONING: The Judicial Yuan interprets the Constitution and has authority to unify the interpretation of statutes and ordinances, as stipulated in Article 78 of the Constitution. Laws that are in conflict with the Constitution shall be null and void, and whenever doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan as explicitly provided in Article 171 of the Constitution. Moreover, Article 4 of the Amendment of the Constitution states that the Judicial Yuan shall appoint a certain number of Grand Justices, who apart from being vested with the authority laid out in Article 78 of the Constitution, shall form the Constitutional Court to adjudicate the dissolution of political parties in the event of conflict with the Constitution, substantiating that the Constitution vests

解釋理由書：司法院解釋憲法，並有統一解釋法律及命令之權，憲法第七十八條定有明文。法律與憲法牴觸者無效，法律與憲法有無牴觸發生疑義時，由司法院解釋之，憲法第一百七十一條規定甚明。又憲法增修條文第四條規定，司法院設大法官若干人，大法官除掌理憲法第七十八條之規定外，並組成憲法法庭審理政黨違憲之解散事項，足見憲法賦予大法官維護規範位階及憲政秩序之重大職責。是司法院大法官依司法院大法官審理案件法之規定，就憲法所為之解釋，不問其係闡明憲法之真義、解決適用憲法之爭議、抑或審查法律是否違憲，均有拘束全國各機關及人民之效力，業經本院釋字第一八五號解釋在案。立法院行使立法權時，雖有相當廣泛之自由形成空間，但不得逾越憲法規定及司法院所為之憲法解釋，自不待言。

in the Grand Justices the considerable duty of preserving the hierarchy of laws as well as constitutional order. Accordingly, Interpretations on the Constitution rendered by Grand Justices of the Judicial Yuan in accordance with the Constitutional Interpretation Procedure Act are binding upon all organizations and people of the nation, regardless of whether the Interpretations concern the meaning of the Constitution, are solutions of disputes concerning the applicability of the Constitution or adjudication on the unconstitutionality of statutes, as held in J.Y. Interpretation No. 185. Even though the Legislative Yuan enjoys a wide range of freedom in exercising its legislative powers, it goes without saying that such exercises of power may not overstep the boundaries laid down by the Interpretations on the Constitution rendered by the Judicial Yuan.

Article 85 of the Constitution stipulates the selection of civil servants shall be by a system of open competitive examination, and no person shall be appointed to a public office without being so qualified

憲法第八十五條規定，公務人員之選拔，應實行公開競爭之考試制度，非經考試及格者不得任用，明示考試用人之原則。學校職員之任用資格，應經學校行政人員考試或經高等、普通考試

through such examination, hence explicitly setting forth the principle of appointment by examination. Qualification for appointment as school staff shall be subject to passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects as provided in Article 21 of the Educators Appointment Act of May 1, 1985, as amended and promulgated on December 19, 1990, and J.Y. Interpretation No. 278 has held the said statute to be in conformity with Article 85 of the Constitution. Prior to promulgation of the above-mentioned statute, the appointment of school staff was through a selective process, which although in contravention with the purposes of the Constitution proclaiming appointment by examination, existed as an exceptional measure from the time the legal system lacked comprehensiveness. With respect to the qualifications of school staff whose current employment commenced prior to enactment of the above-mentioned Regulation and was by a system of selective process pursuant to the language "the original relevant laws and regulations shall apply" as provided in

相當類科考試及格，此不僅為中華民國七十四年五月一日公布施行、七十九年十二月十九日修正公布之教育人員任用條例第二十一條所規定，亦經本院釋字第二七八號解釋認與憲法第八十五條之意旨相符。前開條例公布施行前，以遴用方式進用學校職員，與考試用人之憲法意旨固有不符，惟乃屬法制未完備前之例外措施。在該條例施行前已遴用之各類學校現任職員，其任用資格依前開於七十九年修正公布之該條例第二十一條所稱：「適用各該原有關法令」，並不能取得與考試及格者相同之任用資格，已經本院上述解釋釋示在案。此類職員依原有關法令所取得之權益雖應受保障，其範圍應以不牴觸考試用人之憲法意旨為限。上開解釋，並未禁止此類職員於原學校內得以升遷，惟僅能繼續在原學校任職，乃係在不牴觸考試用人之憲法意旨範圍內，對其原有權益予以最大限度之保障。此項例外措施，自不應再以立法擴張其範圍，以免違反平等原則。八十三年七月一日修正公布之教育人員任用條例第二十一條第二項中，關於「並得在各學校間調任」之規定，使未經考試及格者與取得公務人員任用資格者之法律地位幾近相同，對於前開條例施行後以考試及格任用之人員有失

Article 21 of said Act, amended and promulgated in 1990, such school staff may not obtain the same qualifications for appointment as those who have passed examination, as held in the J.Y. Interpretation herein. Although the rights of such staff under the former laws and regulations shall be preserved, said rights shall be limited to the extent not conflicting with the purpose of appointment by examination as proclaimed by the Constitution. The above Interpretation does not prohibit the promotion of such staff within their original schools; however, their employment shall be limited to their original schools, which has been the greatest preservation of their original rights without contradicting the principle of appointment by examination intended by the Constitution. This exception shall not be further expanded by additional legislation to avoid violation of the principle of equality. . In Article 21, Paragraph 2, of the Act, as amended and promulgated on July 1, 1994, the language “may additionally be transferred among schools” grants to those who have not been qualified through examination nearly the same

公允，與憲法第八十五條、第七條及前開解釋意旨不符，應自本解釋公布之日起失其效力。至於此類職員因僅能繼續在原學校任職，致其有所不便，宜由考試院依其法定職權舉辦相關考試定其任用資格，以資解決，併此說明。

status for appointment as civil servants as those who have passed the examination. Such provision is unfair to the persons who are appointed by the passing of examination after enactment of said Act, and is inconsistent with Articles 7 and 85 of the Constitution and the above-referred holding herein. Consequently, it shall become null and void from the publication date of this Interpretation. As for the inconvenience caused to such staff in restricting their employment to their original schools, it would be appropriate for the Examination Yuan, in accordance with the authority conferred upon it by law, to hold relevant examinations to establish their appointment qualifications.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.406（June 21, 1996）*

ISSUE: Does the additional restriction that a building permit shall not be issued until a detailed plan has gone through legal procedures contradict the property right of the people protected under the Constitution?

RELEVANT LAWS:

Article 172 of the Constitution（憲法第一百七十二條）; Articles 15 and 17 of the Urban Planning Act（都市計畫法第十五條、第十七條）.

KEYWORDS:

urban planning（都市計畫）, building line（建築線）, building permit（建築執照）.**

HOLDING: The "other matters required to be specified" as referred to in Article 15, Paragraph 1, Subparagraph 10, of the Urban Planning Act refer to other matters of similar nature to those provided under Subparagraphs 1 through 9 of said Article and are required to be specified in the Master Plan. There should be no further restriction, or specification or provi-

解釋文：都市計畫法第十五條第一項第十款所稱「其他應加表明之事項」，係指同條項第一款至第九款以外與其性質相類而須表明於主要計畫書之事項，對於法律已另有明文規定之事項，自不得再依該款規定為限制或相反之表明或規定。都市計畫法第十七條第二項但書規定：「主要計畫公布已逾二年以上，而能確定建築線或主要公共設

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

sion to the contrary regarding matters that have been expressly provided by law. The proviso of Paragraph 2 of Article 17 of said Act provides: “Where the Master Plan was announced more than two years earlier and the building line or major public facilities have been confirmed as being completed per the Master Plan, a building permit may be issued, per the provisions of related building ordinances, for the building line designated by the regulatory building authority”. The purpose is for the case where restrictions regarding the use of building and alteration of terrain (first sentence of Paragraph 2 of said Article) are imposed upon a piece of land for urban planning, for reason that a detailed plan has not been announced two years following the announcement of the Master Plan, in circumstances where the building line may be designated, an application may be filed, per the provisions of related building ordinances, for the designation of a building line for the issuance of a building permit, so as to remove the restriction on building and to protect the constitutional right of the people to have the freedom to use property. The interpretation

施已照主要計畫興建完成者，得依有關建築法令之規定，由主管建築機關指定建築線，核發建築執照」，旨在對於主要計畫公布已逾二年以上，因細部計畫未公布，致受不得建築使用及變更地形（同條第二項前段）限制之都市計畫土地，在可指定建築線之情形下，得依有關建築法令之規定，申請指定建築線，核發建築執照，解除其限建，以保障人民自由使用財產之憲法上權利。內政部中華民國七十三年二月二十日七十三台內營字第二一三三九二號函釋略謂：即使主要計畫發布實施已逾滿二年，如其（主要）計畫書內有「應擬定細部計畫後，始得申請建築使用，並應儘可能以市地重劃方式辦理」之規定者，人民申請建築執照，自可據以不准等語，顯係逾越首開規定，另作法律所無之限制。與憲法保障人民財產權之意旨不符，應不適用。

letter issued by the Ministry of the Interior dated February 20, 1984, Ref. No. (73)-Tai-Ne-Ying-213392 commented in summary that: even if two years have elapsed since the announcement of the Master Plan, if the "Master Plan" contains the provision that "Application for a building permit shall not be submitted until a detailed plan has been drawn up, and shall be handled per the urban land rezoning approach as much as possible", the application submitted by the people for a building permit is still subject to rejection. This interpretation clearly exceeds the scope of the aforesaid Article and imposes an additional restriction not provided in the law. This contradicts the constitutional purpose to protect the property right of the people, and should not be applicable.

REASONING: Under Paragraph 1 of Article 15 of the Urban Planning Act, in respect of urban planning for cities and towns, a Master Plan should first be drawn up. Under Subparagraph 10 of said Article and Paragraph, "other matters required to be specified" may be specified

解釋理由書：市鎮都市計畫，依都市計畫法第十五條第一項規定，應先擬定主要計畫書。該主要計畫書依同條項第十款規定，雖得表明「其他應加表明之事項」，惟所稱「其他應加表明之事項」係指同條項第一款至第九款以外，與其性質相類而須表明於主要計畫

in the Master Plan. However, said "other matters required to be specified" refer to other matters of similar nature to those provided under Subparagraph 1 through 9, thereof and are required to be specified in the Master Plan. There should be no further restriction, or specification or provision to the contrary regarding matters that have been separately and expressly provided by law. Otherwise, it will contradict Article 172 of the Constitution. Further, Paragraph 1 of Article 17 of the Urban Planning Act provides that: in respect of the implementation schedule provided for in Subparagraph 9 of Paragraph 1 of Article 15, the priority should be set in accordance with the development trend and local fiscal capability concerning the planned area. A detailed plan for the area designated for Phase I development should be completed within two years after the Master Plan has been announced for implementation, and construction of public facilities should be completed within five years after the announcement of said detailed plan. Detailed plans and construction for other areas should be drawn up in proper sequence after Phase I

書之事項，對於法律已另有明文規定之事項，自不得再依該款規定為限制或相反之表明或規定，否則即與憲法第一百七十二條有違。又都市計畫法第十七條第一項規定：第十五條第一項第九款所定之實施進度，應就其計畫地區範圍預計之發展趨勢及地方財力，訂定分區發展優先次序。第一期發展地區應於主要計畫發布實施後，最多二年完成細部計畫；並於細部計畫發布後，最多五年完成公共設施。其他地區應於第一期發展地區開始進行後，次第訂定細部計畫建設之。其同條第二項規定「未發布細部計畫地區、應限制其建築使用及變更地形」，固在求都市計畫之圓滿實施，而為增進公共利益所必要，然憲法所保障之人民財產權，尚不能因主管機關之遲延不於主要計畫實施後二年內發布細部計畫，使其繼續陷於不能自由使用土地建築之不利益。故同項但書規定：主要計畫發布已逾二年以上，而能確定建築線或主要公共設施已照主要計畫興建完成者，得依有關建築法令之規定，由主管建築機關指定建築線，核發建築執照，用以解除對土地建築使用之限制。是主管機關依同法第十五條第一項擬定之主要計畫書，雖得就同條第一項第一款至第九款以外與其性質相類之事項為

development has gotten under way. Paragraph 2 of said Article provides that "Areas for which a detailed plan has yet to be announced should be subject to restrictions on the use of building and alteration of terrain". It is granted that the foregoing aims for the successful implementation of the urban planning project and therefore is necessary so as to promote public interests. However, the property right of the people protected under the Constitution should not be infringed upon lest they have no freedom to use the land or building, as a result of the regulatory authority's delay and failure to announce a detailed plan within two years following the implementation of the Master Plan. Therefore, the proviso of said Paragraph provides: Where the Master Plan was announced more than two years earlier and the building line or major public facilities have been confirmed as being completed per the Master Plan, a building permit may be issued, per the provisions of related building ordinances, for the building line designated by the regulatory building authority. Accordingly, in respect of the Master Plan drawn up per Paragraph 1 of

規定，但不得於第十款其他表明事項中規定「須於細部計畫完成法定程序後，始准予發建築執照」，以排除「主要計畫已逾二年，而能確定建築線或主要公共設施已照主要計畫興建完成者，得依有關建築法之規定，由主管建築機關指定建築線，核發建築執照」規定之適用。內政部中華民國七十三年二月二十日七十三台內營字第二一三三九二號函釋略謂，即使主要計畫發布實施已逾滿二年，如其（主要）計畫書內有規定如主旨所敘（按即都市計畫主要計畫內規定：「應擬定細部計畫後，始得申請建築使用，並應儘可能以市地重劃方式辦理，以取得公共設施用地」）者，人民申請建築執照，自可據以不准云云，及臺灣省苗栗縣政府七十六年十月二十一日七六府建都字第九三二六六號公告竹南頭份（土牛及港墘地區）都市計畫（通盤檢討）圖表明「附帶條件應另行擬定細部計畫，除主要計畫指定之公共設施外，依規定配置必要之公共設施用地，並俟細部計畫完成法定程序後，始准予發照建築，以市地重劃方式開發」，其中關於核發建築執照之規定，依上開說明顯係逾越都市計畫法第十五條第一項第十款規定範圍，另作同法第十七條第二項但書規定所無之限制，與

Article 15 of said Act, the regulatory authority may provide for other matters of similar nature as compared to those provided under Subparagraph 1 through 9 of said Article but have not been provided under said Subparagraphs, but may not provide in Subparagraph 10, regarding other matters, that "a building permit should not be issued unless and until a detailed plan has gone through legal procedures" so as to exclude the applicability of the provision that "Where the Master Plan was announced more than two years earlier and the building line or major public facilities have been confirmed as being completed per the Master Plan, a building permit may be issued, per the provisions of related building ordinances, for the building line designated by the regulatory building authority". The interpretation letter issued by the Ministry of the Interior dated February 20, 1984, Ref. No. (73)-Tai-Ne-Ying-213392 commented in summary that: even if two years have elapsed since the announcement of the Master Plan, if the "(Master) Plan" contains the provision as per the syllabus (i.e., in the Master Plan it is provided that:

憲法保障人民財產權之意旨不符，應不適用。

"Application for a building permit shall not be submitted until a detailed plan has been drawn up, and shall be handled per the urban land rezoning approach as much as possible, so as to obtain the land for public facilities"), the application for a building permit submitted by the people may be rejected, and so forth. In addition, the Urban Planning (Comprehensive Review) Map for Chu-Nan Tou-Fen (Tu Niu and Kang Chien areas) in the Pronouncement issued by the government of Miao-li Hsien, Taiwan Province, dated October 21, 1987, Ref. No. (76)-Fu-Jien-Du-93266 specified the "incidental conditions that: (1) a detailed plan should be separately drawn up, and in addition to the public facilities designated by the Master Plan and the allocation of necessary land for public facilities according to relevant regulations, a building permit should not be issued until a detailed plan has gone through legal procedures, and (2) development by rezoning the city land". The foregoing regarding the issuance of a building permit, according to the above explanation, apparently exceeds the prescribed scope of Subparagraph 10 of

Paragraph 1 of Article 15 of the Urban Planning Act and imposes a further restriction that does not exist under the proviso of Paragraph 2 of Article 17 of said Act. This contradicts the property right of the people protected under the Constitution and thus should not be applicable.

J. Y. Interpretation No.407（July 5, 1996）*

ISSUE: Is the directive issued by the Government Information Office setting up certain specific criteria based upon Article 32, Subparagraph 3, of the Publication Act for defining the offenses of obscenity so stipulated by Article 235 of the Criminal Code in conflict with the spirit and intent of the constitutional protection of free speech?

RELEVANT LAWS:

Articles 11 and 80 of the Constitution（憲法第十一條、第八十條）; Article 235 of the Criminal Code（刑法第二百三十五條）; Articles 7, 32, Subparagraph 3, 37, 39 and 40 of the Publication Act（出版法第七條、第三十二條第三款、第三十七條、第三十九條、第四十條）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

obscenity（猥褻）, obscene publications（猥褻出版品）, freedom of press（新聞自由）, freedom of publication（出版自由）, freedom of speech（言論自由）.**

HOLDING: For the purpose of implementing the rule of certain laws, an

解釋文：主管機關基於職權因執行特定法律之規定，得為必要之釋

* Translated by Nigel N.T. Li.

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

agency may issue interpretive rulings, so as to provide a necessary basis for future action by the same agency or its subordinate agencies. The letter ruling at issue, (81) Chiang-Ban-Tze-02275 (February 10, 1992) is considered constitutional, as it exemplifies a reading of the prohibitive provision of Article 32, Subparagraph 3, of the Publication Act in the context of determining whether a publication would, in its content, be considered in contravention of Article 235 of the Criminal Code which prescribes the offenses of obscenity. The letter ruling containing specific requirements for discerning obscene materials, including the requirement of whether or not they appeal to prurient interests, does not simply apply to nor thereby outlaw all written or pictorial publications under challenge; it therefore conforms to the referenced purpose of the Publication Act and is not in conflict with the Constitution. Obscene publications are those publications that, by objective standards, can stimulate or satisfy a prurient interest, generate among common people a feeling of shame or distaste, thereby offending their sense of morality, and un-

示，以供本機關或下級機關所屬公務員行使職權時之依據。行政院新聞局中華民國八十一年二月十日（八一）強版字第〇二二七五號函係就出版品記載內容觸犯刑法第二百三十五條猥褻罪而違反出版法第三十二條第三款之禁止規定，所為例示性解釋，並附有足以引起性慾等特定條件，而非單純刊登文字、圖畫即屬相當，符合上開出版法規定之意旨，與憲法尚無牴觸。惟猥褻出版品，乃指一切在客觀上，足以刺激或滿足性慾，並引起普通一般人羞恥或厭惡感而侵害性的道德感情，有礙於社會風化之出版品而言。猥褻出版品與藝術性、醫學性、教育性等出版品之區別，應就出版品整體之特性及其目的而為觀察，並依當時之社會一般觀念定之。又有關風化之觀念，常隨社會發展、風俗變異而有所不同，主管機關所為釋示，自不能一成不變，應基於尊重憲法保障人民言論出版自由之本旨，兼顧善良風俗及青少年身心健康之維護，隨時檢討改進。至於個別案件是否已達猥褻程度，法官於審判時應就具體案情，依其獨立確信之判斷，認定事實，適用法律，不受行政機關函釋之拘束，乃屬當然。

dermine societal cultural ethics. To distinguish obscene publications from legitimate art, medical or educational publications, one must examine the features and aims of the publications at issue as a whole, and adapt them to the contemporary common values of society. In addition, cultural ethics often vary subject to social development and changing customs. Any rulings of the agency in-charge must be flexible rather than rigid, and should be improved and adjusted from time to time, in light of both the true intent of the Constitution to safeguard freedom of speech and press, and the government's interest in maintaining a moral social fabric and the welfare of children and youth. As to determining whether in any individual cases the definition of obscenity has been met, it goes without saying that the judge shall make his decision in light of concrete factual situations, pursuant to his independent judgment, in both fact-finding and law application, without being bound by the interpretive ruling of the executive branch.

REASONING: That the

解釋理由書：法官依據法律

judges shall, in accordance with law, try cases independently is set forth in Article 80 of the Constitution. The judges, when trying cases, are not bound by interpretive rulings of law made by various administrative agencies based upon their respective authorities. However, if a judge applies a ruling to a case, the parties to the case may in turn petition for this Yuan's interpretation pursuant to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act. The final and binding judgment in the case at issue relies on the letter ruling of the Government Information Office, Executive Yuan, (81) Chiang-Ban-Tze-02275, as the basis for its fact-finding. The applicant specifically challenges the letter as being constitutionally questionable, and as stated above, we shall take the case for review.

獨立審判，憲法第八十條設有明文。各機關依其職掌就有關法規為釋示之行政命令，法官於審判案件時，並不受其拘束。惟如經法官於裁判上引用者，當事人即得依司法院大法官審理案件法第五條第一項第二款規定聲請解釋，業經本院釋字第二一六號解釋闡釋在案。本件確定終局判決係以行政院新聞局（八一）強版字第〇二二七五號函為其認定事實之論據，經聲請人具體指陳上開函件有牴觸憲法之疑義，依上說明，應予受理。

Freedom of the press is one of the foundations of constitutional democracy. Publications are an important medium in which people can express their thoughts in writing, through which public opinion may be reflected, democracy strength-

出版自由為民主憲政之基礎，出版品係人民表達思想與言論之重要媒介，可藉以反映公意，強化民主，啟迪新知，促進文化、道德、經濟等各方面之發展，為憲法第十一條所保障。惟出版品無遠弗屆，對社會具有廣大而深遠

ened, and cultural, moral, economic development nurtured, and for these reasons, are protected by Article 11 of the Constitution. However, given the vast and deep influence upon society that widely disseminated publications may bring about, anyone who enjoys the freedom of press must be self-disciplined, undertake the associated social responsibility and refrain from abusing his freedom. Therefore, anyone whose publications lower moral values and customs, jeopardize social harmony and public order may be subject to legal sanctions imposed by the state.

之影響，故享有出版自由者，應基於自律觀念，善盡其社會責任，不得有濫用自由情事。其有藉出版品妨害善良風俗、破壞社會安寧、公共秩序等情形者，國家自得依法律予以限制。

What laws may prescribe are often abstract norms. For the purpose of implementing the rule of certain laws, an agency may issue interpretive rulings, so as to provide a necessary basis for future action by the same agency or its subordinate agencies. The standard for judging whether a publication constitutes a crime of obscenity by instigating obscene conduct may vary because of differences in customs and ethics in various nations, but one thing in common among different nations is the governmental regulation of

法律所定者，多係抽象之概念，主管機關基於職權，因執行特定法律，就此抽象概念規定，得為必要之釋示，以供本機關或下級主管機關作為適用法律、認定事實及行使裁量權之基礎。出版品是否有觸犯或煽動他人觸犯猥褻罪情節，因各國風俗習慣之不同，倫理觀念之差距而異其標準，但政府管制有關猥褻出版品乃各國所共通。猥褻出版品當指一切在客觀上，足以刺激或滿足性慾，並引起普通一般人羞恥或厭惡感而侵害性的道德感情，有礙於社會風化之出版品而言。猥褻出版品與藝術性、醫

obscene publications. Obscene publications are those publications that, by objective standards, can stimulate or satisfy a prurient interest, generate among common people a feeling of shame or distaste, thereby offending their sense of sexual morality, and undermining societal cultural ethics. To distinguish obscene publications from legitimate art, medical or educational publications, one must examine the features and aims of the publications at issue as a whole, and adapt them to the contemporary common values of society.

學性、教育性等出版品之區別，應就出版品整體之特性及其目的而為觀察，並依當時之社會一般觀念定之。

The Government Information Office of the Executive Yuan, under Article 7 of the Publication Act, is the agency in the Central Government in charge of implementing the said Act. Having considered the social environment and customs of this nation, its issuance of the letter ruling at issue, (81) Chiang-Ban-Tze-02275 (February 10, 1992), stating that whether a publication in its content contravenes, or instigates others to contravene, the obscenity offenses prescribed in Article 32, Subparagraph 3, of the Publication Act, is

行政院新聞局依出版法第七條規定，為出版品中央主管機關，其斟酌我國社會情況及風俗習慣，於中華民國八十一年二月十日（八一）強版字第〇二二七五號函釋謂「出版品記載觸犯或煽動他人觸犯出版法第三十二條第三款妨害風化罪，以左列各款為衡量標準：甲、內容記載足以誘發他人性慾者。乙、強調色情行為者。丙、人體圖片刻意暴露乳部、臀部或性器官，非供學術研究之用或藝術展覽者。丁、刊登婦女裸體照片、雖未露出乳部、臀部或性器官而姿態淫蕩者。戊、雖涉及醫藥、衛

to be judged according to the following criteria:

(1) if its content appeals to prurient interests;

(2) if the emphasis is on sexual, prurient conduct;

(3) if pictures of the human body intentionally reveal breasts, buttocks, or genitals, not for the purpose of academic studies or art exhibitions;

(4) if it is a publication containing pictures of naked females, making sexually suggestive gestures, while not revealing breasts, buttocks or genitals;

(5) if it overtly depicts sexual behavior while relating to medical, hygienic, or health matters;

is considered constitutional, as it exemplifies a reading of the prohibitive provision of Article 32, Subparagraph 3, of the Publication Act in the context of determining whether a publication would, in its content, be considered in contravention of Article 235 of the Criminal Code prescribing the offenses of obscenity, and therefore subject to the rulings set forth in Articles 37, 39, Paragraph 1, Subparagraphs

生、保健、但對性行為過分描述者」，係就出版品記載內容觸犯刑法第二百三十五條猥褻罪，違反出版法第三十二條第三款之禁止規定，應依同法第三十七條、第三十九條第一項第三款及第四十條第一項第四款處罰所為例示性解釋，並附有足以誘發、強調色情、刻意暴露、過分描述等易引起性慾等特定條件，非單純刊登文字、圖畫即屬相當，以協助出版品地方主管機關認定出版法第三十二條第三款有關刑法妨害風化罪中之猥褻罪部分之基準，函釋本身未對人民出版自由增加法律所未規定之限制，與憲法尚無牴觸。又有關風化之觀念，常隨社會發展、風俗變異而有所不同，主管機關所為釋示，自不能一成不變，應基於尊重憲法保障人民言論出版自由之本旨，兼顧善良風俗及青少年身心健康之維護，隨時檢討改進。

3 and 40, and Paragraph 1, Subparagraph 4, of the same Act. The letter ruling containing specific requirements for discerning obscene materials, including the requirements of whether or not they appeal to prurient interests with emphasis on prurient conduct, are intentionally revealing or overtly suggestive, etc., does not simply apply to nor thereby outlaw all written or pictorial publications under challenge. It helps establish the criteria for judging offenses of obscenity under Article 32 of the Publication Act and Criminal Code, by the agencies of local government, but does not create more restrictions than what the said Act has prescribed over people's freedom of publication. It therefore does not conflict with the Constitution. In addition, cultural ethics often vary subject to societal development and changing customs. Any rulings of the agency in-charge must be flexible rather than rigid, and should be improved and adjusted from time to time, in light of both the true intent of the Constitution to safeguard freedom of speech and press, and the government's interest in maintaining a social moral fabric and the welfare

of children and youth.

Administrative offenses and criminal offenses contain different constituent elements. Criminal adjudication and administrative adjudication must function differently in terms of fact-finding. To determine whether in any individual cases a certain pictorial or written publication has met the legal definition of obscenity, the judge shall make his decision in light of concrete factual situations, pursuant to his independent judgment, in both fact-finding and law application, without being bound by the interpretive ruling of the executive branch. It is to be noted here that this interpretation is made upon the referenced ruling of the Government Information Office of the Executive Yuan only, and is not dispositive on any other issues about the Publication Act.

行政罰與刑罰之構成要件各有不同，刑事判決與行政處罰原可各自認定事實。出版品記載之圖文是否已達猥褻程度，法官於審判時應就具體案情，依其獨立確信之判斷，認定事實，適用法律，不受行政機關函釋之拘束。本件僅就行政院新聞局前開函釋而為解釋，關於出版法其他事項，不在解釋範圍之內，併此說明。

Justice Geng Wu filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋吳大法官庚提出協同意見書；孫大法官森焱、蘇大法官俊雄分別提出不同意見書。

J. Y. Interpretation No.408（July 5, 1996）*

ISSUE: Is the Ministry of the Interior directive constitutional in stipulating that no occupant of a tilling land may acquire superficies thereon and apply for registration of such by prescription?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 832 of the Civil Code（民法第八百三十二條）; Article 82 of the Land Act（土地法第八十二條）; Article 3, Subparagraph 11, of the Agricultural Development Act （農業發展條例第三條第十一款）; Paragraph 3, Subparagraph 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription （時效取得地上權登記審查要點第三點第二款）.

KEYWORDS:

superficies（地上權）, prescription（時效）.**

HOLDING: According to Article 832 of the Civil Code, a superficies is the right to use the land of another person with the object of owning thereon a structure, other work, bamboo stand or trees. Therefore, land with superficies must be suitable for the construction of premises,

解釋文：民法第八百三十二條規定，稱地上權者，謂以在他人土地上有建築物，或其他工作物，或竹木為目的而使用其土地之權。故設定地上權之土地，以適於建築房屋或設置其他工作物或種植竹林者為限。其因時效取得地上權而請求登記者亦同。土地法第八

* Translated by BAKER & McKENZIE.

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

installation of other work, the planting of bamboo or trees. The same applies where superficies over the land is secured by virtue of the statute of limitation and registration of the superficies being sought. According to the first sentence of Article 82 of the Land Act, land specifically zoned shall not be used for other purposes. Land considered as tilling land under Article 3, Subparagraph 11, of the Agricultural Development Act is not suitable for registration of superficies by nature. According to Paragraph 3, Subparagraph 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription, as promulgated by the Ministry of Interior on August 17, 1988, per Letter No. Tai-Nei-Ti-Tze-621464, no occupant of tilling land may apply for registration of superficies secured by virtue of the statute of limitation. Neither the above-cited provision of the Agricultural Development Act nor the Guidelines contradict the intent of the Constitution, which is to protect the people's property rights.

十二條前段規定，凡編為某種使用地之土地，不得供其他用途之使用。占有土地屬農業發展條例第三條第十一款所稱之耕地者，性質上既不適於設定地上權，內政部於中華民國七十七年八月十七日以台內地字第六二一四六四號函訂頒時效取得地上權登記審查要點第三點第二款規定占有人占有上開耕地者，不得申請時效取得地上權登記，與憲法保障人民財產權之意旨，尚無牴觸。

REASONING: According to Article 832 of the Civil Code, superficies

解釋理由書：民法第八百三十二條規定，稱地上權者，謂以在他人土

is the right to use the land of another person with the object of owning thereon a structure, other work, bamboo stand or trees. Therefore, land with superficies must be suitable for the construction of premises, installation of other work, or the planting of bamboo or trees. The so-called planting of bamboo or trees does not include the cultivation of plants on another's land for the purpose of regular gain. (See Interpretation No. Yuan-tze 738) According to the first sentence of Article 82 of the Land Act, land specifically zoned shall not be used for other purposes. According to Article 3, Subparagraph 11, of the Agricultural Development Act, the term "tilling land" means land for agriculture and animal husbandry as zoned in accordance with the Zoning Act; an agricultural area, rice paddy or dry farmland in a reservation area as zoned in accordance with the Urban Planning Act; agricultural land zoned by the Land Act; or rice paddy or dry farmland not expressly zoned by law but in the land registers. Since tilling land is only to be used for farming, it is not to be used for the construction of premises, installation of other

地上有建築物，或其他工作物，或竹木為目的而使用其土地之權。故設定地上權之土地，以適於建築房屋或設置其他工作物，或種植竹林者為限。所謂種植竹林不包括以定期收穫為目的而施人工於土地，以栽培植物之情形（參看院字第七三八號解釋）。依土地法第八十二條前段規定，凡編為某種使用地之土地，不得供其他用途之使用。農業發展條例第三條第十一款規定，耕地係指農業用地中，依區域計畫法編定之農牧用地、或依都市計畫法編為農業區、保護區之田、旱地目土地，或依土地法編定之農業用地，或未依法編定而土地登記簿所記載田、旱地目之土地。耕地既僅供耕作之用，自不適於建築房屋或設置其他工作物，亦不適於種植竹木而供林地之用，性質上即不符設定地上權之要件，亦無從依時效取得地上權而請求登記為地上權人。內政部於中華民國七十七年八月十七日以台內地字第六二一四六四號函訂頒時效取得地上權登記審查要點第三點第二款規定，占有人占有上開耕地者，不得申請時效取得地上權登記，與憲法保障人民財產權之意旨，尚無牴觸。

work, or the planting of bamboo or trees. By nature, therefore, such land does not conform to the requirements for the establishment of superficies. Accordingly, no application for registration of a superficiary can be made by virtue of the superficies being acquired upon the expiration of the statute of limitation. According to Paragraph 3, Subparagraph 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription, as promulgated by the Ministry of Interior on August 17, 1988, per Letter No. Tai-Nei- Ti-Tze-621464, no occupant of tilling land may apply for registration of superficies secured by virtue of the statute of limitation. Such Guidelines do not contradict the intent of the Constitution, which is to protect the people's property rights.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.409（July 5, 1996）*

ISSUE: Does Article 208 of the Land Act, which though it stipulates the requirements and procedures for expropriation, yet fails to be concrete and specific, conflict with the intent and purpose of the Constitution's protection of the people's property rights?

RELEVANT LAWS:

Articles 15, 23, 108 and 143, Paragraph 1, of the Constitution（憲法第十五條、第二十三條、第一百零八條、第一百四十三條第一項）; Articles 208, 219, 222 - 235 of the Land Act（土地法第二百零八條、第二百十九條、第二百二十二條至第二百三十五條）; Article 48 of the Urban Planning Act（都市計畫法第四十八條）; Article 49 of the Enforcement Act of the Land Act（土地法施行法第四十九條）.

KEYWORDS:

public necessity（公用需要）, public utilities（公共利益）, expropriation（徵收）, principle of proportionality（比例原則）.**

HOLDING: It is obvious from Article 23 and Article 143, Paragraph 1, of the Constitution that the state, for public necessity, can, according to law, re-

解釋文：人民之財產權應受國家保障，惟國家因公用需要得依法限制人民土地所有權或取得人民之土地，此觀憲法第二十三條及第一百四十三條第

* Translated by Dr. Tze-Shiou Chien.

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

strict people's land ownership or expropriate their land, even though the people's property rights are guaranteed by the state. Typically, where the state invokes public necessity, it expropriates privately owned land and pays what it considers to be fair compensation. The requirements and procedures of expropriation, however, have not been provided for in the Constitution. However, Article 108, Paragraph 1, Subparagraph 14, of the Constitution has delegated these for regulation by the Legislature. Article 208, Subparagraph 9, of the Land Act, and Article 48 of the Urban Planning Act are in essence general clauses stipulating the purpose and end use of eminent domain. This does not mean that the state can arbitrarily expropriate land once the above purpose and end use have been declared. The state should still be restricted by the principle of proportionality implied in the relevant provisions of the Land Act and Article 49 of the Enforcement Act of the Land Act. Therefore, the above Article 208, Subparagraph 9, of the Land Act and Article 48 of the Urban Planning Act are not inconsistent with the spirit of constitutional

一項之規定自明。徵收私有土地，給予相當補償，即為達成公用需要手段之一種，而徵收土地之要件及程序，憲法並未規定，係委由法律予以規範，此亦有憲法第一百零八條第一項第十四款可資依據。土地法第二百零八條第九款及都市計畫法第四十八條係就徵收土地之目的及用途所為之概括規定，但並非謂合於上述目的及用途者，即可任意實施徵收，仍應受土地法相關規定及土地法施行法第四十九條比例原則之限制。是上開土地法第二百零八條第九款及都市計畫法第四十八條，與憲法保障人民財產權之意旨尚無牴觸。然徵收土地究對人民財產權發生嚴重影響，法律就徵收之各項要件，自應詳加規定，前述土地法第二百零八條各款用語有欠具體明確，徵收程序之相關規定亦不盡周全，有關機關應檢討修正，併此指明。

protection of the people's property rights. As the expropriation of land is by its very nature a significant encroachment on the people's property rights, the requirements of expropriation should be comprehensively laid out in the relevant laws. The language of various subparagraphs of the above-mentioned Article 208 of the Land Act is ambiguous, and the provisions of the expropriation procedure are not satisfactory. We herein recommend that the relevant organizations should review them and make the necessary amendments.

REASONING: Article 15 of the Constitution provides that the property right shall be guaranteed to the people. However, it is obvious from Article 23 and Article 143, Paragraph 1, of the Constitution that the state, for public necessity, can, according to law, restrict people's land ownership or take their land. Typically, where the state invokes public necessity, it expropriates privately owned land and pays what it considers to be fair compensation. The requirements and procedures of expropriation have not been provided for in the Constitution. How-

解釋理由書：人民之財產權應予保障，憲法第十五條定有明文。惟國家因公用需要得依法限制人民土地所有權或取得人民之土地，此觀憲法第二十三條及第一百四十三條第一項之規定自明。徵收私有土地，給予相當補償，即為達成公用需要手段之一種，而徵收土地之要件及程序，憲法並未規定，係委由法律予以規範，此亦有憲法第一百零八條第一項第十四款可資依據（並參照本院釋字第二三六號解釋）。土地法第二百零八條規定：「國家因左列公共事業之需要得依本法之規定，徵收私有土地。但徵收之範圍，應以其事業所必需

ever, Article 108, Paragraph 1, Subparagraph 14, of the Constitution has delegated these for regulation by the legislature (See J.Y. Interpretation No. 236). Article 208 of the Land Act provides that: "the state, where the following public undertakings so require, may, according to law, expropriate privately owned land to the extent necessitated by these public undertakings: 1) military facilities; 2) transportation enterprises; 3) public utilities; 4) water resources; 5) public health; 6) government organizations, local self-governments and other public buildings; 7) educational, academic or charitable organizations; 8) state-owned enterprise, and 9) governmental projects undertaken for the public interest. The first sentence of Article 48 of the Urban Planning Act provides that "relevant organizations or undertakings should, according to law, expropriate the land which has been designated as reserve land for public facilities to be used by public utilities." Both provisions are in essence general clauses stipulating the purpose and end use of eminent domain. This does not mean that the state can arbitrarily expropriate land because it

者為限：一、國防設備。二、交通事業。三、公用事業。四、水利事業。五、公共衛生。六、政府機關、地方自治機關及其他公共建築。七、教育學術及慈善事業。八、國營事業。九、其他由政府興辦以公共利益為目的之事業」，都市計畫法第四十八條前段規定：「本法指定之公共設施保留地，供公用事業設施之用者，由各該事業機構依法予以徵收」，均係就徵收土地之目的及用途所為之概括規定，但並非謂合於上述目的及用途者，即可任意實施徵收，仍應受土地法相關規定及土地法施行法第四十九條：「徵收土地於不妨礙徵收目的之範圍內，應就損失最少之地方為之，並應儘量避免耕地」之限制。又土地法第二百二十二條至第二百三十五條之規定，為辦理徵收必須遵守之程序。且徵收補償發給完竣後一定期間內，土地未依計畫開始使用者，或未依核准徵收原定興辦事業使用者，原土地所有權人復得依同法第二百十九條行使收回權。是上開土地法第二百零八條第九款及都市計畫法第四十八條前段，旨在揭櫫徵收土地之用途應以興辦公共利益為目的之公共事業或公用事業之必要者為限，與憲法保障人民財產權之意旨尚無牴觸。

has declared a purpose and end use covered by these two articles. The state should still be restricted by the principle of proportionality implied in the relevant provisions of the Land Act and Article 49 of the Enforcement Act of the Land Act, which provides that "To the extent consistent with the aims of the expropriation, the expropriation should be conducted in such a way as to cause the minimum possible damage and to avoid encroachment upon agricultural land." The procedure provided in Articles 222 to 235 of the Land Act has to be followed when the state does expropriate land. Furthermore, according to Article 219 of the same Act, the original owners are entitled to buy back any land which has been expropriated but has not been used by an undertaking which has received approval for the expropriation, during a specific period of time after receiving compensation. The aims of the above Article 208, Subparagraph 9, of the Land Act and the first sentence of Article 48 of the Urban Planning Act are to provide that where land is expropriated, its end use should be restricted to the necessity for constructing public

utilities or public undertakings in the public interest. Thus, neither provision is inconsistent with the spirit of constitutional protection of the people's property rights.

As the expropriation of land is by its very nature a significant encroachment on people's property rights, the requirements and procedures of expropriation should be comprehensively laid out in the relevant laws. Purposes and end uses should be specified, and standards for balancing public interests and justifying emergency expropriation should be provided in legislation. Otherwise, the administrative organizations which manage the expropriation process and the judicial organizations which have to review the legality of any expropriation will have no benchmark by which to assess their deliberations. In particular, to balance public and private interests and to improve the transparency of decision-making, the opinions and comments of landowners and relevant persons should be heard before the finalization of an expropriation plan. The language of various subparagraphs of the above Article 208 of the Land Act is ambiguous and

徵收土地對人民財產權發生嚴重影響，舉凡徵收土地之各項要件及應踐行之程序，法律規定應不厭其詳。有關徵收目的及用途之明確具體、衡量公益之標準以及徵收急迫性因素等，均應由法律予以明定，俾行政主管機關處理徵收事件及司法機關為適法性審查有所依據。尤其於徵收計畫確定前，應聽取土地所有權人及利害關係人之意見，俾公益考量與私益維護得以兼顧，且有促進決策之透明化作用。土地法第二百零八條各款用語有欠具體明確，徵收程序之規定亦不盡周全，有關機關應本諸上開意旨檢討修正，併此指明。

the provisions of the expropriation procedure are not satisfactory. We herein recommend that the relevant organizations should review them and make the necessary amendments.

J. Y. Interpretation No.410（July 19, 1996）*

ISSUE: Does Article 1 of the Enforcement Act of the Part of Family of the Civil Code which prohibits the application of the Civil Code ex post facto constitute an infringement on the right of equality guaranteed by Article 7 of the Constitution to the married women?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Articles 1016, 1017, 1018, 1019 and 1030 of the Civil Code（民法第一千零十六條、第一千零十七條、第一千零十八條、第一千零十九條、第一千零三十條）; Article 1 of the Enforcement Act of the Part of Family of the Civil Code（民法親屬編施行法第一條）; Article 16, Subparagraph 11, of the Estate and Gift Taxes Act（遺產及贈與稅法第十六條第十一款）.

KEYWORDS:

gender equity（男女平等）, separate property（特有財產）, contributed property（原有財產）, marital union property（聯合財產）.**

HOLDING: Article 1 of the Enforcement Act of the Part of Family of the Civil Code (hereinafter the "Enforcement

解釋文：民法親屬編施行法第一條規定「關於親屬之事件，在民法親屬編施行前發生者，除本施行法有特別

* Translated by Lawrence L. C. Lee.

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

Act") [1] states that, except as otherwise provided by the present Enforcement Act, the provision of the Civil Code (hereinafter the Code) applying to succession does not apply to succession completed before the Enforcement Act came into force; unless otherwise provided for by the present Enforcement Act, the revised provisions do not apply to any succession opened before the revision. Article 1 of the Enforcement Act is not in violation of the Constitution because the purpose of Article 7 of the Constitution is to recognize the situation prior to the enactment or amendment of the Enforcement Act and to maintain legitimacy stability. Furthermore, the Enforcement Act also enacted differential regulations to be consistent with coexisting legal order, which should be changed or eliminated. In the matter of regulations governing the community property, Article 1017, Paragraph 1, of the Code, promulgated on December 26, 1930, [2] states that the part of the commu-

規定外，不適用民法親屬編之規定。其在修正前發生者，除本施行法有特別規定外，亦不適用修正後之規定」，旨在尊重民法親屬編施行前或修正前原已存在之法律秩序，以維護法安定之要求，同時對於原已發生之法律秩序認不應仍繼續維持或須變更者，則於該施行法設特別規定，以資調和，與憲法並無牴觸。惟查關於夫妻聯合財產制之規定，民國七十四年六月三日修正前民法第一千零十七條第一項規定：「聯合財產中，妻於結婚時所有之財產，及婚姻關係存續中因繼承或其他無償取得之財產，為妻之原有財產，保有其所有權」，同條第二項規定：「聯合財產中，夫之原有財產及不屬於妻之原有財產部分，為夫所有」，第三項規定：「由妻之原有財產所生之孳息，其所有權歸屬於夫」，及最高法院五十五年度台抗字第一六一號判例謂「妻於婚姻關係存續中始行取得之財產，如不能證明其為特有或原有財產，依民法第一千零十六條及第一千零十七條第二項之規定，即屬聯合財產，其所有權應屬於

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1 LAW GOVERNING THE APPLICATION OF THE OF CIVIL CODE PART IV FAMILY, which includes 15 articles, was enacted in 1930, and was amended in 1985, 1996, and 2000.

2 The Civil Code Part IV Family, which comprises articles numbered between 967 and 1136, was enacted in 1930, and had five amendments in 1985, 1996, 1998, 1999, and 2000.

nity property which belonged to the wife at the time of marriage as well as what she acquired during the continuance of the marriage constitute her contributed property and it remains in her ownership. Article 1017, Paragraph 2, states that the part of the community property initially belonging to the husband and that cannot be proved to be property owned by the wife should be presumed as the property of the husband. Article 1017, Paragraph 3, states that the ownership of the interest coming from the wife's property belongs to the husband. Therefore, the Supreme Court's Precedent T.K.T. No. 161 (Sup. Ct., 1966) held that the property obtained by the wife during the continuance of the marriage which cannot be proved separate property or contributed property belongs to the husband under Articles 1016 and 1017, Paragraph 2, of the Code. Under the authority of Article 7 of the Constitution emphasizing gender equity, the Code was amended on June 3, 1985. The previous precedent, which follows the amended Code, is no longer to be implemented. Nevertheless, because the Enforcement Act did not set forth different regulations

夫」，基於憲法第七條男女平等原則之考量，民法第一千零十七條已於七十四年六月三日予以修正，上開最高法院判例亦因適用修正後之民法，而不再援用。由於民法親屬編施行法對於民法第一千零十七條夫妻聯合財產所有權歸屬之修正，未設特別規定，致使在修正前已發生現尚存在之聯合財產，仍適用修正前之規定，由夫繼續享有權利，未能貫徹憲法保障男女平等之意旨。對於民法親屬編修正前已發生現尚存在之聯合財產中，不屬於夫之原有財產及妻之原有財產部分，應如何處理，俾符男女平等原則，有關機關應儘速於民法親屬編施行法之相關規定檢討修正。至遺產及贈與稅法第十六條第十一款被繼承人配偶及子女之原有財產或特有財產，經辦理登記或確有證明者，不計入遺產總額之規定，所稱「被繼承人之配偶」並不分夫或妻，均有其適用，與憲法第七條所保障男女平等之原則，亦無牴觸。

of the modification of the community property in Article 1017 of the Code, the community property, prior to the amendment of the Code in 1984 which still applied to the original regulations, belonged to the husband. A regulation that does not comply with the Constitution's ensuring of gender equality is obviously unconstitutional. In order to agree with the principle of gender equity, the portion of the Enforcement Act regarding community property that does not belong to either the husband or wife should be reviewed by the relevant authorities. Article 16, Subparagraph 11, of the Estate and Gift Taxes Act mentions that the total amount of the inherited property excludes the surviving spouse's and heir's separate property or contributed property, which is officially registered or has a deed. The term, "survivor spouse," which appears in the Estate and Gift Taxes Act, is not limited to a husband or wife. This provision does not breach Article 7 of the Constitution emphasizing the principle of gender equity.

REASONING: Article 1 of the Enforcement Act stipulates that, except as

解釋理由書：民法親屬編施行法第一條規定「關於親屬之事件，在民

otherwise provided by the present Enforcement Act, the provision of the Civil Code applying to succession does not apply to succession completed before the Enforcement Act came into force; unless otherwise provided for by the present Enforcement Act, the revised provisions do not apply to any succession opened before the revision. Article 1 of the Enforcement Act is not in violation of the Constitution because the purpose of Article 1 of the Enforcement Act is to recognize the situation prior to the enactment or amendment of the Enforcement Act and to maintain legitimacy stability. Furthermore, the Enforcement Act also enacted different regulations to be consistent with the coexisting legal order, which should be changed or eliminated. In the matter of the regulations governing the community property, Article 1017, Paragraph 1, of the Code, promulgated on December 26, 1930, states that the part of the community property which belonged to the wife at the time of the marriage as well as what she acquired during the continuance of the marriage constitutes her contributed property and remains in her ownership. Article

法親屬編施行前發生者，除本施行法有特別規定外，不適用民法親屬編之規定。其在修正前發生者，除本施行法有特別規定外，亦不適用修正後之規定」，旨在尊重民法親屬編施行前或修正前原已存在之法律秩序，以維護法安定之要求，同時對於原已發生之法律秩序認不應仍繼續維持或須變更者，則於該施行法設特別規定，以資調和，與憲法並無牴觸。惟查關於夫妻聯合財產制之規定，民國七十四年六月三日修正前民法第一千零十七條第一項規定：「聯合財產，妻於結婚時所有之財產，及婚姻關係存續中因繼承或其他無償取得之財產，為妻之原有財產，保有其所有權」，同條第二項規定：「聯合財產中，夫之原有財產及不屬於妻之原有財產部分，為夫所有」，同條第三項：「由妻之原有財產所生之孳息，其所有權歸屬於夫」，及最高法院五十五年度台抗字第一六一號判例謂「妻於婚姻關係存續中始行取得之財產，如不能證明其為特有或原有財產，依民法第一千零十六條及第一千零十七條第二項之規定，即屬聯合財產，其所有權應屬於夫」，基於憲法第七條男女平等原則之考量，故七十四年六月三日民法對此已加修正，即修正後民法第一千零十七條

1017, Paragraph 2, states that the part of the community property initially belonging to the husband and that cannot be proved to be the property owned by wife should be presumed as the property of the husband. Article 1017, Paragraph 3, states that the ownership of the interest coming from the wife's property belongs to the husband. Therefore, the Supreme Court's Precedent T.K.T. No. 161 (Sup. Ct., 1966) held that the property obtained by the wife during the continuance of the marriage which can not be proved separate property or contributed property belongs to the husband under Articles 1016 and 1017, Paragraph 2, of the Code. Under the authority of Article 7 of the Constitution emphasizing gender equity, the Code was amended on June 3, 1985. The amendment to Article 1017, Paragraph 1, pronounces that the part of the community property which belongs to the husband or the wife at the time of marriage as well as what he or she acquires during the continuance of the marriage constitute his or her contributed property and remains in his or her ownership. The amendment to Article 1017, Paragraph 2, asserts that the

第一項規定：「聯合財產中，夫或妻於結婚時所有之財產，及婚姻關係存續中取得之財產，為夫或妻之原有財產，各保有其所有權」，同條第二項規定：「聯合財產中，不能證明為夫或妻所有之財產，推定為夫妻共有之原有財產」，並將同條第三項刪除。關於聯合財產之管理，修正後之民法第一千零十八條規定：「聯合財產，由夫管理。但約定由妻管理時，從其約定。其管理費用由有管理權之一方負擔。聯合財產由妻管理時，第一千零十九條至第一千零三十條關於夫權利義務之規定，適用於妻，關於妻權利義務之規定，適用於夫」，以符合憲法規定。上開最高法院判例，亦因適用修正後之民法，而不再援用。由於上述修正之規定，對於發生於修正前者，依民法親屬編施行法第一條後段規定：「除本施行法有特別規定外，亦不適用修正後之規定」，而同法施行法對於民法第一千零十七條夫妻聯合財產所有權歸屬部分之修正，並未設特別規定，致仍適用修正前之規定，修正前已發生且現尚存在聯合財產中，不屬於夫之原有財產及妻之原有財產部分仍由夫繼續享有其所有權及對妻原有財產所生孳息之所有權暨對聯合財產之管理權，未能貫徹男女平等精神等意旨，

part of the community property which cannot be proved to be property owned by either the husband or the wife shall be presumed as property contributed by the husband and the wife jointly. Article 1017, Paragraph 3, enacted in 1930 has been cancelled. Regarding the management of the community property, the amendment to Article 1018 rules that the husband shall manage that marital property except where it has been agreed that the wife shall manage it, and the cost of management shall be borne by the party who is entitled to manage. In order to be consistent with the Constitution, where the community property is managed by the wife, provisions of Articles 1019 through 1030 on the rights and duties of the husband shall be applicable to the wife and the rights and duties of the wife shall be applicable to the husband. The previous precedent which follows the amended Code should no longer be implemented. Nevertheless, because Article 1 of the Enforcement Act stipulates the above, and unless otherwise provided for by the present the Enforcement Act rules, the revised provisions are not applicable to the

有關機關應儘速檢討修正民法親屬編施行法相關規定，以使修正前聯合財產之所有權及管理權與既有法律秩序之維護，獲得平衡。又遺產及贈與稅法第十六條第十一款被繼承人配偶及子女之原有財產或特有財產，經辦理登記或確有證明者，不計入遺產總額之規定，所稱「被繼承人之配偶」並不分夫或妻，均有其適用，與憲法第七條所保障男女平等之原則，亦無牴觸。至適用七十四年六月三日修正前民法第一千零十七條第二項規定，致遺產總額之計算發生差異，係因民法親屬編施行法第一條後段規定之結果，尚難謂該條稅法之規定違背憲法第七條規定。

community property accumulated before the revision. The Enforcement Act did not modify the community property portion of Article 1017 of the Code. As a result, the community property portion was in place prior to the amendment of the Code in 1985 and still applies to the regulations amended in 1930. It is obviously unconstitutional to maintain that the property which does not belong solely to the husband or solely to the wife belongs to the husband as well as interest gathered from the wife's separate property. The management right to the martial union property is unconstitutional because this regulation does not comply with the Constitution's guarantee of gender equity. In order to agree with the principle of gender equity, the portion of the Enforcement Act regarding the community property which does not belong to either the husband or wife should be reviewed by the relevant authorities. Then, the authorities should amend the current provision because the right of management and ownership of community property should be protected under the existing legal order. Article 16, Subparagraph 11, of the Estate and Gift

Taxes Act mentions that the total amount of the inherited property excludes the surviving spouse's and heir's separate property or contributed property, which is officially registered or has a deed. The term "survivor spouse" that appears in the Estate and Gift Taxes Act is not limited to the husband or wife. This provision does not breach Article 7 of the Constitution emphasizing the principle of gender equity. It is hard to allege that the Estate and Gift Taxes Act breaches Article 7 of the Constitution emphasizing the principle of gender equity, because it creates different amounts of inheritance calculated under Article 1 of the Enforcement Act.

J. Y. Interpretation No.411（July 19, 1996）*

ISSUE: (1) Is the limitation on areas of practice of civil engineers based on executive ordinances issued jointly by seven administrative agencies in contravention to the constitutional guarantee of the right of work?

(2) Are those civil engineers who obtained their licenses after September 19, 1978 subject to the limitation of areas of practices?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article12, Paragraph 2 of the Technician Act（技師法第十二條第二項）.

KEYWORDS:

civil engineer（土木工程科技師）, structural engineer（結構工程科技師）,areas of practice（執業範圍）, central governing authority（中央主管機關）, authority in charge of relevant matters（目的事業主管機關）, right of work（工作權）, in contravention to（牴觸）, Examination Yuan（考試院）, architect（建築技師）, public welfare（公共福祉）, public interests（公共利益）, public safety（公共安全）, abolish（廢止）, temporary measure（暫時性措施）.**

* Translated by Professor Chun-Jen Chen.

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

HOLDING: On April 19, 1991, together with the Ministry of the Interior, the Ministry of Transportation and Communication, the Council of Agriculture, the Council of Labor Affairs, the Department of Health, and the Environmental Protection Administration of the Executive Yuan, the Ministry of Economic Affairs (foregoing seven administrative agencies referred to hereinafter as the Ministries) issued the Ministry of Economic Affairs Ordinance No. 015522 (80 Jin-Kung-Tze No. 015522) prescribing the "Practicing Areas of Engineers", which limited the areas of practice of civil engineers to "the plan, design, research, and analysis of the structures of buildings whose heights are under thirty-six meters". Such limitations are prescribed by the Ministries which are either the central governing authorities or the authorities in charge of relevant matters under the authorization of Article 22, Paragraph 2 of the Technician Act to allocate the areas of practice between civil engineers and structural engineers and are not in contravention to the constitutional guarantee of the right of work. In addition, on Septem-

解釋文：經濟部會同內政部、交通部、行政院農業委員會、行政院勞工委員會、行政院衛生署、行政院環境保護署（下稱經濟部等七部會署）於中華民國八十年四月十九日以經（八十）工字第〇一五五二二號等令訂定「各科技師執業範圍」，就中對於土木工程科技師之執業範圍，限制「建築物結構之規劃、設計、研究、分析業務限於高度三十六公尺以下」部分，係技師之中央主管機關及目的事業主管機關為劃分土木工程科技師與結構工程科技師之執業範圍，依技師法第十二條第二項規定所訂，與憲法對人民工作權之保障，尚無牴觸。又行政院於六十七年九月十九日以台六十七經字第八四九二號令與考試院於六十七年九月十八日以（六七）考台秘一字第二四一四號令會銜訂定「技師分科類別」及「技師分科類別執業範圍說明」，就結構工程科之技師執業範圍特別訂明「在尚無適當數量之結構工程科技師開業之前，建築物結構暫由開業之土木技師或建築技師負責辦理。」乃係因應當時社會需要所訂之暫時性措施。迨七十六年十月二日始由行政院及考試院會銜廢止。則經濟部等七部會署嗣後以首揭令訂定「各科技師執業範圍」，於土木工程科執業範圍「備註」

ber 19, 1978 the Executive Yuan joined the Examination Yuan Ordinance No. 2414 (78 Tai-Mi-Yi-Tze No. 2414) of September 18, 1978 and issued the Executive Yuan Ordinance No. 8492 (78 Tai-Jin-Tze No. 8492) of September 19, 1978 stipulating "Categories of Engineers" and "Illustrations of Areas of Practice of Categories of Engineers", which under the category of the structural engineer specially specified that, "until the numbers of practicing structural engineers reach an adequate level, practicing civil engineers and architects are temporarily authorized to be in charge of the structures of buildings." This temporary authorization was a temporary measure adopted to reflect the then existing needs of the society and was abolished by the Executive Yuan and the Examination Yuan jointly on October 2, 1987. Later, the Ministries prescribed the above-mentioned "Practicing Areas of Engineers" and noted in the footnotes of the category of the civil engineer stating that, "those civil engineers who obtained their licenses before September 19, 1978 and had experiences of designing the structures of buildings above thirty-six

欄下註明「於民國六十七年九月十八日以前取得土木技師資格，並於七十六年十月二日以前具有三十六公尺以上高度建築物結構設計經驗者，不受上列建築物結構高度之限制。」其於六十七年九月十九日以後取得土木工程科技師資格者，仍應受執業範圍規定之限制，要屬當然。

meters before October 2, 1987 are not subject to the said limitation of buildings' heights." Accordingly, as a matter of course, those civil engineers who obtained their licenses after September 19, 1978 are subject to the said limitation of areas of practice.

REASONING: Article 15 of the Constitution guarantees people's right of work, so people may freely choose jobs and occupations to make a living. However, people's jobs are closely related to public welfare. In J. Y. Interpretation No. 404, we stated that in order to enhance public interests the government may enact laws to prescribe necessary requirements and conditions on how people conduct their jobs, their qualifications, etc. Surely, laws cannot possibly prescribe every requirement and condition and may authorize pertinent administrative agencies to issue necessary ordinances to classify areas of practice of each profession. The Ministry of Economic Affairs together with other six administrative agencies jointly issued the Ministry of Economic Affairs Ordinance No. 015522 (80 Jin-

解釋理由書：憲法第十五條規定人民之工作權應予保障，故人民得自由選擇工作及職業，以維持生計。惟人民之工作與公共福祉有密切關係，為增進公共利益之必要，對於人民從事工作之方法及應具備之資格或其他要件，得以法律為適當之規範，此有本院釋字第四○四號解釋可資參照。惟法律之規定不能鉅細靡遺，對於各種專門職業之執業範圍，自得授權有關機關以命令為必要之劃分。經濟部等七部會署於中華民國八十年四月十九日以經（八十）工字第○一五五二二號等令訂定「各科技師執業範圍」，就中對於土木工程科技師之執業範圍，限制「建築物結構之規劃、設計、研究、分析業務，限於高度三十六公尺以下」係技師之中央主管機關及目的事業主管機關認為土木工程科技師之執業範圍雖包括建築物結構之規劃等業務，惟與結構工程科技師之執業

Kung-Tze No. 015522) providing the "Practicing Areas of Engineers", which limited the areas of practice of civil engineers to "the plan, design, research, and analysis of the structure of buildings whose heights are under thirty-six meters". Such limitations are properly prescribed by the Ministries which are either the central governing authorities or the authorities in charge of relevant matters under the authorization of Article 22, Paragraph 2 of the Technician Act to limit civil engineers' areas of practice relating to the part of buildings' structures, because the Ministries think distinctions between the areas of practice of civil engineers and those of structural engineers may be drawn upon the degrees of complexity and specialty, although civil engineers' areas of practice include the plan, design, research, and analysis of the structure of buildings. Because the civil and structural constructions involve public safety, in order to enhance public welfare, law and regulation may prescribe necessary requirements and conditions to require that such constructions be undertaken by qualified persons with certain

範圍相較，仍有繁簡廣狹之別，依技師法第十二條第二項規定，對於土木工程科技師之執業範圍，關於建築物結構之部分，為適當之限制。由於土木與結構工程均涉及公共安全，限由學有專精者執行其專長業務，是為增進公共利益所必要，與憲法對人民工作權之保障，尚無牴觸。

levels of expertise and these requirements and conditions are not in contravention to the constitutional guarantee of the right of work.

On September 19, 1978 the Executive Yuan joined the Examination Yuan Ordinance No. 2414 (78 Tai-Mi-Yi-Tze No. 2414) of September 18, 1978 and issued the Executive Yuan Ordinance No. 8492 (78 Tai-Jin-Tze No. 8492) of September 19, 1978 prescribing "Categories of Engineers" and "Illustrations of Areas of Practice of Categories of Engineers", which under the category of the structural engineer specially specified that, "until the numbers of practicing structural engineers reach an adequate level, practicing civil engineers and architects are temporarily authorized to be in charge of the structures of buildings." This temporary authorization was a reflection to the then needs of the society specially specifying civil engineers' areas of practice to include the research, design, analysis, appraisal, evaluation, construction, supervision, and examination of the structures of buildings which originally belong to

行政院於六十七年九月十九日以台六十七經字第八四九二號令及考試院於六十七年九月十八日以（六七）考台秘一字第二四一四號令會銜訂定「技師分科類別」及「技師分科類別執業範圍說明」，就結構工程科之技師執業範圍特別訂明「在尚無適當數量之結構工程科技師開業之前，建築物結構暫由開業之土木技師或建築技師負責辦理」，乃係因應當時社會需要，特別訂明開業之土木工程科技師之執業範圍，包括建築物結構之研究、設計、分析、鑑定、評價、施工、監造及檢驗等原屬結構工程科技師之業務，此為行政機關本於法律之授權就當時取得土木工程科技師資格劃定之執業範圍，屬於一種暫時性措施。迨七十六年十月二日始由行政院及考試院會銜廢止。則經濟部等七部會署嗣後以首揭令訂定「各科技師執業範圍」，於土木工程科執業範圍「備註」欄下註明「於民國六十七年九月十八日以前取得土木技師資格，並於七十六年十月二日以前具有三十六公尺以上高度

structural engineers' area of practice and is a temporary measure adopted by administrative agencies under the authorization of law to specify the areas of practice of then qualified civil engineers and was abolished by the Executive Yuan and the Examination Yuan jointly on October 2, 1987. Later, the Ministries prescribed the above-mentioned "Practicing Areas of Engineers" and noted in the footnotes of the category of the civil engineer stating that, "those civil engineers who obtained their licenses before September 19, 1978 and had experiences of designing the structures of buildings above thirty-six meters before October 2, 1987 are not subject to the said limitation of buildings' heights." Accordingly, as a matter of course, those civil engineers who obtained their licenses after September 19, 1978 are subject to the said limitation of areas of practice.

建築物結構設計經驗者，不受上列建築物結構高度之限制。」其於六十七年九月十九日以後取得土木工程科技師資格者，仍應受執業範圍規定之限制，要屬當然。

Justice Chi-Nan Chen filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋陳大法官計男提出協同意見書；孫大法官森焱提出不同意見書。

J. Y. Interpretation No.412（August 2, 1996）*

ISSUE: Is Article 10 of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions promulgated by the Examination Yuan in contravention to its statutory authority, or to the constitutional mandate of equal protection of the right to work under Article 7 of the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 6 of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions（後備軍人轉任公職考試比敘條例第六條）; Article 10 of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions（後備軍人轉任公職考試比敘條例施行細則第十條）; Article 2 of the Act Governing the Appointment of Armed Forces Military Officers and Sergeants（陸海空軍軍官士官任官條例第二條）.

KEYWORDS:

military reserve personnel（後備軍人）, civil servant（公務員）, public functionary（公務人員）, appointment（任用）, remuneration（俸給）, right of work（工作權）, equal protection（平等保障）, military officer（軍官）, military noncommissioned officer（士官）, ranking（官階）.**

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* Translated by Professor Spenser Y. Hor.

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

HOLDING: Article 6 of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions authorizes the Examination Yuan to promulgate enforcement rules. Under this authorization and taking into account that the Public Functionaries Appointment Act and the Public Functionaries Remuneration Act were reestablished and enacted in 1986 and implemented on January 16, 1987, the Examination Yuan on January 11, 1988, promulgated Article 10, Paragraph 5, of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions limiting the applications of the Act Governing the Replacement Test of the Military Reserve Personnel for Civil Reappointment to those who seek reappointments after January 16, 1987. It represents the efforts of the Examination Yuan to coincide with the newly enacted Public Functionaries Appointment Act and the Public Functionaries Remuneration Act and a set of rules promulgated after considering the differences of various circumstances. Therefore, it is neither in contravention to the Act Governing the

解釋文：後備軍人轉任公職考試比敘條例第六條授權考試院訂定施行細則，考試院乃於中華民國七十七年一月十一日考量公務人員任用法及公務人員俸給法已於七十五年重新制定，並於七十六年一月十六日施行，於後備軍人轉任公職考試比敘條例施行細則第十條第五項明定將其適用範圍限於七十六年一月十六日以後之轉任人員，係為配合新制公務人員任用法及公務人員俸給法，並斟酌各種情況之差異所為之規定，尚未違反後備軍人轉任公職考試比敘條例授權之意旨，與憲法有關工作權之平等保障，亦無牴觸。

Replacement Test of the Reserve Military Personnel for Civil Positions, nor to the constitutional mandate of equal protection of the right to work.

REASONING: The principle of equal protection under Article 7 of the Constitution provides de jure equality, i.e., the legislature may, with different legislative intents, enact different laws to respond to various factual circumstances pursuant to the nature of matters. The legislature may also enact laws and authorize the administrative branch to promulgate reasonable and necessary rules applicable under different factual circumstances. Article 6 of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions authorizes the Examination Yuan to promulgate enforcement rules. According to this authorization, the Examination Yuan in 1980 amended and implemented Article 10, Paragraph 1, of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions regulating correspondent rankings between military personnel and

解釋理由書：憲法第七條所定之平等原則，係為保障人民在法律上地位之實質平等，亦即法律得依事物之性質，就事實情況之差異及立法之目的，而為不同之規範。法律就其所定事實上之差異，亦得授權行政機關發布施行細則為合理必要之規定。後備軍人轉任公職考試比敘條例第六條授權考試院訂定施行細則，考試院本此於中華民國六十九年修正發布之同條例施行細則第十條第一項規定軍官士官具有任用資格而轉任公務人員時得比敘之官等職等，與陸海空軍軍官士官任官條例第二條附表一「陸海空軍軍官士官官等官階與公務人員職等對照表」之規定意旨相符；同細則第十條第二項則係規定軍官及士官轉任公務人員時，依公務人員俸給法或分類職位公務人員俸給法規定比敘。以上均係就法律所定軍職年資之事實上差異為必要之規定。嗣考試院於七十七年一月十一日考量公務人員任用法及公務人員俸給法已於七十五年重新制定，並於七十六年一月十六日施行，乃修正後備

public functionaries to enable qualified military personnel to be reappointed to proper rankings as public functionaries. The legislative intent of Article 10, Paragraph 1, of the above-mentioned Enforcement Rules is the same as that of Article 2 of the Act Governing the Appointment of Armed Forces Military Officers and Sergeants, which provides a chart of Correspondent Ranks between Officers and Noncommissioned Officers of the Armed Forces and Civil Servants. Article 10, Paragraph 2, of the same Enforcement Rules stipulates that the ranking bases of the reappointments are those provided in the Public Functionaries Remuneration Act or the Classified Rankings for Public Functionaries Remuneration Act. Both Paragraphs 1 and 2 of Article 10 of the Enforcement Rules at issue are practically necessary for the factual differences in superiority and seniority of those qualified military personnel. Thereafter on January 11, 1988, taking into account the fact that both the Public Functionaries Appointment Act and the Public Functionaries Remuneration Act were reestablished and enacted in 1986 and implemented on

軍人轉任公職考試比敘條例施行細則第十條，除於第二項作文字修正外，並增訂第五項，明定將其適用範圍限於七十六年一月十六日以後之轉任人員，係為配合新制公務人員任用法及公務人員俸給法，並斟酌各種事實情況之差異所為之規定，尚未違反後備軍人轉任公職考試比敘條例授權之意旨，與憲法有關工作權之平等保障，亦無牴觸。

January 16, 1987, the Examination Yuan promulgated Article 10 of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions on January 11, 1988. Besides the emendation to said Paragraph 2 thereof and the addition of Paragraph 5, the aforesaid Article 10 expressly limits the applications of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions to those who seek reappointments after January 16, 1987. It represents the efforts of the Examination Yuan to coincide with the newly enacted Public Functionaries Appointment Act and the Public Functionaries Remuneration Act and a set of rules promulgated after considering differences under various circumstances. Accordingly, it is neither in contravention to the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions, nor to the constitutional mandate of equal protection of the right to work.

Justice Geng Wu filed dissenting opinion in part, in which Justice Jyun-Hsiung Su and Justice Ho-Hsiung Wang joined.

本號解釋吳大法官庚、蘇大法官俊雄與王大法官和雄共同提出部分不同意見書。

J. Y. Interpretation No.413（September 20, 1996）*

ISSUE: Does the Administrative Court precedent restricting the privilege of tax reduction and exemption conferred by the Act of Encouragement of Investment and the Act for Upgrading Industries on nonresident aliens or overseas Chinese who have invested in an ROC business and resided in the ROC for over 183 days in a taxable year to manage their investment to those who have no spouse residing in the ROC add a new condition nonexistent in the laws, thus contravening the principle of taxation by law as enunciated in Article 19 of the Constitution?

RELEVANT LAWS:

Articles 7 and 19 of the Constitution（憲法第七條、第十九條）; Article 16, Paragraph 1, Subparagraph 1, and 17 of the Act of Encouragement of Investment（獎勵投資條例第十六條第一項第一款、第十七條）; Act of Investment by Foreign Nationals（外國人投資條例）; Act of Investment by Overseas Chinese（華僑回國投資條例）; Article 11, Paragraphs 1 and 2, of the Act for Upgrading Industries（促進產業升級條例第十一條第一項、第二項）; Articles 2, Paragraph 2, 7, Paragraph 2, Subparagraph 2, and 15 of the Income Tax Act（所得稅法第二條第二項、第七條第二項第二款、第十五條）; Article 1002 of the Civil Code（民法第一千零零二

* Translated by Raymond T. Chu.

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

條）; Article 25 (1) of the Enforcement Rules of the Act of Encouragement of Investment（獎勵投資條例施行細則第二十五條之（一））; J. Y. Interpretation Nos. 195, 217, 367 and 385（司法院釋字第一九五號、第二一七號、第三六七號、第三八五號解釋）; Administrative Court Judgment No. Pan-673 of 1974（行政法院六十三年判字第六七三號判例）.

KEYWORDS:

taxable year（課稅年度）, dividend（股利）, withholding at source（就源扣繳）, filing of final tax return（結算申報）, taxpayer（納稅義務人）, taxpaying body（納稅主體）, tax denomination（稅目）, tax rate（稅率）, method of tax payment（納稅方法）, tax reduction and exemption（稅捐減免）, tax benefit（租稅優惠）, tax items（租稅項目）, tax burden（稅負）, special law（特別法）, general law（普通法）, to reside（居住）, domicile（住所）, *chui-fu*（贅夫）, principle of tax per legislation（租稅法律主義）.**

HOLDING: Where an individual who is not a resident of the Republic of China makes an investment in the Republic of China in pursuance of an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals, holds the office of a director,supervisor, or manager

解釋文：非中華民國境內居住之個人，經依華僑回國投資條例或外國人投資條例核准在中華民國境內投資，並擔任該事業之董事、監察人或經理人者，如因經營或管理其投資事業需要，於一定課稅年度內在中華民國境內居留期間超過所得稅法第七條第二項第二款所定一百八十三天時，其自該事業所分

of the business in which he invests, and has resided within the Republic of China for over 183 days in a particular taxable year as set forth in Article 7, Paragraph 2, Subparagraph 2, of the Income Tax Act, for the purpose of handling or managing the business, the dividend he receives from such business shall be taxable by withholding at source at the fixed rate under Article 16, Paragraph 1, Subparagraph 1, of the Act of Encouragement of Investment (since repealed), and Article 11, Paragraph 1, of the Act for Upgrading Industries, and the provisions in the Income Tax Act in respect of filing of final tax return shall be made inapplicable. This is clearly prescribed in Article 17 of the Act of Encouragement of Investment, and Article 11, Paragraph 2, of the Act for Upgrading Industries. The Administrative Court Judgment No. Pan-673 of 1974, which quotes: "The term 'withholding at source' in the Income Tax Act, Article 2, Paragraph 2; the Act of Encouragement of Investment, Article 17; and the Enforcement Rules of the Act of Encouragement of Investment, Article 25(1) denotes an individual who is not a resident of the Republic of China and has no income from business operations within the Republic of China, but receives dividends from a company within the Republic of China, and the dividends are subject to withholding at source at the fixed rate under Article 16, Paragraph 1, Subparagraph 1, of the Act of Encouragement of Investment (since repealed), and Article 11, Paragraph 1, of the Act for Upgrading Industries, and the provisions in the Income Tax Act in respect of filing of final tax return shall be made inapplicable. 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配之股利，即有獎勵投資條例（現已失效）第十六條第一項第一款及促進產業升級條例第十一條第一項之適用，按所定稅率就源扣繳，不適用所得稅法結算申報之規定，此觀獎勵投資條例第十七條及促進產業升級條例第十一條第二項之規定甚明。行政法院六十三年判字第六七三號判例：「所得稅法第二條第二項及獎勵投資條例第十七條暨同條例施行細則第二十五條之所稱就源扣繳，係指非中華民國境內居住之個人，且無配偶居住國內之情形而言。若配偶之一方居住國內，為中華民國之納稅義務人，則他方縱居住國外，其在國內之所得，仍應適用所得稅法第十五條規定合併申報課稅」，增列無配偶居住國內之情形，添加法律所無之限制，有違憲法所定租稅法律主義之本旨，應不予適用。

public of China and has no spouse residing in this country. If either the husband or the wife is a resident and taxpayer of the Republic of China, his or her income earned in this country shall be taxable, and he or she shall file a joint income tax return even though his or her spouse is a nonresident," adding to the law an element requiring nonresident status of the spouse and imposing a restriction not legally provided, is contrary to the principle of taxation by law embodied in the Constitution and must therefore be ignored.

REASONING: The legislative purposes of the Act of Encouragement of Investment (repealed on December 31, 1990) and the Act for Upgrading Industries are to encourage investment and to accelerate the development of the national economy. The provisions in said Acts in respect of tax withholding at source shall be given prior applicability over the Income Tax Act clauses on the filing of final returns. To attain the aforesaid purposes by inviting foreign capital, such provisions are also made applicable to all persons making investment in this country

解釋理由書：獎勵投資條例（已於中華民國七十九年十二月三十一日失效）及促進產業升級條例之立法目的，在獎勵興辦生產事業，加速國家經濟發展。上開條例所定稅率就源扣繳之規定，優先於所得稅法有關結算申報規定之適用，其依華僑回國投資條例及外國人投資條例經核准在國內投資之人亦適用此一規定者，原在藉此減輕投資人之稅負，提升華僑及外國人投資之意願，以吸收國外資本之方法達成立法之目的。是獎勵投資條例及促進產業升級條例有關所得稅部分，乃所得稅法之特別法，因投資而受獎勵之人民其繳納義

under the Act of Investment by Overseas Chinese and the Act of Investment by Foreign Nationals in the hope of minimizing the investors' taxation and thereby increasing the interest of overseas Chinese and foreign investors. It must be noted that the provisions set forth in the Act of Encouragement of Investment and the Act for Upgrading Industries with respect to income tax are special laws of the Income Tax Act, and that the provisions therein contained in respect of reduced taxation shall naturally be applicable to the tax duty of those who have made investment under the legal incentive programs (See J. Y. Interpretation No. 195).

務，自應適用上開條例有關減輕稅負之規定（參照本院釋字第一九五號解釋）。

The Constitution provides in Article 19 that the people shall have the duty to pay tax in accordance with law. This means that the people have the duty to pay tax and the privilege to enjoy tax benefits pursuant to the taxpaying bodies, tax denominations, tax rates, methods of tax payment, and tax reduction and exemption as they are prescribed by law. Any tax matter that shall be explicitly prescribed by law may not be regulated by

憲法第十九條規定，人民有依法律納稅之義務，係指人民祇有依法律所定之納稅主體、稅目、稅率、納稅方法及稅捐減免等項目而負繳納義務或享受優惠，舉凡應以法律明定之租稅項目，自不得以命令取代法律或作違背法律之規定，迭經本院釋字第二一七號、第三六七號及第三八五號等著有解釋。判例當然亦不得超越法律所定稅目、稅率、稅捐減免或優惠等項目之外，增加法律所無之規定，並加重人民之稅負，否則

administrative orders in lieu of or against law. This has been repeatedly maintained by us in our Interpretations Nos. 217, 367 and 385. It follows without doubt that court decisions, likewise, may not go beyond the tax denominations, tax rates, tax reduction or exemption, tax benefit, or other tax matters specified in law or add any rules not existing in the law, thereby increasing the taxation of the people and ultimately constituting a violation of the principle of taxation by law embodied in the Constitution.

即有違憲法上之租稅法律主義。

The Act of Encouragement of Investment, as amended on January 26, 1987, provides in Article 16, Paragraph 1, Subparagraph 1: "The income tax payable by a person making investment pursuant to an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals shall be withheld at source by the withholder specified in the Income Tax Act at the rate of twenty percent (20%) of the amount to be paid or distributed to him." Article 17 of the same Act provides: "Where an individual who is not a resi-

依七十六年一月二十六日修正公布之獎勵投資條例第十六條第一項第一款：「依華僑回國投資條例或外國人投資條例申請投資經核准者，其應納之所得稅，由所得稅法規定之扣繳義務人於給付時，按給付額或應分配額扣繳百分之二十」，又同條例第十七條：「非中華民國境內居住之個人，經依華僑回國投資條例或外國人投資條例核准在中華民國境內投資，並擔任該事業之董事、監察人或經理人者，如因經營或管理其投資事業需要，於一課稅年度內在中華民國境內居留期間超過所得稅法第七條第二項第二款所定一百八十三天時，其

dent of the Republic of China makes investment in the Republic of China in pursuance of an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals, holds the office of a director, supervisor, or manager of the business in which he invests, and has resided within the Republic of China for more than 183 days in a particular taxable year as set forth in the Income Tax Act, Article 7, Paragraph 2, Subparagraph 2, for the purpose of handling or managing the business, the provision of Subparagraph 1 of Paragraph 1 of the preceding article may be applicable to the dividend he receives from such business." The same provision is incorporated in Article 11 of the Act for Upgrading Industries. Suffice it to say that, insofar as the elements required by the foregoing clauses are present, the provisions for withholding at source at the specified rate as quoted above shall govern, and the provisions in the Income Tax Act with respect to filing of final income tax returns shall be rendered inapplicable, so that the legislative intent of those provisions and the doctrine that a special law

自該事業所分配之股利，得適用前條第一項第一款之規定」，促進產業升級條例第十一條之規定亦同。是凡符合上開規定之情形者，即有前述所定稅率就源扣繳之適用，不再援引所得稅法結算申報之規定，方符上開條例立法之本意及特別法優於普通法之原理。獎勵投資條例第十七條僅稱非中華民國境內居住之個人，並未附加配偶之居住條件，乃行政法院六十三年判字第六七三號判例謂：「所得稅法第二條第二項及獎勵投資條例第十七條暨同條例施行細則第二十五條之所稱就源扣繳，係指非中華民國境內居住之個人，且無配偶居住國內之情形而言。若配偶之一方居住國內，為中華民國之納稅義務人，則他方縱居住國外，其在國內之所得，仍應適用所得稅法第十五條規定合併申報課稅」，增列無配偶居住國內之情形，添加法律所無之限制，與憲法上租稅法律主義自屬有違，與本解釋意旨不符，應不予適用。至納稅義務人或其配偶是否得因其一方在中華民國境內有住所或有其他情事，而應認定納稅義務人或其配偶不合「非中華民國境內居住之個人」之要件，非獎勵投資條例或促進產業升級條例適用之對象者，應依所得稅法第十五條規定，合併申報其所得，則係另一認

prevails over a general law are followed. Nevertheless, the Administrative Court Judgment No. Pan-673 of 1974 rules that: "The term 'withholding at source' in the Income Tax Act, Article 2, Paragraph 2; the Act of the Encouragement of Investment, Article 17; and the Enforcement Rules of the Act of Encouragement of Investment, Article 25(1) denotes an individual who is not a resident of the Republic of China and has no spouse residing in this country. If either the husband or the wife is a resident and taxpayer of the Republic of China, his or her income earned in this country shall be taxable, and he or she shall file a joint income tax return even though his or her spouse is a nonresident." Consequently, the court has added to the law an element requiring nonresident status of the spouse and imposed a restriction not legally provided, and this is certainly contrary to the principle of taxation by law embodied in the Constitution as well as the essence of this Interpretation, and must therefore be ignored. With regard to the question of whether the taxpayer or his/her spouse should be denied, on the ground of ab-

定事實適用法律問題，不在本解釋之列。

sence of the element required, his or her status as "a person who is not a resident of the Republic of China" because the taxpayer or his/her spouse maintains a domicile or does something in the Republic of China and is therefore not a subject to whom the Act of Encouragement of Investment or the Act for Upgrading Industries is applicable, and for this reason a joint income tax return must be filed under Article 15 of the Income Tax Act, is a separate issue of law to be resolved based upon the facts found, and is beyond the scope of this Interpretation.

Besides, the Petitioner asserts in general language that Article 1002 of the Civil Code, which provides that "a wife shall take the domicile of the husband as her domicile, and a chui-fu [1] (a son-in-law who takes the place of a son and lives in his wife's home, usually an heirless family. [This definition was taken from the Far East Chinese-English Dictionary.]) shall take the domicile of the wife as his

聲請意旨又泛指民法第一千零零二條：「妻以夫之住所為住所，贅夫以妻之住所為住所。但約定夫以妻之住所為住所，或妻以贅夫之住所為住所者，從其約定」，違反憲法第七條男女平等之規定部分，並未具體指陳前述民法規定在客觀上有如何牴觸憲法之疑義，亦不在本件受理解釋範圍，併此說明。

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[1] In Chinese traditional marriage, a chui-fu (also called chui-hsu) is a man who is married into and lives with his wife's family. He may or may not have to take or change to his wife's family name.

domicile, except where it is agreed that the husband shall take the domicile of the wife as his domicile or the wife shall take the domicile of the chui-fu as her domicile" contradicts the provision of Article 7 of the Constitution with respect to gender equality. Inasmuch as the Petitioner has made no specific statement on the exact points of conflict between the Constitution and the Civil Code article quoted above, this issue is also beyond the scope of this Interpretation.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

Justice Young-Mou Lin filed dissenting opinion.

Justice Vincent Sze filed dissenting opinion, in which Justice Chung-Mo Cheng joined.

本號解釋蘇大法官俊雄提出部分不同意見書；林大法官永謀提出不同意見書；施大法官文森、城大法官仲模共同提出不同意見書。

J. Y. Interpretation No.414（November 8, 1996）*

ISSUE: (1) Does freedom of speech guaranteed by Article 11 of the Constitution include commercial speeches made with the intent to obtain profits through sales of goods, services and concepts?

(2) Is censorship by the provincial (municipal) health authority prior to the broadcasting of a drug commercial constitutional?

RELEVANT LAWS:

Articles 11, 15 and 23 of the Constitution（憲法第十一條、第十五條及第二十三條）; Articles 66 and 105 of the Pharmaceutical Affairs Act（藥事法第六十六條、第一百零五條）; Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act（藥事法施行細則第四十七條第二款）.

KEYWORDS:

drug commercial（藥物廣告）, pharmaceutical manufacturers（藥商）, property right（財產權）,commercial speech（商業言論）, freedom of speech（言論自由）, prior censorship（事前審查）.**

HOLDING: Drug commercials are economic activities engaged in by pharmaceutical manufacturers for the pur-

解釋文：藥物廣告係為獲得財產而從事之經濟活動，涉及財產權之保障，並具商業上意見表達之性質，惟因

* Translated by Li-Chih Lin, Esq., J.D.

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

pose of obtaining profits. These kinds of activities involve protection of property rights and possess the characteristics of a commercial speech. Because drug commercials are closely related to the health of nationals, they thus should be strictly regulated by law to protect the public interest. In order to ascertain the truthfulness of the drug commercial and to maintain the health of nationals, Article 66, Paragraph 1, of the Pharmaceutical Affairs Act provides that before broadcasting the drug commercial, the pharmaceutical manufacturer should submit all writings, graphics, or words and phrases to the provincial (municipal) health authority for approval. This prior censorship requirement is necessary to protect the public interest and is consistent with Articles 11 and 15 of the Constitution. In addition, Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act provides that by allowing the exchange of prizes with the drug containers or by granting awards, the content of drug commercials is likely to encourage consumers to use drugs abusively, the provincial (municipal) health authority thus should delete or disapprove of such content

與國民健康有重大關係，基於公共利益之維護，應受較嚴格之規範。藥事法第六十六條第一項規定：藥商刊播藥物廣告時，應於刊播前將所有文字、圖畫或言詞，申請省（市）衛生主管機關核准，旨在確保藥物廣告之真實，維護國民健康，為增進公共利益所必要，與憲法第十一條及第十五條尚屬相符。又藥事法施行細則第四十七條第二款規定：藥物廣告之內容，利用容器包裝換獎或使用獎勵方法，有助長濫用藥物之虞者，主管機關應予刪除或不予核准，係依藥事法第一百零五條之授權，就同法第六十六條相關事宜為具體之規定，符合立法意旨，並未逾越母法之授權範圍，與憲法亦無牴觸。

according to the authorization granted under Article 105 of the Pharmaceutical Affairs Act. Furthermore, Article 47, Subparagraph 2, of the Enforcement Rules of the Pharmaceutical Affairs Act is promulgated to supplement the explicit requirements for the relevant matters governed by Article 66 of the Pharmaceutical Affairs Act, and complies with the legislative intent without exceeding the scope of authorization granted under Article 66 of the Pharmaceutical Affairs Act and is consistent with the Constitution.

REASONING: Through the mass media, drug commercials promote the beneficial effects of medical treatment for the purpose of soliciting sales. These drug commercials are economic activities engaged in by pharmaceutical manufacturers to obtain profits. By possessing the characteristics of a commercial speech, these drug advertisements should be protected under Articles 15 and 11 of the Constitution where freedom of speech is guaranteed. Freedom of speech is to protect the free flow of opinions so that people can acquire information and express

解釋理由書：藥物廣告係利用傳播方法，宣傳醫療效能，以達招徠銷售為目的，乃為獲得財產而從事之經濟活動，並具商業上意見表達之性質，應受憲法第十五條及第十一條之保障。言論自由，在於保障意見之自由流通，使人民有取得充分資訊及自我實現之機會，包括政治、學術、宗教及商業言論等，並依其性質而有不同之保護範疇及限制之準則。其中非關公意形成、真理發現或信仰表達之商業言論，尚不能與其他言論自由之保障等量齊觀。藥物廣告之商業言論，因與國民健康有重大關係，基於公共利益之維護，自應受較嚴

themselves. The categories of speech protected under Articles 15 and 11 of the Constitution include political speech, academic speech, and commercial speech. The scope of protection and the level of restriction are different for the abovementioned three categories of speeches according to their characteristics. Being irrelevant to the formation of public opinion, fact-finding, or the expression of beliefs, commercial speech does not enjoy the high degree of protection afforded to the other categories of speeches. Because the commercial speech of drug advertisements is closely related to the health of nationals, it thus should be strictly regulated by law to protect the public interest.

格之規範。

Article 66 of the Pharmaceutical Affairs Act provides that before broadcasting a drug commercial, the pharmaceutical manufacturer should submit all writings, graphics, or words and phrases to the provincial (municipal) health authority for approval and should send the permit to the media. The media is prohibited from broadcasting a drug commercial without approval from the provincial (municipal)

藥事法第六十六條規定：「藥商刊播藥物廣告時，應於刊播前將所有文字、圖畫或言詞，申請省（市）衛生主管機關核准，並向傳播業者送驗核准文件。傳播業者不得刊播未經省（市）衛生主管機關核准之藥物廣告。」旨在確保藥物廣告之真實，維護國民健康，其規定藥商刊播藥物廣告前應申請衛生主管機關核准，係為專一事權，使其就藥物之功能、廣告之內容、及對市場之影

health authority. The purpose of this prior censorship is to ascertain the truthfulness of the drug commercial and to protect the health of nationals. The provincial (municipal) health authority has the exclusive right to impose such requirements so that it can, in accordance with routine procedure, objectively review the effects of the drug, the content of the drug commercial, and the impact on the market. This prior censorship is necessary to protect the health of nationals and is consistent with the freedom of speech guaranteed by Article 11 of the Constitution and existence rights, right of work and property rights guaranteed by Article 15 of the Constitution. In addition, Article 47, Subparagraph 2, of the Enforcement Rules of the Pharmaceutical Affairs Act provides that by allowing the exchange of prizes with the drug containers or granting other awards, the content of drug commercials is likely to encourage consumers to use drugs abusively. The provincial (municipal) health authority thus should delete or disapprove of such content pursuant to the authorization granted under Article 105 of the Pharmaceutical Affairs Act. Furthermore,

響等情事，依一定程序為專業客觀之審查，為增進公共利益所必要，與憲法第十一條保障人民言論自由及第十五條保障人民生存權、工作權及財產權之意旨尚屬相符。又藥事法施行細則第四十七條第二款規定：藥物廣告之內容，利用容器包裝換獎或使用獎勵方法，有助長濫用藥物之虞者，主管機關應予刪除或不予核准，係依藥事法第一百零五條之授權，為執行同法第六十六條有關事項而為具體之規定，符合立法意旨，並未逾越母法之授權範圍，亦未對人民之自由權利增加法律所無之限制，與憲法亦無牴觸。惟廣告係在提供資訊，而社會對商業訊息之自由流通亦有重大利益，故關於藥物廣告須先經核准之事項、內容及範圍等，應由主管機關衡酌規範之必要性，依比例原則隨時檢討修正，併此指明。

Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act is promulgated to supplement the explicit requirements for the relevant matters governed by Article 66 of the Pharmaceutical Affairs Act, and complies with the legislative intent without exceeding the scope of authorization granted under Article 66 of the Pharmaceutical Affairs Act. The regulation neither burdens any freedoms or rights of the people with additional restrictions not imposed by law nor is contrary to the Constitution. Because the purpose of advertising is to provide information and the society may have a strong interest in the free flow of commercial information, therefore, as to the items, content and scope of drug commercials submitted for approval, the provincial (municipal) health authority should consider the need for prior censorship and modify the requirements accordingly.

Justice Geng Wu filed dissenting opinion in part, in which Justice Jyun-Hsiung Su and Justice Chung-Mo Cheng joined.

Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋吳大法官庚、蘇大法官俊雄與城大法官仲模共同提出部分不同意見書；孫大法官森焱提出部分不同意見書。

J. Y. Interpretation No.415（November 8, 1996）*

ISSUE: Do the Enforcement Rules of the Income Tax Act restricting the tax exemptions for supporting relatives/family members to those who are listed under the same household registry exceed the scope authorized by the said Act, thus contravening the principle of taxation by law as provided in Article 19 of the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 1114, Subparagraph 4, and 1123, Paragraph 3, of the Civil Code（民法第一千一百十四條第四款、第一千一百二十三條第三項）; Article 4 of the Household Registration Act（戶籍法第四條）; Article 17, Paragraph 1, Subparagraph 1, Item 4 of the Income Tax Act（所得稅法第十七條第一項第一款第四目）; Article 21-2 of the Enforcement Rules of the Income Tax Act（所得稅法施行細則第二十一條之二）.

KEYWORDS:

income tax exemption（所得稅免稅額）, household（家屬）, household registry（戶籍）, living together（共同生活）, legal support obligation（法定扶養義務）, principle of taxation by law（租稅法律主義）.**

* Translated by BAKER & McKENZIE.

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

HOLDING: The purpose of the Income Tax Act provision relating to tax exemptions allowed for an individual's consolidated income tax is to enable the taxpayer to meet his/her legal support obligations, with respect to certain specific relatives or household members, with a tax break. Article 17, Paragraph 1, Subparagraph 1, Item 4, of the same Act stipulates that "the taxpayer, with other relatives or household members, meeting the requirements of Article 1114, Paragraph 4, and Article 1123, Paragraph 3, of the Civil Code, being under twenty years old or sixty years or older without the ability to make a living, and receiving, in fact, support from the taxpayer" may deduct an exemption amount in accordance with the number of people receiving the said support when filing income tax returns. It is a requirement that the taxpayer and persons receiving the support live in the same household. To constitute a household is to live together with the aim of permanently living together. Whether the person receiving support is the taxpayer's head of household or household member, for the purpose of the exemp-

解釋文：所得稅法有關個人綜合所得稅「免稅額」之規定，其目的在以稅捐之優惠使納稅義務人對特定親屬或家屬盡其法定扶養義務。同法第十七條第一項第一款第四目規定：「納稅義務人其他親屬或家屬，合於民法第一千一百十四條第四款及第一千一百二十三條第三項之規定，未滿二十歲或滿六十歲以上無謀生能力，確係受納稅義務人扶養者」，得於申報所得稅時按受扶養之人數減除免稅額，固須以納稅義務人與受扶養人同居一家為要件，惟家者，以永久共同生活之目的而同居為要件，納稅義務人與受扶養人是否為家長家屬，應取決於其有無共同生活之客觀事實，而不應以是否登記同一戶籍為唯一認定標準。所得稅法施行細則第二十一條之二規定：「本法第十七條第一項第一款第四目關於減除扶養親屬免稅額之規定，其為納稅義務人之其他親屬或家屬者，應以與納稅義務人或其配偶同一戶籍，且確係受納稅義務人扶養者為限，其應以與納稅義務人或其配偶「同一戶籍」為要件，限縮母法之適用，有違憲法第十九條租稅法律主義，其與上開解釋意旨不符部分應不予援用。

tion, shall depend on whether they in fact live together. The fact of whether they are registered under the same household in the household registry shall not be the only determinative factor. Article 21-2 of the Enforcement Rules of the Income Tax Act stipulates that for "the requirement of Article 17, Paragraph 1, Subparagraph 1, Item 4, of this Act, relating to the tax exemptions for supporting relatives/family members, the exemption shall be limited to the taxpayer's other relatives and household members who are listed under the same household registry as the taxpayer or his/her spouse and in fact receive support from the taxpayer." As to the requirement of being "listed under the same household registry" as the taxpayer or his/her spouse, it narrows the applicability of the original law and is in violation of the principle of taxation by law of Article 19 of the Constitution. Any part of the regulation that is inconsistent with the rationales of the above holding shall not be applied.

REASONING: Article 19 of the Constitution stipulates that people have

解釋理由書：憲法第十九條規定人民有依法律納稅之義務，係指稅捐

the obligation to pay tax in accordance with the law, which means the tax components, i.e., the taxpaying entity, the object being taxed, the tax base, and the tax rates, shall be expressly specified by law. The authorities in charge, in setting the regulations based on the general authorizations from the law, can only regulate matters relating to the enforcement of the original law and should not separately add or eliminate or create taxpaying obligations and requirements. The purpose of the tax exemption provision for an individual's consolidated income tax in the Income Tax Act is to assist the taxpayer to meet his/her legal support obligation towards certain specific relatives and household members. It is a privilege pertaining to the taxpayer fulfilling such legal support obligation. If the regulation adds or eliminates the exemption requirements without proper legal basis, then it is inconsistent with the principle of taxation by law.

主體、稅捐客體、稅基及稅率等稅捐構成要件，均應以法律明定之。主管機關基於法律概括授權而訂定之施行細則，僅得就實施母法有關之事項予以規範納稅義務及其要件不得另為增減或創設。所得稅法有關個人綜合所得稅「免稅額」之規定，其目的在使納稅義務人對特定親屬或家屬善盡其法定扶養義務，此亦為盡此扶養義務之納稅義務人應享之優惠，若施行細則得任意增減「免稅額」之要件，即與租稅法律主義之意旨不符。

Article 17, Paragraph 1, Subparagraph 1, Item 4, of the same Act stipulates that "the taxpayer with other relatives or

所得稅法第十七條第一項第一款第四目規定：「納稅義務人其他親屬或家屬，合於民法第一千一百十四條第四

household members, meeting the requirements of Article 1114, Paragraph 4, and Article 1123, Paragraph 3, of the Civil Code, being under twenty years old or sixty years or older without the ability to make a living, and receiving, in fact, support from the taxpayer" may deduct an exemption amount in accordance with the number of people receiving the said support when filing income tax returns. This expressly states that the applicability of the exemption requires that the person being supported, whether a relative or household member, has to in fact receive support from the taxpayer and meet the requirement of Article 1114, Paragraph 4, and Article 1123, Paragraph 3, of the Civil Code, i.e., the requirement of being the head of household or a household member. A household, under the substance over form principle of the Civil Code, is determined by the fact of living together with the aim of permanently living together, and not limited to being registered under the same household registry. Even though Article 4 of the Household Registration Act provides that people living under the same roof are deemed as

款及第一千一百二十三條第三項之規定，未滿二十歲或滿六十歲以上無謀生能力，確係受納稅義務人扶養者」，得於申報所得稅時按受扶養之人數減除免稅額，明示此項免稅額之享有，無論受扶養者為其他親屬或家屬，除確係受納稅義務人扶養外，尚須符合民法第一千一百十四條第四款及第一千百二十三條第三項之規定，即以具備家長家屬關係為要件。所謂家，民法上係採實質要件主義，以永久共同生活為目的而同居一家為其認定標準，非必以登記同一戶籍者為限。戶籍法第四條雖規定，凡在一家共同生活者為一戶，惟以永久共同生活為目的之家長家屬，有時未必登記為一戶，如警察人員，其戶籍必須設於服務地區（財政部六十九年四月二日臺財稅第三二六三一號函），即其一例。所得稅法施行細則第二十一條之二規定：「本法第十七條第一項第一款第四目關於減除扶養親屬免稅額之規定，其為納稅義務人之其他親屬或家屬者，應以與納稅義務人或其配偶同一戶籍，且確係受納稅義務人扶養者為限」，其「應以與納稅義務人或其配偶同一戶籍」為唯一之認定標準，使納稅義務人不得舉證證明受扶養人確為與其共同生活之家屬，限縮母法之適用，有違首開憲法第

one registered household, however, at times, head of household and household members living together with the intent to live together permanently may not actually be registered under the same household. For example, a policeman has to register his/her residence at the place of service (Ministry of Finance, April 2, 1980, Interpretative Letter titled Tai-Tsai-Hsu No. 32631). Article 21-2 of the Enforcement Rules of the Income Tax Act stipulates that for "the requirement of Article 17, Paragraph 1, Subparagraph 1, Item 4, of this Act, relating to the tax exemptions for supporting relatives / household members, the exemption shall be limited to the taxpayer's other relatives and household members who are listed under the same household registry as the taxpayer or his/her spouse and in fact receive support from the taxpayer." Its requirement of "listed under the same household registry as the taxpayer or his/her spouse" precludes the taxpayer from proving the person being supported is in fact a household member living together with him/her and narrows the applicability of the original law. It violates

十九條租稅法律主義之意旨，此不符部分應不予援用。

the principle of taxation by law of Article 19 of the Constitution, and the said part in violation shall not be applied.

J. Y. Interpretation No.416（December 6, 1996）*

ISSUE: Does the Supreme Court's precedent which states the details to be followed in appealing against the judgment of the court of second instance in accordance with Article 468 of the Code of Civil Procedure on the ground that the judgment did not apply the law or applied the law wrongly impose additional limitations not being provided for by the said Code, thus contradicting Article 16 of the Constitution which guarantees the people's right of instituting legal proceedings?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 467, 468, 469, 470, 471 and 476 of the Code of Civil Procedure（民事訴訟法第四百六十七條、第四百六十八條、第四百六十九條、第四百七十條、第四百七十一條、第四百七十六條）.

KEYWORDS:

law not applied to or wrongly applied to judgment（判決不適用法規或適用不當）, petition and statement of reasons for appeal（其上訴狀或理由書）, concrete indications of the violation of law（對違背法令有具體之指摘）.**

HOLDING: The Precedent T.S.T. No. 314 (Sup. Ct., 1982) states that

解釋文：最高法院七十一年台上字第三一四號判例所稱：「當事人依

* Translator by John C. Chen.

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

"when appealing against the judgment of the court of the second instance in accordance with Article 468 of the Code of Civil Procedure on the ground that the judgment did not apply the law or applied the law wrongly, the Appellant shall specify concretely and provide the article or content of such law in a petition or statement of reasons for appeal. If it is a legal principle rather than codified laws, the purposes and the points of such principles should be identified. If it is a Judicial Yuan Interpretation or Precedent of the Supreme Court, the number and content of such Interpretation or Precedent shall be indicated. If appealing to the court of the third instance with the reasons provided for in the various items of Article 469 of the Code of Civil Procedure, the Appellant should identify the fact(s) corresponding to the itemized reason(s) in the petition or statement of reasons for appeal. If the petition or statement of reasons for appeal does not conform to the aforesaid methods, such petition or statement shall not be considered to have concretely indicated the violation of law by the judgment of the court of the second

民事訴訟法第四百六十八條規定以第二審判決有不適用法規或適用法規不當為上訴理由時，其上訴狀或理由書應有具體之指摘，並揭示該法規之條項或其內容，若係成文法以外之法則，應揭示該法則之旨趣，倘為司法院解釋或本院之判例，則應揭示該判解之字號或其內容，如依民事訴訟法第四百六十九條所列各款事由提起第三審上訴者，其上訴狀或理由書應揭示合於該條款之事實，上訴狀或理由書如未依此項方法表明者，即難認為已對第二審判決之違背法令有具體之指摘，其上訴自難認為合法。」係基於民事訴訟法第四百七十條第二項、第四百七十六條規定之意旨，就條文之適用，所為文義之闡析及就判決違背法令具體表明方法之說明，並未增加法律所未規定之限制，無礙人民訴訟權之正當行使，與憲法尚無牴觸。

instance, and thus the appeal shall not be deemed lawful." Such Precedent engages in the literal interpretation of the application of articles and explains the methods to present the judgment's violation of law in the light of the meanings of Article 470, Paragraph 2, and Article 476 of the Code of Civil Procedure, without imposing any additional limitation than what the law provides for. Thus, the people's exercise of their rights to litigation is not hindered and such Precedent does not contradict Article 16 of the Constitution.

REASONING: The people's rights to litigation under Article 16 of the Constitution refer to the people's beneficial rights to judicature, where the people have the rights to file lawsuits when their rights are infringed upon and the courts are obligated to provide a lawful trial. Judicial Yuan Interpretation Nos. 154, 160 and 179 have already elucidated this issue. Because it is not provided for in the Constitution as to how such right shall be exercised, the Legislative Branch can make reasonable enactments in consideration of the nature of the lawsuits. Accord-

解釋理由書：按憲法第十六條所謂人民有訴訟之權，乃人民司法上之受益權，指人民於其權利受侵害時，有提起訴訟之權利，法院亦有依法審判之義務而言，迭經本院釋字第一五四號、第一六〇號、第一七九號解釋理由釋明在案。惟此項權利應如何行使，憲法並未設有明文，自得由立法機關衡量訴訟事件之性質，為合理之規定。民事訴訟法第四百六十七條就第三審法院之審判，定為法律審，規定對於第二審判決上訴，非以其違背法令為理由不得為之。同法第四百七十條第一項及第二項復規定提起上訴，應以上訴狀提出於原

ing to Article 467 of the Code of Civil Procedure, the procedure of the court of the third instance shall be the one for legal review and no appeal against the judgment of the court of the second instance shall be filed without asserting its violation of laws as the reason for appeal. Article 470, Paragraphs 1 and 2, of the Code of Civil Procedure further provides that the appeal shall be made by submitting the petition for appeal to the original court of the second instance and such petition shall specify the reason for appeal. Article 471, Paragraph 1, of the Code of Civil Procedure also provides that "the Appellant must, within twenty days from the filing of the appeal, submit a statement of reasons to the original court of the second instance if the reasons for appeal were not provided in the petition for appeal; if the Appellant fails to do so, such appeal shall be dismissed by a ruling of the original court of the second instance without ordering the Appellant to correct such failure." Since the principle of mandatory submission of the statement of reasons is adopted in such provision, the court of the third instance may review the appeal

第二審法院為之，上訴狀內應表明上訴理由。同法第四百七十一條第一項並規定：「上訴狀內未表明上訴理由者，上訴人應於提起上訴後二十日內，提出理由書於原第二審法院；未提出者，毋庸命其補正，由原第二審法院以裁定駁回之」，即採所謂第三審上訴理由書提出強制主義，俾第三審法院得據以審理，並防止當事人之濫行上訴。至上訴理由應如何記載始符上開規定，同法未設有規定，最高法院七十一年台上字第三一四號判例所稱：「當事人依民事訴訟法第四百六十八條規定以第二審判決有不適用法規或適用法規不當為上訴理由時，其上訴狀或理由書應有具體之指摘，並揭示該法規之條項或其內容，若係成文法以外之法則，應揭示該法則之旨趣，倘為司法院解釋或本院之判例，則應揭示該判解之字號或其內容，如依民事訴訟法第四百六十九條所列各款事由提起第三審上訴者，其上訴狀或理由書應揭示合於該條款之事實，上訴狀或理由書如未依此項方法表明者，即難認為已對第二審判決之違背法令有具體之指摘，其上訴自難認為合法。」係為上開法律之適用，所為文義之闡析及就判決違背法令具體表明方法之說明，並未增加法律所未規定之限制，無礙人民訴

based on the asserted grounds, and the abuse of the right to appeal can be prevented. However, this is not provided in the Code of Civil Procedure regarding the lawful elaboration of reasons for appeal. The Precedent T.S.T. No. 314 (Sup. Ct., 1982) states that "when appealing against the judgment of the court of the second instance in accordance with Article 468 of the Code of Civil Procedure on the ground that the judgment did not apply the law or applied the law wrongly, the Appellant shall specify concretely and provide the article or content of such law in a petition or statement of reasons for appeal. If it is a legal principle rather than codified laws, the purposes and the points of such principles should be identified. If it is a Judicial Yuan Interpretation or Precedent of the Supreme Court, the number and content of such Interpretation or Precedent shall be indicated. If appealing to the court of the third instance with the reasons provided for in the various items of Article 469 of the Code of Civil Procedure, the Appellant should identify the fact(s) corresponding to the itemized reason(s) in the petition or statement of reasons for

訟權之正當行使，與憲法尚無牴觸。

appeal. If the petition or statement of reasons for appeal does not conform to the aforesaid methods, such petition or statement shall not be considered to have concretely indicated the violation of law by the judgment of the court of the second instance, and thus the appeal shall not be deemed lawful." Such Precedent engages in the literal interpretation of the application of the said articles and explains the methods to present the judgment's violation of law. No additional limitation than what the law provides for was imposed. Thus, the people's exercise of their rights to litigation is not hindered and such Precedent does not contradict Article 16 of the Constitution.

J. Y. Interpretation No.417（December 6, 1996）*

ISSUE: (1) Does the Act Governing the Punishment for Violation of Road Traffic Regulations, which imposes a fine upon jaywalking, violate the constitutional protection of property rights?

(2) Is the Regulation Governing Road Traffic Safety, which require any pedestrian, under penalty of fine, to cross a traffic lane via a crosswalk, an overhead bridge or underground tunnel regardless of personal disability, bad weather, or natural disaster, constitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 78, Subparagraphs 2 and 3, of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第七十八條第二款及第三款）; Article 134, Subparagraph 1, of the Regulation Governing Road Traffic Safety（道路交通安全規則第一百三十四條第一款）.

KEYWORDS:

pedestrian（行人）, walk across the vehicular traffic lane（穿越車道）, traffic safety lesson（道路交通安全講習）, pedestrian passageway（行人穿越道）, overhead bridge（人行天橋）, underground tunnel（人行地下道）, infeasibility（不可能實行）, exemption（免除）, jaywalking（不守交通規則穿越馬路）.**

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* Translated by Li-Chih Lin, Esq., J.D.

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

HOLDING: Article 78, Subparagraph 3, of the Act Governing the Punishment for Violation of Road Traffic Regulations provides that any pedestrian who crosses a vehicular traffic lane in violation of the traffic regulations will be fined one hundred and twenty silver dollars (NT$ 360), or will be required to take one or two hours of traffic safety instruction. This provision is necessary to maintain the social order and public interest, and is therefore consistent with the Constitution. Promulgated under the authorization of the aforementioned provision, Article 134, Subparagraph 1, of Regulation Governing Road Traffic Safety provides that where a crosswalk, an overhead bridge, or underground tunnel is readily available within 30 meters of distance, any pedestrian who wants to cross the vehicular traffic lane must make use of the crosswalk, overhead bridge, or underground tunnel accordingly. This provision is a necessary supplement to Article 78, Subparagraph 3, of the Act Governing the Punishment for Violation of Road Traffic Regulations, and is therefore consistent with the legislative intent of Article 78,

解釋文：道路交通管理處罰條例第七十八條第三款規定：行人在道路上不依規定，擅自穿越車道者，處一百二十元罰鍰，或施一至二小時之道路交通安全講習，係為維持社會秩序及公共利益所必需，與憲法尚無牴觸。依同條例授權訂定之道路交通安全規則第一百三十四條第一款規定：行人穿越道路設有行人穿越道、人行天橋或人行地下道者，必須經由行人穿越道、人行天橋或人行地下道穿越，不得在其三〇公尺範圍內穿越道路，係就上開處罰之構成要件為必要之補充規定，固符合該條例之立法意旨；惟行人穿越道、人行天橋及人行地下道之設置，應選擇適當之地點，注意設置之必要性及大眾穿越之方便與安全，並考慮殘障人士或其他行動不便者及天候災變等難以使用之因素，參酌同條例第七十八條第二款對有正當理由不能穿越天橋、地下道之行人不予處罰之意旨，檢討修正上開規則。

Subparagraph 3, of said Act. However, the location of the crosswalk, overhead bridge, or underground tunnel should be carefully chosen by considering the necessity of the construction, the convenience and safety of the public who cross the vehicular traffic lane, and other factors such as the infeasibility during bad weather and natural disasters, or the infeasibility for the disabled. The competent authorities shall review the aforementioned provision and revise it with reference to the legislative intent of Article 78, Subparagraph 2, of the Act which provides exemptions for pedestrians who have a valid reason to cross the vehicular traffic lane despite the fact that a crosswalk, an overhead bridge, or underground tunnel is readily available.

REASONING: The Act Governing the Punishment for Violation of Road Traffic Regulations was enacted to be followed by all vehicle operators and pedestrians for the purpose of improving traffic management, maintaining traffic order, and insuring traffic safety. Any vehicle operator or pedestrian who violates

解釋理由書：國家為加強交通管理、維持交通秩序及確保交通安全，乃制定道路交通管理處罰條例，俾車輛及行人共同遵行。如有違反，則予處罰，以維護人車通行之安全，進而保障人民之生命、身體及財產。該條例第七十八條第三款規定：行人在道路上不依規定，擅自穿越車道者，處一百二十元

the provisions of the Act will be disciplined in order to preserve the safety of vehicles and pedestrians, and to protect the lives and property of the people. Article 78, Subparagraph 3, of the Act provides that any pedestrian who crosses the vehicular traffic lane in violation of the traffic regulations will be fined one hundred and twenty silver dollars (NT$ 360), or will be required to take one or two hours of traffic safety instruction. This provision is necessary to maintain the social order and public interest, and is therefore consistent with the Constitution. Promulgated under the authorization of the aforementioned provision, Article 134, Subparagraph 1, of the Regulation Governing Road Traffic Safety provides that where a crosswalk, an overhead bridge, or underground tunnel is readily available within 30 meters of distance, any pedestrian who wants to cross the vehicular traffic lane must make use of the crosswalk, overhead bridge, or underground tunnel accordingly. This provision is a necessary supplement to Article 78, Subparagraph 3, of the Act Governing the Punishment for Violation of Road Traffic

罰鍰，或施一至二小時之道路交通安全講習。其對人民違反行政法上義務之行為予以處罰，係為維持社會秩序及增進公共利益所必需，與憲法第二十三條以法律限制人民自由權利之意旨尚無牴觸。至同條例第七十八條授權訂定之道路交通安全規則第一百三十四條第一款規定：行人穿越道路設有行人穿越道、人行天橋或人行地下道者，必須經由行人穿越道、人行天橋或人行地下道穿越，不得在其三〇公尺範圍內穿越道路，係就上開法條處罰構成要件中「依規定」所為之必要補充，固與該條例之立法意旨相符；惟行人穿越道、人行天橋及人行地下道之設置，應選擇適當之地點，注意設置之必要性及大眾穿越之方便與安全，並考慮殘障人士或其他行動不便者及天候災變等難以使用之因素，參酌同條例第七十八條第二款對有正當理由不能穿越天橋、地下道之行人不予處罰之意旨，檢討修正上開規則。

Regulations, and is therefore consistent with the legislative intent of Article 78, Subparagraph 3, of said Act. However, the location of the crosswalk, overhead bridge, or underground tunnel should be carefully chosen by considering the necessity of the construction, the convenience and safety of the public who cross the vehicular traffic lane, and other factors such as the infeasibility during bad weather and natural disasters, or the infeasibility for the disabled. The competent authorities shall review the aforementioned provision and revise it with reference to the legislative intent of Article 78, Subparagraph 2, of the Act which provides exemptions to pedestrians who have a valid reason to cross the vehicular traffic lane despite the fact that a pedestrian passageway, overhead bridge, or underground tunnel is readily available.

Justice Tieh-Cheng Liu filed dissenting opinion in part.

本號解釋劉大法官鐵錚提出一部不同意見書。

J. Y. Interpretation No.418（December 20, 1996）*

ISSUE: Does Article 87 of the Act Governing the Punishment for Violation of Road Traffic Regulations preventing the offender from appealing the High Court's ruling to the Supreme Court deprive him of his right to institute legal proceeding, thus violating Article 16 of the Constitution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 8 and 87 of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第八條、第八十七條）.

KEYWORDS:

right to bring lawsuits（訴訟權）, judicial relief（司法救濟）, judicial beneficiary right（司法受益權）, due process of law（正當法律程序）, administrative relief（行政救濟）.**

HOLDING: Article 16 of the Constitution guarantees the people the right to bring a lawsuit and the intent is to ensure that the people have the right to initiate lawsuits in accordance with the

解釋文：憲法第十六條保障人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權利。至於訴訟救濟，究應循普通訴訟程序抑依行政訴訟程序為之，則由立法機關依職

* Translated by David T. Liou.

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legal procedures and the right to a fair trial. The issue of whether a relief to a lawsuit should be sought in accordance with the ordinary litigation proceedings or in accordance with the administrative litigations is a matter to be formulated by the legislative authorities taking into account the nature of the lawsuit and the functions of the existing litigation system. Article 87 of the Act Governing the Punishment for Violation of Road Traffic Regulations stipulates that if the offender is dissatisfied with the punishment imposed by the competent authority for traffic violations, the offender may raise an objection to the competent district court, and may appeal the ruling rendered by the district court to the High Court in the event that the offender is dissatisfied with the ruling; however, the offender may not further appeal to the Supreme Court. This procedure not only gives the litigant an opportunity to raise objection and provide evidence, but also is in compliance with due process of law and is therefore not in conflict with the intent of Article 16 of the Constitution ensuring the people's right of instituting legal proceedings.

權衡酌訴訟案件之性質及既有訴訟制度之功能等而為設計。道路交通管理處罰條例第八十七條規定，受處分人因交通違規事件，不服主管機關所為之處罰，得向管轄地方法院聲明異議；不服地方法院對聲明異議所為之裁定，得為抗告，但不得再抗告。此項程序，既已給予當事人申辯及提出證據之機會，符合正當法律程序，與憲法第十六條保障人民訴訟權之意旨尚無牴觸。

REASONING: Article 16 of the Constitution refers to the right of the people to request for relief from a court of law in the event that their rights are harmed and to the court's obligation to try the case in accordance with the law. This judicial beneficiary right not only, as a matter of formality, protects the right of the people to assert their rights in a court of law, but also, as a practical matter, ensures that the individual's rights are indeed being effectively protected. The methods of judicial relief include having an ordinary court of law render judgment on civil matters, criminal matters or administrative disputes, or, in addition to the ordinary courts of law, setting up a separate administrative court to deal with administrative disputes. Irrespective of which method is being adopted, their rights do not vary in that the people have the right to request for relief from a court of law in the event that their rights are harmed by reason of unlawful administrative acts. With respect to the allocation by the legislative authorities of administrative disputes of a special nature to which type of court for determination, and the

解釋理由書：憲法第十六條保障人民訴訟權，係指人民於其權利遭受侵害時，有請求法院救濟之權利，法院亦有依法審判之義務而言。此種司法上受益權，不僅形式上應保障個人得向法院主張其權利，且實質上亦須使個人之權利獲得確實有效之保護。司法救濟之方式，有不論民事、刑事或行政訴訟之裁判，均由普通法院審理；有於普通法院外，另設行政法院審理行政爭訟事件，我國即從後者。然無論採何種方式，人民於其權利因違法行政處分而遭受侵害時，得向法院請求救濟，則無不同。至立法機關將性質特殊之行政爭訟事件劃歸何種法院審理、適用何種司法程序，則屬立法者之權限，應由立法者衡酌權利之具體內涵、訴訟案件之性質及既有訴訟制度之功能等因素，以法律妥為合理之規定。

applicable judicial procedures, such matters fall within the discretion of the legislators and should be determined by the legislators taking into account factors such as the substantive content of the right in question, the nature of the dispute and the function of the existing litigation system, and enact reasonable rules accordingly.

The types of punishment enumerated in the Act Governing the Punishment for Violation of Road Traffic Regulations include fines, suspension of driver's license and confiscation of license plates. These are administrative penalties imposed by the administrative authorities for behaviors that violate traffic regulations. Article 87 of the Act Governing the Punishment for Violation of Road Traffic Regulations provides that "where the offender is not satisfied with the punishment imposed by the competent authorities in accordance with Article 8, the offender may, within fifteen days from the day next to the day of receipt of the determination, raise his/her objections to the competent district court;" "a court may render a rul-

道路交通管理處罰條例中所規定之處罰計有罰鍰、吊扣駕駛執照及汽車牌照等，均係行政機關對違反秩序行為之裁罰性行政處分。道路交通管理處罰條例第八十七條規定：「受處分人，不服第八條主管機關所為之處罰，得於接到裁決之翌日起十五日內，向管轄地方法院聲明異議」；「法院受理前項異議，以裁定為之」；「不服第二項之裁定，得為抗告。但不得再抗告」。是受處分人因交通事件對行政機關處罰而不服者，應由普通法院之交通法庭審理，而非如一般行政爭訟事件循訴願、再訴願及行政訴訟程序，請求救濟。此係立法機關基於行政處分而受影響之權益性質、事件發生之頻率及其終局裁判之急迫性以及受理爭訟案件機關之負荷能力等因素之考量，進而兼顧案件之特性及

ing when dealing with the aforesaid objection;" and "in the event that the offender is not satisfied with the ruling rendered in accordance with paragraph 2, the offender may appeal, however, the offender may not appeal against the ruling on appeal." Therefore, the offender, who does not accept the punishment imposed by the administrative authorities for traffic violations, should be tried by the traffic court of an ordinary court of law and should not request for relief in the same way as the ordinary administrative disputes which follow the procedure of administrative appeal, re-appeal and administrative litigation. Such is formulated by the legislative authorities taking into account factors such as the nature of the right being impacted by the administrative punishment, the frequency of the events occurring, the urgency for final and binding judgments, and the capacity of the authorities dealing with the dispute, and also having regard to the characteristics of the dispute and the functions of the existing litigation system. The aforesaid legal provision not only provides the litigant the opportunity to raise objections and to offer evidence, but

既有訴訟制度之功能而為設計。上開法條，既給予當事人申辯及提出證據之機會，並由憲法第八十條所規定之法官斟酌事證而為公平之裁判，顯已符合正當法律程序，依本理由書首段所揭示之法理，與憲法第十六條保障人民訴訟權之意旨尚無牴觸。

also provides a fair trial stipulated in Article 80 of the Constitution which requires judges to take into account the evidence and render fair judgment for the dispute in question accordingly. This is evidently in compliance with the due process of law. As is disclosed in the jurisprudence shown in the first paragraph of this reasoning, it is not in conflict with the intent of Article 16 of the Constitution ensuring the people's right of instituting legal proceedings.

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。

J. Y. Interpretation No. 419（December 31, 1996）*

ISSUE: (1) May Vice President concurrently hold the office of Premier of the Executive Yuan? Is this a political question that bars the judicial branch from rendering an Interpretation?

(2) Are the Premier and the entire Cabinet constitutionally obligated to resign on the occasion of each new president's inauguration? If so, how should such resignations be handled?

(3) Does the Legislative Yuan have the authority to pass a resolution requesting the President to take certain actions not otherwise provided by the Constitution?

RELEVANT LAWS:

Articles 35-44, 49- 51, 53, 55, 57, 62, 63, 75, 103-105, 111 and 174 of the Constitution（憲法第三十五條至第四十四條、第四十九條至五十一條、第五十三條、第五十五條、第五十七條、第六十二條、第六十三條、第七十五條、第一百零三至第一百零五條、第一百十一條及第一百七十四條）; Article 2, Paragraphs 1-4, 7, 8 and Article 6, Paragraphs 3, 5 of Amendments to the Constitution（憲法增修條文第二條第一項至第四項、第七項、第八項、第六條第三項、第五項）; J. Y. Interpretations Nos. 1, 15, 17, 20, 30, 74, 75, 207, 261, 325, 328, 342 and 387（司法院釋字第一號、第一五號、第

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* Translated by Professor Andy Y. Sun, Except as indicated otherwise, all notes are added by the translator.

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一七號、第二〇號、第三〇號、第七四號、第七五號、第二〇七號、第二六一號、第三二五號、第三二八號、第三四二號、第三八七號解釋）; Articles 3 and 4 of the Organic Act of the National Security Council（國家安全會議組織法第三條、第四條）.

KEYWORDS:

cabinet（內閣）, check and balance of powers（權力制衡原則）, customary constitution（憲法慣例）, Five Power Division（五權分立）, general resignation（總辭）, Legislative Yuan（立法院）, political question（政治問題）, Premier（行政院院長）, re-nomination（再提名）, Vice President（副總統）.**

HOLDING: 1. The Constitution does not expressly specify whether the Vice President may concurrently hold the office of Premier of the Executive Yuan. While the nature of the duties of the two offices is not apparently incompatible, in case the office of the President should become vacant or the President is incapable of carrying out his/her duties, the situation [of the same individual holding two offices] will affect the very design of power acting or succession under the Constitution, hence it will not be com-

解釋文：一、副總統得否兼任行政院院長憲法並無明文規定，副總統與行政院院長二者職務性質亦非顯不相容，惟此項兼任如遇總統缺位或不能視事時，將影響憲法所規定繼任或代行職權之設計，與憲法設置副總統及行政院院長職位分由不同之人擔任之本旨未盡相符。引發本件解釋之事實，應依上開解釋意旨為適當之處理。

pletely in conformity with the Constitution's objective of having separate individuals assume the duties of the offices of Vice President and Premier, respectively. The facts that triggered the present Interpretation should be properly disposed of in accordance with this ruling.

2.That the Premier tenders the general resignation [of the entire Cabinet] on the occasion of the new President's inauguration is a matter of courtesy in deference to the nation's leader, not an obligation under the Constitution. [Therefore,] how such a resignation not otherwise obligated under the Constitution should be handled is a matter of governance and falls within the presidential discretion, not subject to constitutionality review by this Yuan.

二、行政院院長於新任總統就職時提出總辭，係基於尊重國家元首所為之禮貌性辭職，並非其憲法上之義務。對於行政院院長非憲法上義務之辭職應如何處理，乃總統之裁量權限，為學理上所稱統治行為之一種，非本院應作合憲性審查之事項。

3. In accordance with the Constitution, the Executive Yuan is responsible to the Legislative Yuan. Except as otherwise stipulated by the Constitution, the Legislative Yuan does not have the authority to pass a resolution requesting the President to undertake or not to undertake a certain

三、依憲法之規定，向立法院負責者為行政院，立法院除憲法所規定之事項外，並無決議要求總統為一定行為或不為一定行為之權限。故立法院於中華民國八十五年六月十一日所為「咨請總統儘速重新提名行政院院長，並咨請立法院同意」之決議，逾越憲法所定立

act. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination to the Legislative Yuan's confirmation as soon as possible" exceeded the constitutional authority of the Legislative Yuan and shall be considered as advisory [opinion only] that carries no constitutional binding power over the President.

法院之職權，僅屬建議性質，對總統並無憲法上之拘束力。

REASONING: This Interpretation results from four respective petitions: (1) a petition filed by Mr. Hau Lung-bin along with 81 other members of the Legislative Yuan on the constitutional question of whether the Vice President may concurrently hold the office of Premier of the Executive Yuan; (2) a petition filed by Mr. Chang Chun-hsiung along with 56 other members of the Legislative Yuan regarding the question of whether the fact that Vice President Lien Chan also serves as Premier of the Executive Yuan violates, among other things, Article 49 of the Constitution; (3) a petition filed by Mr. Fong Ting-kuo along with 61 other

解釋理由書：本件係因：一、立法委員郝龍斌等八十二人為副總統得否兼任行政院院長，適用憲法時產生疑義，聲請解釋。二、立法委員張俊雄等五十七人為連戰副總統兼任行政院院長，有牴觸憲法第四十九條等條文之疑義，聲請解釋。三、立法委員馮定國等六十二人為新任總統可否就行政院院長率內閣總辭時，對行政院院長批示慰留或退回，而無須再提名並咨請立法院同意，又副總統得否兼任行政院院長，於適用憲法時均產生疑義，聲請解釋。四、立法委員饒穎奇等八十人為總統改選，行政院院長須否辭職並由總統重新提名行政院院長咨請立法院同意，副總統得否兼任行政院院長，及立法院八十

members of the Legislative Yuan regarding the questions of whether a newly inaugurated President may decline the Cabinet's general resignation led by the Premier and simply retain the Premier [to continue his services] without the need for renomination and confirmation by the Legislative Yuan; furthermore, whether the Vice President may simultaneously hold the office of Premier of the Executive Yuan; and (4) a petition filed by Mr. Yao Ying-chi along with 79 other members of the Legislative Yuan regarding the questions of whether the [same] Premier must resign, be renominated by the President and approved by the Legislative Yuan in light of the presidential election, whether the Vice President may also hold the office of Premier of the Executive Yuan, whether the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination for the Legislative Yuan's confirmation as soon as possible" exceeds the constitutional authority bestowed on the Legislative Yuan and whether such a resolution has

五年六月十一日審查通過「咨請總統儘速重新提名行政院院長，並咨請立法院同意」決議案，是否逾越憲法賦與立法院之職權，以及對總統有無拘束力等，產生疑義，聲請解釋。以上四案經大法官議決應予受理及將上開各案合併審理，並依司法院大法官審理案件法第十三條第一項規定通知聲請人代表及訴訟代理人暨關係機關行政院指派代表及訴訟代理人等，於八十五年十月十六日及十一月一日到場，在憲法法庭行言詞辯論，合先說明。又言詞辯論終結後，聲請人立法委員饒穎奇於十一月二十六日具狀聲請再開言詞辯論，經大法官審酌審理過程所得資料，已足供判斷，認無再開言詞辯論之必要，併此指明。

legal binding force over the President. The Grand Justices granted these four petitions and resolved to consolidate them into a single case for review. It must be first pointed out that, in accordance with Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act, notices were served to the legal representatives and counsels of the petitioners, as well as to the designated representative and counsels to the related agency, the Executive Yuan. Oral argument was conducted at the Constitutional Court on October 16 and November 1, 1996. After the conclusion of the oral argument, petitioner Mr. Yao Ying-chi moved for another oral argument on November 26. Having reviewed the information collected, the Grand Justices considered the materials sufficient to warrant an Interpretation and ruled that no further oral argument was necessary.

Arguments contained from the first to the third petitions may be summarized as follows: (1) Whether the Vice President may also serve as Premier is not a political question. While many constitutional ques-

本件前述第一案至第三案聲請人之主張略稱：一、副總統可否兼任行政院院長非屬政治問題：蓋所有憲法上之爭議，多具政治性，若因此而視之為政治問題不予解釋，則憲法上爭議將難於

tions do inherently carry a certain level of controversy that is political in nature, no constitutional disputes may be resolved judicially because they are all being treated as political questions. Given the fact that the Grand Justices have previously rendered several Interpretations on political issues (such as J. Y. Interpretations Nos. 261, 387, etc.), provided that the Judicial Yuan has also in its history issued more than a dozen statutory interpretations on the issue of holding more than one public office simultaneously, wouldn't it be self-contradictory if the issue of whether the Vice President may simultaneously hold the office of Premier of the Executive Yuan were to be considered a political question? Moreover, the doctrine of political question is a theory that has been developed incrementally through individual cases or precedents by American courts. Yet its contents are nevertheless vague and constantly subject to challenges by scholars and, thus, should not be hastily adopted. Moreover, given the fact that our nation has adopted the system of advisory interpretation for constitutional questions, the Grand Justices are obligated to render

經由司法解決，以往大法官對政治性問題已作成多則解釋（如釋字第二六一號、第三八七號等）。尤其司法院歷年以來就兼職案件所著解釋多達十餘號，若將副總統兼任行政院院長認作政治問題，豈非自相矛盾？況政治問題乃美國法院經個案逐漸發展而成之理論，其內涵既不明確，又受學者質疑，實不宜遽予引用。又我國係採憲法疑義解釋制度，只要合於聲請法定要件，大法官即有解釋義務。二、副總統與行政院院長之職務不相容，不能兼任：衡諸憲政理論，總統代表國家，統而不治，行政院院長領導政府，治而不統，我國憲法即依此項理論設計，並屬於內閣制之一種，依憲法第三十七條、第五十七條、增修條文第二條第四項等相關規定，總統與行政院院長間有制衡關係，故總統絕不能兼任行政院院長。副總統依增修條文第二條第一項之規定，競選時與總統候選人聯名登記，在選票上同列一組圈選；副總統出缺時，依同條第七項亦由總統提名並召集國民大會補選，故副總統與總統理念相同，關係密切並具有一體性，總統既不能兼任行政院院長，副總統自亦不能為之。依憲法第五十三條行政院為國家最高行政機關，行政院院長及其領導之內閣須對立法院負責，

their interpretation to a given question as long as the petitions meet certain legal standards. (2) The office of the Vice President and the Premier are incompatible in nature and cannot be concurrently held [by the same individual]. Having surveyed various constitutional theories, we find [it is clear] that the President represents the country that symbolizes the rule but does not govern; the Premier leads the government that governs but does not symbolize the rule, and this principle is a kind of cabinet rule upon which our Constitution is designed. In accordance with Articles 37 and 57 of the Constitution and Article 2, Paragraph 4, of the Articles in Addition and Amendment to the Constitution (hereinafter "Constitutional Amendments"), there is a check-and-balance relationship between the President and the Premier. Therefore, the President may not concurrently hold the office of the Premier. In accordance with Article 2, Paragraph 4, of the Constitutional Amendments, the vice presidential candidate shall register together with the presidential candidate in a given election campaign and they shall be placed to-

副總統固屬備位性質，憲法上亦無明定之職權，但副總統有輔弼總統之責，乃總統之僚屬或副手，平日承總統之命行事，副總統實具有潛在之職權，一旦由副總統兼任行政院院長，則閣揆變成總統之幕僚長，而行政權盡入總統囊中，憲法設計之制衡機制破壞殆盡，覆議核可權及副署制度均失其意義，且事實上，兼任損及公益並有害於人民之信賴，時間之分配亦不容一人兼任兩項繁重職務。另由行政法學之觀點，縱認副總統非總統之部屬，但基於憲法機關功能維護之理論，副總統既有襄助總統之職責，仍不應兼任院長職務。又憲法機關以不能互相兼任為原則，若有兼任情事，必憲法有明文可據（如美國副總統之兼任參議院議長）。我國憲法第四十九條及增修條文第二條第八項分別規定：總統缺位時，由副總統繼任，至總統任期屆滿為止，總統、副總統均缺位時，由行政院院長代行其職權；總統因故不能視事時，由副總統代行其職權，總統、副總統均不能視事時，由行政院院長代行其職權。副總統與行政院院長分別設置，乃憲法保障總統職位之繼任，所作雙重保險機制，由副總統兼任行政院院長，不僅使候補人數減少，且一旦總統缺位，勢將出現一人同時擔任

gether as a team on the voting ballot. In accordance with the same Article, Paragraph 7, in case the office of the Vice President should become vacant, the President shall nominate and call forth the National Assembly to elect [a candidate]. Therefore, the President and Vice President shall share the same philosophy, maintain a close relationship and work as an integral unit. Since the President may not concurrently be the Premier, it follows that the Vice President can not concurrently serve as Premier either. Under Article 53 of the Constitution, the Executive Yuan is the highest organ [or body] of the nation's executive branch; hence, the Premier and the Cabinet under his/her leadership is subject to oversight by the Legislative Yuan. While the Vice President by nature is to serve as a contingency to the President, the Constitution does not clearly delineate the powers and duties bestowed to him, yet being the President's counselor who carries out the orders of the President on a daily basis, the Vice President does in fact have the duty to assist and counsel the President. Hence, the Vice President does possess certain

三項職務之「三位一體」局面，自與憲法本旨相違。若非總統缺位，而係不能視事，則「三位一體」固依舊不能避免，並且產生究竟以副總統抑行政院院長身分代行，以及有無憲法第五十一條三個月期限適用之難題，而無從解決。復依照憲法增修條文，副總統之彈劾適用第六條第五項之規定，行政院院長則與一般公務人員之彈劾相同，依同條第三項處理，二者程序及效果完全不同，副總統兼任行政院院長而有違法失職情事時，監察院如何彈劾將無所適從。設若行政院院長總揆庶政，或因施政疏失而遭監察院糾彈，甚至去職，則是否仍適合擔任副總統，亦生質疑。又副總統須對國民大會負責，一旦兼任須向立法院負責之行政院院長，倘立法院與國民大會意見不同時，易形成衝突局面。再者，在三權分立或五權分立之外，尚有元首權，係立於行政、立法及司法權等之上，以超然中立之態度，由總統、副總統協調於五院之間，憲法第四十四條之規定即寓有此一意旨，副總統兼任行政院院長，則本身既為爭執之一造，自無從作超然中立之協調。最後，依司法院歷來解釋，關於兼職之禁止與否，皆視職務性質是否相容或有無利益衝突為斷，由以上所述足認副總統兼任行政院

latent powers and duties to discharge. If the Vice President were to become concurrently the Premier, the chief of the Cabinet would become the chief of staff to the President, who then would possess the entire administrative authority, thereby entirely destroying the check-and-balance mechanism designed under the Constitution, rendering [the Premier's] concurring and countersignature power meaningless.[1] In fact, holding two offices not only impinges upon the public interest but also jeopardizes the public trust. The required time commitment further precludes one individual from undertaking two positions since each carries a heavy workload. Furthermore, from the view

院長皆與容許兼職原則有違，乃憲法所不許。三、副總統兼任行政院院長不構成憲政慣例：按憲法慣例或憲政上之習慣法，其成立應有反覆發生之先例，並對一般人產生法之確信，始足當之。副總統兼任行政院院長以往雖有兩例，但均發生於動員戡亂及戒嚴時期，並非常態，且有違憲之疑義，自不能視為憲政慣例或習慣法。四、新任總統對行政院院長率閣員總辭時，不應批示慰留或退回，必須重新提名咨請立法院同意：在五權憲法架構下，總統與行政院院長間並無從屬關係，故行政院院長之辭職並無長官可以批示。總統對行政院院長之免職令僅形式上而非實質上權力，行政院院長於新總統選出後辭職，總統即應提名新院長人選咨請立法院同意。原立

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1 Article 37 of the Constitution stipulates: "The President shall, in accordance with the law, promulgate laws and issue orders [or ordinances] in accordance with the countersignature of the President of the Executive Yuan (hereinafter referred as "Premier") or with the countersignatures of both the Premier and the Ministers or Chairmen of Commissions concerned. "This concurring or countersignature power was later curtailed by Article 2, Paragraph 2 of the Constitution Amendments: "Presidential orders to appoint or remove from office the Premier of the Executive Yuan or officials appointed with the confirmation of the Legislative in accordance with the Constitution, and to dissolve the Legislative Yuan, are not required to counter-sign by the Premier. The provision of Article 37 of the Constitution is not applicable in this regard." The purpose of this amendment was to avoid a potential constitution crisis in which a stalemate occur between the President and Premier if and when the President wants to remove or dismiss a Premier or minister but the latter parties refuse to oblige. See also Article 58, Paragraph 2 of the Constitution stipulating the powers reserve to the Executive Yuan.

point of administrative law, even though the Vice President may not be considered as a subordinate to the President, based on the theory of upholding the integrity of each constitutional body, the Vice President should not concurrently be the Premier since he/she already has the duty to counsel the President. In addition, it should be a matter of principle that no two constitutionally created offices may be occupied by the same individual and any exception must be expressly stipulated by the Constitution (as under the U.S. Constitution where the Vice President also serves as President of the Senate). Article 49 of the Constitution and Article 2, Paragraph 8, of the Constitutional Amendments respectively provide: "The Vice President shall succeed in case the office of the President is vacant until the expiration of the original presidential term, in case both the offices of the President and Vice President become vacant, the Premier shall serve as the Acting President [until a new president is elected];in case the President is incapable of carrying out his/her duties, the Vice President shall act on behalf of the President, in case both

法院同意之院長，已具副總統身分，客體不同，不能以已經立法院同意而延續任職至新總統就任後。綜上所述，副總統兼任行政院院長係屬違憲行為，應由司法院解釋為不得兼任，其已兼任者，應自司法院解釋公布之次日起，於本職與兼職中擇一辭職，未選擇者，視為辭卸本職等語。

the President and Vice President are incapable of discharging their duties, the Premier shall be the Acting President." That the Constitution respectively institutes the offices of the Vice President and the Premier is a double insurance mechanism designed to safeguard [a smooth] succession of the presidency. If the Vice President were also the Premier, it would not only reduce the number of [possible] successors, but also create a "trinity" situation where a single individual would simultaneously occupy three offices should the office of President become vacant. This naturally would contradict the fundamental principles of the Constitution. If the office of the President is not vacant but the President is incapable of discharging his/her duties, while this "trinity" situation is nevertheless inevitable, it further creates a difficult and [perhaps] irresolvable issue of whether this successor should assume acting status either as Vice President or Premier, and whether the three-month interim term under Article 51 of the Constitution is applicable.[2] [By

[2] Article 51 of the Constitution provides that the term by which the Premier serves as Acting President shall not exceed three months.

the same token,] in accordance with the Constitutional Amendments, Article 6, Paragraph 5, stipulates the impeachment of the Vice President, whereas the impeachment of the Premier applies the [general] rules governing the impeachment of government employees and the disposition thereof in accordance with the same Article, Paragraph 3, with two distinctively different proceedings and results.[3] Thus, there would be no applicable rules on how the Control Yuan may impeach the Vice President if he/she should also be the Premier while committing impeachable offenses. Conversely, as the

[3] Note that this Article has since been amended and revised, but the rule and spirit of differentiating presidential and vice presidential impeachment from other types of impeachments (including that of the Premier) remains the same. Before July 21, 1997, the impeachment power of all public officials resides exclusively in the Control Yuan albeit presidential and vice presidential impeachments are subject to different proceedings. As of that date (when the forth Constitution Amendments went into effect), however, the power to impeach the President and Vice President was transferred to and now lies in the hands of the Legislative Yuan. See Article 4, Paragraph 7 of the Constitution Amendments (as of April 25, 2000): "Notwithstanding Articles 90, 100 of the Constitution and Article 7, Paragraph 1 of the Constitution Amendments, the Legislative Yuan's impeachment of the President or the Vice President shall be moved forth by more than one-half, and passed by more than two-thirds of the total members of the Legislative Yuan, before the [Bill of] Impeachment may be submitted to the National Assembly." The Control Yuan, on the other hand, retains power over all other impeachment matters. See Article 7, Paragraph 3 of the Constitution Amendments: "Notwithstanding the restrictions imposed by Article 98 of the Constitution, the Control Yuan's impeachment proceeding against a public official at the central or local government as well as personnel at the Judicial or Examination Yuan shall not be initiated except by the submission of no less than two Ombudsmen, and be reviewed and resolved by no less than nine Ombudsmen."

chief executive of the entire government, if and when the Premier is sanctioned by the Control Yuan due to negligence in discharging his/her duties, or even resigns or is removed from his/her post, it is also questionable whether he/she is still fit for the position of Vice President. Moreover, as the Vice President reports to the National Assembly, once he/she takes the Premier position, he/she is now also required to report to the Legislative Yuan, and thus a conflicting situation would be created if and when the Legislative Yuan and the National Assembly disagree. Furthermore, in addition to the checks and balances among the three or five branches, there is also the presidential power that is over the executive, legislative and judicial power and so forth so that the President and Vice President may be in agreement and coordinate among the five branches with objectivity and neutrality. This [spirit and design] is incorporated into Article 44 of the Constitution.[4] That

[4] Article 44 of the Constitution states: "In case of disputes between or among different Yuans, except otherwise provided by this Constitution, the President may call forth a conference within which presidents of each respective Yuan shall meet to resolve their disputes." Technically the Constitution authorizes the President to step in and provide Good Offices in resolving a dispute. Whether or not this is a presidential "power" that sits above the checks and balances of different branches, as petitioners argued, is questionable. Also, only the President is given this authority, not the Vice President.

the Vice President concurrently serves as the Premier results in him/her being a [potential] party involved in the dispute, thereby not being able to coordinate that very dispute objectively and neutrally. Finally, based on a series of this Yuan's previous Interpretations, whether occupying two offices should be permitted or prohibited hinges upon whether the nature and scope of their respective duties are compatible or involve any conflicts of interest. The aforementioned [arguments] are sufficient to determine that allowing the Vice President to serve concurrently as Premier violates the conflict of interest rules and is prohibited by the Constitution. (3) There is no customary rule of the Constitution for the Vice President to concurrently be the Premier: Before a [given practice or case] is to acquire the effect of being a constitutional precedent or customary rule of the Constitution, it must be a precedent that is subject to the same recurrence and must create a firm belief among the general populace. Although there were two instances where the Vice President concurrently served as the Premier, both occurred during the

Period of National Mobilization for the Suppression of the Communist Rebellion and the Period of Martial Law and are considered extraordinary with questionable constitutionality. Therefore, they cannot [in any way] be considered constitutional precedents or customary rule. (4) The new President should not just retain or return the general resignation by the Premier along with the entire Cabinet, but must renominate [them] and seek confirmation by the Legislative Yuan. Under the constitutional framework of the Five Powers Division, there is no subordinate relationship between the President and the Premier. It follows that there is no superior officer available to approve the resignation of the Premier. The Presidential Order for the Premier's Discharge of Duties is only a pro forma matter that carries no substantive powers. When the Premier tenders his or her resignation after the election of a new President, the President must then immediately nominate a new candidate for the Premier position and submit that nomination to the Legislative Yuan for confirmation. While the previous Premier was indeed approved by the

Legislative Yuan, he/she is now in a different capacity as the Vice President and should not use [that previous confirmation] as a justification to continue serving until after the inauguration of the new President. In sum, it is an act that violates the Constitution for the Vice President to serve concurrently as the Premier. Wherefore, [the petitioners plead that] the Judicial Yuan should insert in its Interpretation the language that [the Constitution] does not allow simultaneous and concurrent occupation of both positions and for those who have already done so, they must resign from either one of the positions as of the next day after the issuance of the Interpretation. If and when no choice is made, [under the Constitution] the resignation of the Premiership should be considered effective.

Arguments contained in the aforementioned fourth petition may be summarized as follows: (1) The Legislative Yuan's resolution of June 11, 1996, requesting the President to re-nominate the candidate for the Premier of the Executive Yuan and to submit said re-nomination for

前述第四案聲請人及關係機關行政院主張略稱：一、立法院於八十五年六月十一日通過咨請總統儘速重新提名行政院院長，並咨請立法院同意決議案，逾越權限對總統不具拘束力：憲法對行政院院長並無任期之設，只規定由總統提名，立法院同意任命，依司法院

for the Legislative Yuan's confirmation as soon as possible exceeded its [constitutional] authority and had no binding force over the President. The Constitution sets no provision on the term of the Premier of the Executive Yuan but only provides that he/she is to be nominated by the President and approved by the Legislative Yuan. In accordance with Judicial Yuan Interpretation No.387, the Premier should resign before the first session of the newly elected members of the Legislative Yuan. The incumbent Premier, Mr. Lien Chan, had already tendered the general resignation on January 25, 1996, was [then] nominated by the President and approved by the Legislative Yuan to begin his second tenure as the Premier. This is in conformity with the Constitution. Hence, before the Legislative Yuan is re-elected, the President does not have any obligation to renominate nor is there any need for the Legislative Yuan to reapprove the appointment. Furthermore, in accordance with Article 57 of the Constitution, it is the Premier who is responsible to the Legislative Yuan, not the President; the Legislative Yuan cannot supervise the President.

釋字第三八七號解釋，立法委員任期屆滿改選後第一次集會前，行政院院長應行辭職，現任行政院連院長已於八十五年一月二十五日提出總辭，並經總統提名，獲立法院同意，重新出任行政院院長，符合憲政體制。在立法院未改選前，總統自無再提名之義務，更不生又咨請同意之問題。況依憲法第五十七條之規定，對立法院負責者為行政院而非總統，立法院不能越權監督總統。又依憲法相關規定，立法院尚無以決議方式，要求總統為一定行為之權限。憲法第六十三條雖規定立法院有議決法律案、預算案、戒嚴案、大赦案、宣戰案、媾和案、條約案及國家其他重要事項之權，惟立法院前述決議既非此所謂國家重要事項，又非以三讀程序通過之法律案，不具拘束力，應無疑義。二、副總統兼任行政院院長乃高度政治性之問題：政治問題或統治行為應由憲法所設計之政治部門即政府與國會自行解決，司法機關不宜介入，乃各國之通例，司法院釋字第三二八號解釋亦將政治問題排除於司法審查之外。惟司法院大法官之解釋具有定分止爭之功能，無論作成解釋或認為屬於政治問題不加解釋，仍屬司法裁量事項，本件關係機關皆予以尊重。三、副總統兼任行政院院

dent without exceeding its power. Also, under various provisions of the Constitution, there is no power granted to the Legislative Yuan to require the President to conduct a certain act by the passage of a resolution. While Article 63 of the Constitution authorizes the Legislative Yuan with the power to decide by resolution upon statutory and budgetary bills, bills on martial law, amnesty, declaration of war, conclusion of peace or treaties and other important affairs of the State, it is unquestionable that the aforementioned resolution does not have any binding effect since it constitutes neither other important affairs of the State nor bills of act that require the process of Three Readings. (2) That the Vice President concurrently serves as the Premier is a highly political question. It is a common practice among all nations that political questions or acts of governing should be resolved between the political departments themselves, i.e., the executive and parliament, under the architecture of the Constitution, and it is inappropriate for the judicial branch to intervene. The Judicial Yuan Interpretation No.328 also excludes po-

長現行憲法並未禁止，二者職務並具有相容性：自民國二十五年國民政府公布之「五五憲草」，經政治協商會議以迄制憲國民大會，所討論者為總統與行政院院長兩職位之互動，均未涉及副總統，蓋副總統僅係備位性質，兼任行政院院長，從制憲過程而言，並無禁止之意。查大法官歷來對憲法或法律上職務得否兼任之解釋，主要基於職務性質及功能是否相容或有無利益衝突，就此項標準而言，副總統純係備位，平日並無具體之法定職權，故不發生與行政院院長職務性質功能不相容或利益衝突之情形。按我國憲政體制非純粹內閣制，行政院院長之副署權與內閣制國家閣揆副署虛位元首公布法令者不同，我國憲法上真正之制衡機制，乃在於行政院對立法院之關係，而由副總統兼任行政院院長亦不致破壞憲法制衡機制之設計。又依憲法增修條文第二條第一項及總統副總統選舉罷免法之規定，總統副總統同為人民選舉產生，既非由總統任命，亦不得由總統免職。總統與副總統之一體性僅係競選夥伴之「一體性」，並無職權分享之「一體性」，總統與副總統兩者之間並不具有上命下從或指揮監督之長官與部屬關係，憲法有關總統刑事豁免權之規定於副總統並不適用；憲法及

litical questions from the jurisdiction of judicial review. Yet [recognizing that] it is the very function of the Interpretations by the Grand Justices of the Judicial Yuan to settle a given controversy or dispute, it is nevertheless a matter of judicial discretion, and the related [executive] agencies must give their due respect [to the exercise of such discretion], whether an Interpretation shall be rendered or not due to its [nature] being a political question. (3) The current Constitution does not prohibit the Vice President from serving concurrently as Premier of the Executive Yuan, and the duties of the two offices are compatible: From the "May 5th Constitution Draft" issued by the Nationalist Government in 1936 through the Political Consultative Conference and the Constitution Conference of the National Assembly, the discussions [always revolved around] the interactions between the President and the Premier, and never touched upon the position of the Vice President, since it is only a standby position and as far as the legislative history of the Constitution is concerned, there was never a prohibition against [the Vice President] serving con-

法律（中華民國總統府組織法）均未提及副總統行使職權之事項，亦無如一般行政機關副首長輔助首長處理事務之規定，是以副總統兼任行政院院長即非兼具「聽命者」與「制衡者」之角色，故不可能造成憲政上角色衝突問題。至反對兼任者所持兼任在總統缺位或不能視事時，將造成職位重疊問題，已有解決方法，因為副總統兼任行政院院長如遇總統缺位時，依憲法第四十九條規定由副總統繼任總統，所兼任之行政院院長，則可由其以總統身分向立法院提名新院長人選，副總統則依增修條文第二條第七項辦理補選。在未提名或補選之前，固有可能出現所謂「三位一體」之現象，惟此一情形與總統副總統均缺位時，由行政院院長代行其職務三個月，並無二致，後者既為憲法所許，則依同一法理，前者亦應無不許之理。而關於總統不能視事時之代行職務，根據上述處理程序亦非不能解決。又主張副總統不得兼任行政院院長者，認為兼任一旦有違法失職情形，造成監察院行使彈劾權之窒礙，或者出現院與院間爭執須引用憲法第四十四條由總統協調處理時，將引起角色混淆。實則若行政院院長由副總統兼任，遇有彈劾案發生，如係對職務行為違法失職之彈劾，自可視案件

currently as the Premier. In all of the Grand Justices' Interpretations concerning whether [an individual] may hold more than one office either under the Constitution or under law, the standard has been whether the nature and function of the duties discharged are compatible with each other or whether there is any conflict of interest. Based upon such standard, the position of the Vice President is purely on a standby basis which does not carry any substantive, legally discharged duties; thus, under no circumstances is it not compatible or in conflict with the nature and duties of the Premier of the Executive Yuan. Because the constitutional design of this nation is not that of a pure cabinet system, the countersignature power bestowed on the Premier is different from that of those countries adopting the cabinet system in which the Prime Minister countersigns with the figurehead of the state in order to promulgate a given law.[5] The real check-and-balance mechanism

性質究與行政院院長或副總統有關，而決定應採何一程序，如係對非職務行為（如私德不檢）之彈劾，則可由監察院決定採何種程序，在運作上不致有窒礙之處。關於憲法第四十四條協調權之規定，依憲法規定意旨係由總統居於超然地位行使，在總統未缺位時，副總統並無憲法上之職權主動介入協調院際紛爭，不致產生「協調者」與「被協調者」之矛盾。總統對有關行政院與其他院之紛爭，本可自行處理，亦可授權副總統或其他適當人員為之，在副總統兼任行政院院長之情形，總統自不宜授權副總統為之，亦可避免角色衝突。四、副總統兼任行政院院長我國已有先例存在，衡諸外國立法例此項兼任亦不違反相容性：行憲以來，迄今有兩位副總統兼任行政院院長，即陳誠自四十七年七月至五十二年十二月；嚴家淦自五十五年五月至六十一年五月，前後達十一年，並無窒礙難行之處，此二先例雖在動員戡亂時期，但當時憲法與目前憲法有關總統與副總統之關係及副總統備位性質之規定，並無變更，自可作為先例

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[5] See supra note 1. The term "cabinet system" used in this context should in fact be in reference to the parliamentary system, with the United Kingdom's constitutional practices being the leading example.

under this nation's Constitution lies within the relationship between the Executive and the Legislative Yuan. Having the Vice President also serve as the Premier would not in anyway mar the design of this check-and-balance mechanism. Furthermore, in accordance with Article 2, Paragraph 1, of the Constitution Amendments and the Presidential and Vice Presidential Election and Recall Act, the Vice President is elected by the people as the President; he/she is neither appointed nor can he/she be discharged by the President. The President and Vice President are on the same ticket as election partners, but [otherwise] they do not share the same duties. There is no superior or subordinate relationship between the President and the Vice President. The provision concerning presidential immunity from criminal prosecution does not apply to the Vice President.[6] Neither the Constitution nor the law (the Organic Act of the Presidential Office of the Republic of China) mention the duties discharged to

而援引。再者，我國憲法既非純內閣制亦非純總統制，在比較憲法中可資援用之例尚不多見，唯一可供參考者，即美國副總統之兼任參議院議長，蓋美國憲法嚴格區分行政權與立法權，仍容許跨行政部門兼任立法部門之職位，可見備位性質之副總統兼任其他有實權職務，仍具相當彈性。五、新任總統就職時，行政院院長提出總辭，總統自得予以慰留：自司法院釋字第三八七號解釋作成後，行政院院長應於立法委員任期屆滿改選後第一次集會前提出總辭，乃新的憲政制度，連院長八十五年年一月二十五日即係基於憲法義務之辭職。而目前憲法規定，總統任期與立法委員互有參差，李總統當選就任後，連院長所提出辭職，則屬基於政治倫理所為之禮貌性辭職，接受與否、「重提原任」或「另提新人」乃總統依其職權而為之政治權衡。至於所謂立法院八十五年二月時所同意者為「未兼任副總統的行政院院長」，或「總統宣稱不續任的過渡行政院院長」，如今立法院所同意之對象已有不同，應依憲法規定重新行使同意權一節，惟查立法院對總統所提行政院院

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[6] Article 52 of the Constitution states, "With the exception of act of rebellion or treason and without being recalled or discharged, the President shall be immune from criminal prosecution and liability."

the Vice President, nor are there any regulations similar to those of an executive department [or agency] on how a deputy assists the affairs of the chief. As a result, being the Premier [concurrently] does not put the Vice President in the double role of obeying the President and trying to check and balance the powers [of the President] at the same time, and, therefore, cannot possibly create an issue of constitutional conflict of roles. With regard to the opposition's argument that allowing concurrent and simultaneous occupation will cause an overlay of duties in case the office of the President becomes vacant, there is already a solution. In that situation, the Vice President shall succeed to the presidency in accordance with Article 49 of the Constitution. As far as the premiership is concerned, as the new President, he/she can nominate a new candidate for the Premier position and submit said nomination to the Legislative Yuan for confirmation. The vacancy of the Vice Presidential office [created by the succession] will be filled by the make-up election in accordance with Article 2, Paragraph 7, of the Constitutional

長人選行使同意權，即係針對人選之適任性作出決定，當然並未附任何條件限制，故無所謂對象或內涵改變問題，行使同意權之立法委員仍屬同屆，其席次結構未變，行使同意權之對象又為同一，即無重複行使之必要等語。

Amendments. While there is a possibility that a so called "trinity" situation may occur, it would be no different from the situation where the Premier serves as Acting President for no more than three months in case both the President and the Vice President should be unable to attend to office.[7] Given that the latter [scenario] is sanctioned by the Constitution, by the same rule, there is no reason why the former is not permitted. There is no reason why the above procedure cannot be used as well to resolve the situation where the President is unable to attend to office due to any cause. Moreover, those who oppose the Vice President serving [concur rently] as the Premier argue that it will cause great difficulties and obstacles for the Control Yuan in carrying out its duties in the event an impeachable offense may have been committed, or cause role confusion in the event the President should need to coordinate and settle a dispute between different Yuans in accordance with Article 44 of the Constitution. Yet in

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[7] See Article2, Paragraphs 7 and 8 of the Constitution Amendments. Under the current system, these provisions suspend Article 49 of the Constitution concerning presidential and vice presidential succession.

a given impeachment for neglect of duties or violation of law, which procedure should be applied depends upon the nature of the case, i.e., whether it relates to carrying out duties as the Vice President or the Premier; for impeachment not related to carrying out duties (such as moral turpitude), the Control Yuan shall decide which procedure is to apply. Thus, there should not be any difficulties or obstacles [in this regard]. With regard to the coordination power under Article 44 of the Constitution, the purpose of the Constitution is to place the President in a neutral position to carry out that duty. Thus, when the office of the President is not vacant, the Vice President does not have any constitutional authority to engage actively in settling the disputes among Yuans at his/her own initiative, and thus does not create a contradiction of being the coordinator and the coordinated. While the President may delegate the Vice President or other proper personnel to coordinate and settle a dispute between the Executive Yuan and other Yuans, this apparently is not appropriate and the President should not delegate the Vice President such authority in

the event the Vice President also serves as the Premier so that conflict of roles can be avoided. (4) There are precedents where the Vice President serves as the Premier; there is no violation of compatibility standard by reference to examples of other nations: To date, two Vice Presidents have also served as the Premier since the promulgation of the Constitution: [Mr.] Chen Cheng from July 1958 to December 1963 and [Mr.] Yen Chia-kang from May 1966 to May 1972 (for a total of eleven years) which caused no difficulties or obstacles [in executing the Constitution]. Although these two examples took place during the Period of National Mobilization for the Suppression of the Communist Rebellion, they can nevertheless be considered precedents since there has been no change in the Constitution concerning the relationship between the President and the Vice President as well as the standby nature of the Vice President. Moreover, since our Constitution adopts neither a pure cabinet nor a pure presidential system, from a comparative constitutional point of view, there are not many cases that can be made reference to

in this situation. The only reference that can be found is the United States, where the Vice President also serves as the President of the Senate. While the U.S. Constitution strictly distinguishes the executive power from the legislative power, it nevertheless permits a crossover position from the executive branch to the legislature. It illustrates that there remains certain flexibility for a standby Vice President to also occupy a position that carries substantive power. (5) The President can naturally retain the Cabinet in response to the Premier's general resignation of his/her entire Cabinet at the time the new President is inaugurated. Ever since the Judicial Yuan's Interpretation No.387, the new constitution system has required that the Premier submit a general resignation [on behalf of the entire Cabinet] before the newly elected members of the Legislative Yuan convene their first session. The resignation tendered by Premier Lien on January 25, 1996, was to fulfill this constitutional obligation. However, since the terms of the President and members of the Legislative Yuan are staggered under the current Constitution,

Premier Lien's [second] resignation after President Lee was re-elected was a political courtesy. Whether the President accepts the resignation, renominates the incumbent, or nominates a new candidate is a matter of political consideration within the President's discretion and power. [The opposition] claims that because the candidate approved [for the Premier position] by the Legislative Yuan in February 1996 was "a Premier who has not taken up the position of Vice President," or "an interim Premier whom the President declared would not be reappointed," now that circumstances have changed, [the current nomination, in fact] involves a change of target and the reappointment should be subject to the Legislative Yuan's reconfirmation under the Constitution. However, the confirmation process conducted by the Legislative Yuan is to review and decide on a given nominee's qualification without any strings or conditions attached; therefore, there is no such issue of the so-called change of target or contents. Given the fact that the same composition of the Legislative Yuan still exists from the same election cycle with the same nomi-

nee, there is indeed no need to repeat the same confirmation process.

Having considered the overall arguments, this Interpretation is rendered with the following rationale:

I.

The pre-determinative factor in resolving the issue of whether the Vice President may [concurrently] hold the office of Premier of the Executive Yuan is whether it is a political question. A political question is a doctrine developed from and enlarged by the practices of [many] constitutional democracies, with volumes of references available. Issues involving a political question or its similar concept (such as an act of governing or governmental action) should be left for political consideration by the constitutionally created political branches (including the executive and legislative branches), not for judicial review. Interpretation No.328 of this Yuan set a precedent that the definition of existing national territorial boundaries under Article 4 of the Constitution is a matter of major political question, which shall not be interpreted by the Constitu-

本件斟酌全辯論意旨，作成本解釋，其理由如左：

一

副總統得否兼任行政院院長之疑義是否屬於政治問題，乃本件解釋關於兼職合憲性之先決事項。按政治問題或類似之概念（如統治行為或政府行為）所指涉之問題，應由憲法上之政治部門（包括行政及立法部門）作政治之判斷，而非屬可供司法裁決之事項，此在立憲民主國家之憲政實踐中，所累積發展而成之理論，不乏可供參考者，本院釋字第三二八號解釋亦有關於憲法第四條所稱固有疆域範圍之界定，係屬重大關予以解釋之案例。惟就副總統兼任行政治問題，不應由行使司法權之釋憲機政院院長之違憲疑義而言，係屬二項憲法職位互相兼任時，是否牴觸憲法之法律問題，並非涉及政治上之人事安排，揆諸本院歷來對憲法上職位兼任所作之諸多解釋（例如釋字第一號、第十五號、第十七號、第二十號、第三十號、第七十四號、第七十五號及第二〇七號等），本件關於副總統兼任行政院院長

tional Interpretation agency [or institution] in the course of executing its judicial authority. Yet the constitutionality of whether the Vice President may [concurrently] serve as Premier is a question of law concerning the validity of holding more than one public office under the Constitution, which does not involve political appointment. Historically, this Yuan has rendered many Interpretations regarding the issue of [having an individual] hold more than one office under the Constitution (See Interpretations Nos. 1, 15, 17, 20, 30, 74, 75 and 207 for other instances). The constitutional question concerning the Vice President's concurrently serving as the Premier in this petition, therefore, cannot avoid substantive judicial review [merely] by a claim for it under the category of political question or a similar concept. [This Yuan] takes the petition's position that it is not a political question.

之憲法疑義部分，尚不能以政治問題或類似概念為由，不為實體之解釋。聲請意旨主張前述兼職非屬政治問題，自屬可採。

The constitutional convention always plays a critical role in countries that do not have a written constitution and its effect is beyond question. While the concept

憲政慣例在不成文憲法國家，恆居重要地位，其規範效力亦不容置疑。至於在成文憲法之下，雖亦有憲政慣例之概念，但僅具補充成文憲法之作用，

of a constitutional convention also exists in countries that do have a written constitution, it is only complementary to the written constitution, and its importance is not comparable to the former. A customary rule is a recurring practice that is followed or abided by over a long period of time, thereby acquiring binding effect. Even though there may be precedents to a given act or practice, an act or a practice does not acquire the status of a customary rule as long as there are contradictory precedents or suspicions that it may have violated the written laws so that its binding effect is in question. In the present case, although there were two instances in which the Vice President also served as Premier, there was also a precedent whereby [an individual] immediately resigned from the Premier position after being elected as the Vice President. While there is a controversy on the constitutionality of this circumstance, based upon the above illustration, [those precedents] certainly cannot be deemed as taking a bind ing effect as a customary rule under our Constitution.

尚不能與前者相提並論。所謂慣例係指反覆發生之慣行，其經歷長久時間仍受遵循，而被確信具有拘束行為之效力時，始屬不成文規範之一種。若雖有行為之先例，但因亦曾出現相反之先例或因有牴觸成文規範之嫌，拘束力備受質疑者，即不能認其為具備規範效力之慣例。本件副總統兼任行政院院長，以往雖有二例，然亦有因當選副總統而立即辭卸行政院院長之一例，況此種兼任是否牴觸憲法，既有爭論，依上開說明，自不能認已成為我國之憲政慣例而發生規範效力。

On the issue of whether occupying two [public] positions [concurrently] is permitted under the Constitution, if and when the Constitution expressly prohibits [such an act], that prohibition obviously must be obeyed; for example, Articles 75 and 103 of the Constitution restricting members of the Legislative and Control Yuans from holding other [public] positions. In addition, [even if the Constitution is silent,] this prohibition also applies when the two positions are not compatible with each other. This Yuan has on several occasions interpreted this rule (See Interpretations Nos. 20, 30 and 207 cited above). While the Constitution is silent on whether the Vice President may [concurrently] serve as the Premier and there is no expressed prohibition, the critical issue is the compatibility of the two positions. Incompatibility means occupying both positions would violate the fundamental principles of a constitutional democracy or create the concern of conflict of interest. Since the United States ordained its constitution in 1878, a fundamental principle has been a strict check-and- balance system among the three [political] powers.

關於憲法上職位兼任是否容許，憲法有明文禁止兼任者當然應予遵守，如憲法第七十五條及第一百零三條之立法委員及監察委員兼職限制之情形是；此外，若兩種職務確屬不相容者亦不得兼任，迭經本院前引釋字第二十號、第三十號、第二〇七號等著有解釋。副總統得否兼任行政院院長憲法未作任何規定，自無明文禁止可言，故本件所涉者要在兩種職務兼任之相容性問題。按所謂不具相容性，係指憲法上職位兼任違反憲政之基本原理或兼任有形成利益衝突之虞而言。自從一七八七年美國聯邦憲法採嚴格之三權分立為其制憲之基本原則，以及法國一七八九年人權宣言第十六條揭櫫：「任何社會中，未貫徹權利保障，亦無明確之權力分立者，即無憲法。」以還，立憲民主國家，莫不奉任是否相容，首應以有無違反權力分立權力分立為圭臬，故就憲法上職位之兼之原則為斷。一旦違反權力分立原則，除非憲法設有例外之規定（例如美國副總統之兼為參議院議長、內閣制國家之議員得兼任閣員），否則即屬違憲行為。依權力分立原則所區分之各個權力範圍（如立法部門、行政部門及司法部門），若因部門內之權限，依憲法之設計，必須由兩個機關不同之構成員分別

In France, Article 16 of the 1789 Declaration of the Rights of Man and of the Citizens proclaimed, "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."[8] Ever since then, there has not been any country with a constitutional democracy that does not regard the check and balance of powers as the paradigm. Therefore, whether the two constitutional positions are compatible first hinges upon whether the principle of the check and balance of powers is violated. Once it is, unless the Constitution provides exceptions (such as the Vice President also serves as President of the Senate under the U.S. Constitution[9] or a member of the Parliament may serve as a member of the Cabinet in a cabinet system), such act is deemed unconstitutional. By the very design of the Constitution, if and when the discharge of a certain duty within each power branch (such as the executive, legislative and judicial branches) under the principle of the check

行使者，亦在不得兼任之列，例如採兩院制之國會，其法案通過須分別經兩院議決，如由一人同時擔任兩院之議員，則與憲法將立法權分由兩院行使之本旨不符，其兼任自亦非憲法之所許，本院釋字第三十號解釋以「若立法委員得兼國民大會代表，是以一人而兼具提案與複決兩種性質不相容之職務」為由，認立法委員不得兼任國民大會代表，即係本於同一意旨。又如在行政權範疇之內，國家元首與閣揆或閣員間職務相容性問題，則端視各國政制而定：在採內閣制之國家或雙首長制之國家，基於元首與閣揆間制衡之機制，一人當然不得同時兼任；在總統制國家（如美國及中南美諸國），通常國家元首即為最高行政首長，並無閣揆之設置，總統兼閣員（部長）固鮮有其例，但副總統則常兼任部長（如哥斯大黎加、巴拿馬等）；再如一般稱為委員制之瑞士，其行政部門聯邦委員會(Conseil Federal, Bundesrat)，有部長七名，總統及副總統均由部長輪替兼任，蓋均祇涉及行政權之內部分工，而於權力分立之基本原則無違，自亦不生牴觸憲法問題。若就中央

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[8] Text of English translation is based on MILTON VIORST, THE GREAT DOCUMENTS OF WESTERN CIVILIZATION, at 192 (1965).

[9] See Article 1, Section 3, Clause 4 of the U.S. Constitution.

and balance of powers must be carried out by different members of two agencies, no individual can then hold both offices. For example, for a congress that adopts two houses, each bill must pass both to be enacted into law. [As a result,] no individual may serve as a member of both houses [under the U. S. Constitution] because that does not comply with the fundamental principle of dividing the power of the legislature into two departments.[10] Based upon the same reason, in our Interpretation No. 30, [we held that] members of the Legislative Yuan may not also serve as members of the National Assembly for the reason that "if a member of the Legislative Yuan may also serve as a member of the National Assembly, it is [as if] accru-

與地方之分權而論，更非所謂一遇職位互兼即為法所不許，以法國為例，內閣總理或部長兼任市長或其他地方民選職位，亦非罕見。我國中央政制與前述各種制度均不盡相同，但於權力分立原則之堅持則不遜於其他各國，司法、考試及監察三權各自獨立行使職權，固無疑義。行政權與立法權亦截然劃分，並使其成員不得互兼，此為憲法第七十五條立法委員不得兼任官吏之所由設。而憲法對總統及副總統均缺位，或任期屆滿尚未選出，或選出後總統、副總統均未就職之情形，明定由行政院院長代行總統職權，其期限為三個月（憲法增修條文第二條第八項、憲法第五十條、第五十一條），未如其他國家之憲法對總統或副總統均缺位時由國會議長繼任（如美國、法國第五共和及義大利等），或

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[10] Article 1, Section 6, Clause 2 of the U.S. Constitution provides, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, … and no Person holding any Office under the United States, shall be aMember of either House during his Continuance in Office." Prohibition of this clause against any senator or congressman being appointed to any civil office during the senator's or representative tenure and against any person holding any office under the United States being a member of either House was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public officers for the benefit of its own members, not so much on the principle of check and balance of powers. Atkins v. United States, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). Note that technically, neither the U.S. Constitution itself nor congressional acts provide any express restrictions against a member of the Senate from being a member of the House of Representatives, and vice versa.

ing the power of [constitution and bill] proposition and referendum, two incompatible duties, in one person." Also, in the scope of executive power, each nation enacts its own laws in dealing with the compatibility issue between the head of state and the prime minister or members of the cabinet based upon its individual political system. In countries that adopt the cabinet or dual-leadership system, the same individual obviously cannot be in both positions because of the need of the check and balance of powers between the head of state and the prime minister. In countries that adopt the presidential system (such as the United States and many countries in Latin America), there is no installation of a prime minister [or Principal Officer of the Cabinet]; the head of state is normally also the highest executive officer. Rarely have there been cases in which the President also serves as a member of the cabinet (or minister), yet the Vice President often serves as a minister [of some sort] (such as in Costa Rica and Panama). In Switzerland, which adopts what is generally known as the council system, its Federal Council (Con-

甚至規定最高司法機關首長亦得代理總統（如一九八八年十月五日之巴西憲法），蓋嚴守權力分立原則，屬於行政權體系內之權限行使，應由行政體系內輪替，不採制憲過程中由五院院長依次代理總統之建議。我國憲法規定行政院院長由總統提名經立法院同意任命之（第五十五條第一項），行政院對立法院決議之事項移請覆議時，須經總統之核可（第五十七條第二款及第三款），總統公布法律、發布命令須經行政院院長之副署，其屬緊急命令者尚須經行政院會議之通過（憲法第三十七條、增修條文第二條第四項），而行政院無論學理上及實際上皆係由院長主導之獨任制官署，論者以總統與行政院院長兩種職位互有制衡之作用，非無理由。是總統與行政院院長不得由一人兼任，其理甚明。副總統為總統之備位，若由副總統兼任司法、考試或監察三院之院長，其違反五權分立原則而為憲法所不許，實毋庸辭費。至於副總統兼任行政院院長則既不生顯然牴觸權力分立原則之問題，自難從權力分立之觀點遽認其為違憲。

seil Federal or Bundesrat) consists of seven ministers and the Offices of the President and Vice President of the Confederation are rotated among those ministers. Since this [rotation] only concerns the internal division of executive duties, it does not violate the basic principle of the check and balance of powers and naturally does not give rise to the issue of constitutionality.[11] As far as the separation of powers between the central and local government is concerned, there is no such thing as illegality per se in any case of holding two offices. For example, it is not unusual to have the Prime Minister of the Cabinet or a minister also serve as mayor or in other elected offices in France. Our central government system is not exactly the same as any one of the abovementioned systems, yet the insistence upon the principle of the check and balance of powers is [certainly] no less than in other countries. There is no question that the

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[11] The executive power rests in most part in the Federal Chancellery (Bundeskanzlei or Chancellerie fédérale), with the Federal Chancellor being its chief executive officer. With regard to the Federal Council, its councilors are elected every four years by the Federal Assembly (the two Houses united in a plenary session). The main task of the President of the Confederation is to preside over the Council's meeting and to represent the Confederation as its head of state. For details, see Parliament of Switzerland, at http://www.parlament.ch/poly/Framesets/E/Frame-E.htm.

legislative, examination and control powers are independently executed. Even the executive and legislative powers are distinctly separate with members of one [branch] not permitted to serve in the other one, and this is the purpose of Article 75 of the Constitution, which prohibits any member of the Legislative Yuan from concurrently serving in the Executive Yuan. Unlike the constitutions of other countries that require the Speaker of the Parliament to succeed [the president] in case the offices of both the President and Vice President become vacant (such as the United States, the French Fifth Republic, and Italy), or the highest official of the judicial branch to serve as Acting President (such as in Brazil's Constitution of October 5, 1988), [our] Constitution provides that the Premier shall act as the President for a term of [no more than] three months in case the offices of both the President and the Vice President become vacant, or the President and Vice President have not yet been elected when the term [of the previous incumbent] expires, or have been elected but not yet inaugurated (Article 2, Paragraph 8, of the

Constitutional Amendments; Articles 50 and 51 of the Constitution). By strictly adhering to the principle of the check and balance of powers, the discharging of powers within the executive branch ought to be rotated within that branch, and the proposal during the enactment of the Constitution that the position of Acting President be rotated among the chiefs of the Yuans was not adopted. Our Constitution provides that the Premier shall be nominated by the President and approved [or confirmed] by the Legislative Yuan (Article 55, Paragraph 1),[12] that presidential approval is required before the Premier should resubmit a given resolution [already enacted] by the Legislative Yuan for reconsideration (Article 57, Subparagraphs 2 and 3),[13] that the Premier's coun-

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[12] As of July 21, 1997, as a result of the fourth constitution amendment, however, the Premier is directly appointed by the President and no long subject to the confirmation of the Legislative Yuan. See Article 3, Paragraph 1 of the Constitution Amendments.

[13] This in effect amounts to an executive veto power. Under the same provision, the Legislative Yuan may convene itself and override a given veto with more than 1/2 of the total member votes within 15 days since the day the session begins (in the euphemism "reconsideration") or the veto stands. When the veto is in fact overridden, the Premier must either abide by it or resign from office. See Article 3, Paragraph 2, Subparagraph 2 of the Constitution Amendments. If the Premier chooses to do neither, the Legislative Yuan may, within the strict time frame imposed in the Constitution and with more than half of the entire votes, enact a bill of no confidence. When that happens, either the Premier must leave office within ten days or the President may disband the Legislative Yuan. See id., Subparagraph 3 and Article 2, Paragraph 5.

tersignature is necessary before the President may promulgate a law or issue an [executive] order; that, if in the form of an emergency order, even the approval of the Cabinet Meeting is required (Article 37 of the Constitution; Article 2, Paragraph 4, of the Constitution Amendments), and that either in theory or in practice, the Executive Yuan is an office under the sole leadership of the Premier.[14] Therefore, it is not without reason that there is a certain check-and-balance function between the President and the Premier, and clearly the Offices of the President and the Premier cannot be occupied by the same person. The Vice President is in a standby position for the President; thus, suffice it to say that it would be a violation of the Principle of the Five Powers Division and unconstitutional if and when the Vice President should also serve as the chief of the Judicial, Examination or Control Yuan. However, given that there may not necessarily be an obvious contradiction to

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[14] Ever since the implementation of the Constitution, this power has been more or less a "window dresser." Now that the Premier is directly appointed by the President, it is likely that the power of countersign is all but a mere formality given the Premier now serves strictly at the pleasure of the President.

the Principle of the Five Powers Division if the Vice President were to serve as the Premier, it is indeed difficult to abruptly consider that unconstitutional from the point of check and balance.

The next issue that must be examined is whether there is any division of duties between the Vice President and the Premier and whether there exists a function of check and balance or conflict of interest between the two. From the drafters of the Draft Constitution issued on May 5, 1936, (commonly known as the May 5th [or Double Fifth] Constitution Draft) to the National Assembly that ordained the current Constitution, the purpose and function of the installation of the Vice President was always to succeed the President in case that office became vacant, or to serve as Acting President in order to carry out its duties only. There were no other powers and duties [bestowed] on the Vice President under ordinary circumstances. The legislative history is not only evidenced by the related documents concerning the history of the Constitution but also confirmed in the

其次應審究者，乃副總統與行政院院長有無職權分工，二者之間是否亦存在制衡作用或利益衝突之情事。查自民國二十五年五月五日公布之中華民國憲法草案（俗稱五五憲草）之起草者，以迄制定現行憲法之國民大會，其設置副總統之目的及功能，皆係本於總統缺位時繼任總統，或總統因故不能視事時代行總統職權而已。除此之外，平時別無其他職權，經過情形不僅有相關制憲資料可供參證，亦為聲請人立法委員張俊雄等於八十五年六月十五日提出之釋憲理由書所是認。制憲者之原意乃表現為憲法第四十九條之規定：總統缺位時，由副總統繼任至總統任期屆滿為止；總統因故不能視事時，由副總統代行其職權。除本條之外，未見關於副總統職掌及地位之規定，現行法律除國家安全會議組織法第三條及第四條規定副總統與五院院長等同為國家安全會議之組成人員，以及總統不能出席時由副總統代理外，亦未賦予副總統任何權限。

Petition for Constitutional Interpretation of June 15, 1996, submitted by Chang Chun-hsiung, a member of the Legislative Yuan.[15] The original intent of the Constitution's drafters is illustrated in Article 49 of the Constitution: "In case the office of the President should become vacant, the Vice President shall succeed until the expiration of the original presidential term. In case the President should be unable to attend to office in due cause, the Vice President shall be the Acting President."[16] There are no rules [under the Constitution] on the powers, duties, and status of the Vice President other than this provision, and except for Articles 3 and 4 of the Organic Act of the National Security Council which provides that the Vice President and the heads of all Five Yuans shall be members of the National Security Council and the Vice President shall be

故在法定職權上，副總統與行政院院長並無分工之關係，亦無任何制衡作用或利益衝突之可言，與前述國民大會代表與立法委員、總統與行政院院長法定職權即已存有不能相容或角色混淆之情形，其間尚有其差異。副總統既為備位而設，於上開繼位或代行外，未有具體職權，則所謂兼任行政院院長將發生處理公務時間分配問題或有損公益及人民信賴，尚非確論。

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[15] Mr. Chang is affiliated with the Democratic Progressive Party, then the opposition party to the rule of the Nationalist Party (Kuomintang or KMT). He and several other members of his party filed the petition primarily as a challenge to the KMT authority. Ironically, after DPP came into power, Mr. Chang was appointed by President Chen Shui-bian first as Chen's Chief of Staff, then Vice Premier and eventually the Premier, to begin on October 11, 2000. See OFFICIAL GAZETTE OF THE OFFICE OF THE PRESIDENT, Issue No. 6361, October 11, 2001.

[16] See supra note 7.

the Acting Chairperson in case the President cannot preside over the Council meetings, there is no power authorized to the Vice President under existing statutes. Therefore, from the viewpoint of legal authority, there are no relations between the two on the division of duties, nor can it be said that there is any check-and-balance function or conflict of interest. This is different from the aforementioned situation where respective legal authority, either between members of the National Assembly and the Legislative Yuan or between the President and the Premier, is incompatible or causes role confusion. Concerning the backup position which possesses no substantive power except in the case of succession or acting, it is unfounded to claim that concurrent service as the Premier would cause a problem of distribution of work time and damage to the public interests and trust.

As indicated above, although he/she has no substantive and concrete authority under the Constitution, the Vice President [nevertheless] enjoys a prestigious status and naturally possesses a certain political

副總統地位崇隆，在政治上自有其影響力，但憲法上並無具體職權，已如前述。在未依憲法繼任總統或代行總統職權時，若行使任何屬於總統之憲法上權力，即屬於法無據。與一般行政機

influence. If [the Vice President were to] carry out any constitutional power reserved for the President before succession or acting status were to take place in accordance with the Constitution, such an act would be deemed legally groundless. This is not to be compared with the fact that a deputy chief in an administrative agency should, in accordance with the written or unwritten rules and as a matter of course, assist the chief in that agency's affairs. In fact, there have never been instances where the Vice President has been authorized to carry out powers reserved expressly for the President under Articles 35 to 44 of the Constitution even when the Office of the President was not vacant or the President could not attend to that office. Based upon a relationship of trust, the Vice President may inevitably play several ad hoc or ceremonial roles in carrying out certain missions; however, these are not to be considered as the legal duties of the Vice President in assisting the President. Thus, this most certainly is not to be treated as the equivalent of the legal relationship between the chief and deputy chief in an administrative agency. It follows

關之副首長依成文或不成文規範，當然有輔助該機關首長處理事務者不能同日而語。實際上，我國亦從無副總統在總統未缺位或不能視事時，經授權行使憲法第三十五條至第四十四條或其他憲法上明定屬於總統之權限。副總統在備位之餘雖不免基於總統之信任關係，擔任若干臨時性或禮儀性之任務，但皆非可視為副總統有襄助總統之法定職權，與法律關係，尚不能等同視之。職是之一般機關首長與副首長在行政組織上之故，平時總統在位亦無不能視事之情形時，由副總統兼任行政院院長並不發生二者職務上之利益衝突。又副總統容有輔弼總統之事實，亦未如聲請意旨所稱副總統為總統之僚屬或副手，平日承總統之命行事，一旦兼任則有角色衝突之情事。至所謂兼任有礙憲法機關功能維護一節，實則副總統之備位即屬此一職位維繫國家元首不能一日或缺之憲法功能所在，副總統亦未因兼任行政院院長而喪失其備位作用。

lows that there can be no conflict of interest concerning their duties if the Vice President should also serve as Premier of the Executive Yuan while the President is in office and there is no situation under which he/she cannot attend to that office. Even if there is merit to the idea that the Vice President assists and supports the President, it does not amount to the petitioner's claim that as a deputy or subordinate to the President, the Vice President carries daily operations by the direction and instruction from the President, and a conflict of roles would occur if the Vice President were to serve in both capacities. With regard to the claim that concurrent services would create obstacles to the maintaining of the functions of constitutional bureaucracies, it is the very function of the Vice President to be in a standby position to ensure that there will not be a day where there is not a head of state in place to carry out the intent of the Constitution, and such standby function is not diminished because the Vice President serves concurrently as the Premier.

In accordance with Article 2, Para 依憲法增修條文第二條第一項規

graph 1, of the Constitutional Amendments, "The presidential and vice presidential candidates shall register jointly and be listed on the same ballot." Therefore, under normal circumstances, the President-Elect and Vice President-Elect should belong to the same political party or have the same political affiliation and share a common political philosophy. However, in order to win the election, it is [not unusual] for candidates with different political convictions to be brought together on the same ballot as a result of political party realignments. Especially, if and when the Office of the Vice President becomes vacant, in accordance with the same Article, Paragraph 7 of the Constitutional Amendments, the President [must within three months] nominate a [vice presidential] candidate to be elected by the National Assembly.[17] This means the President would have to find a candidate acceptable to the majority of the National Assembly, which does not necessarily make political beliefs or convictions a

定：「總統、副總統候選人應聯名登記，在選票上同列一組圈選」，故當選總統、副總統者，屬於同一政黨或同一政治派系，其政治理念共通，當為常態。但為爭取選舉勝利，難保不發生政黨合縱連橫之事而將理念不同之人選，同列一組圈選；尤其遇有副總統出缺，依增修條文同條第七項規定，由總統提名候選人，召集國民大會補選，則總統之人選為提名對象，而非以理念為優先勢須以國民大會中多數黨黨團所能接受之考慮，其情形與總統提名行政院院長人選咨請立法院同意，並無不同。是以總統與副總統非必然理念相同，關係密切。縱使二人理念一致，關係匪淺，惟副總統既不能與總統共同行使元首之職權，又不能分享憲法上元首之特權，更無日常互為代理之可言，豈可視二人在法律上為一體？關係機關辯論意旨主張：所謂一體者，除競選時共為夥伴外，別無其他意義，尚非無見。此一情形，亦可用於說明總統與行政院院長之關係，若總統不能影響立法院多數黨黨團之投票，其提名行政院院長固然以多數黨黨團之意見為依歸；反之，總統若

[17] As of July 21, 1997, such election is now conducted by the Legislative Yuan, not the National Assembly any longer. See supra note 12.

priority consideration. This is not different from the process in which the President nominates a candidate to be confirmed by the Legislative Yuan as the Premier. Therefore, the President and the Vice President do not necessarily share the same philosophy and maintain a close relationship. Even if that were in fact the case, how could the two be viewed as a single legal entity since the Vice President cannot jointly carry out the powers and duties of the President, nor can he/she share the constitutional privileges reserved for the head of state, let alone act on his/her behalf on a daily basis? It is not without merit in the related agencies' argument that the term "single entity" really carries no meaning other than that of a partnership in an election. This can also be used to describe the relationship between the President and the Premier. Without being able to influence the majority party to cast [favorable] votes, the President's Premier nomination would have to hinge upon the opinion of the majority political party. Conversely, if the President should also be the head of the majority party of the Legislative Yuan, or

為立法院多數黨之黨魁或能影響過半數委員之投票取向時，總統必然提名政見與之一致且為其本身屬意之人選，日後施政行政院院長果追隨總統亦步亦趨，也不生違憲問題，復不能因此而謂總統與行政院院長已具有一體性。聲請意旨中，有從一體性論點而導出「總統不能為者，副總統亦不能為」之結論，自不足採。副總統與總統之關係既如上述，則由副總統兼任行政院院長，憲法第三十七條之副署、第五十七條第二款、第三款之覆議核可及增修條文第二條第四項發布緊急命令之程序等相關規定所涉及之機制，尚難認為即受影響。蓋總統與行政院院長職務之制衡，在於制度上由不同之人分別擔任，而非以任職者之黨派關係或政治主張為斷。尤其不能謂擔任總統與行政院院長者，必須政治主張相反或施政方針對立，始符制衡設計而合憲。又副總統之罷免及補選雖涉及國民大會之職權，然依憲法增修條文副總統並無向國民大會報告國情或聽取建言之職責，自不生聲請意旨所稱兼任行政院院長應分別向國民大會及立法院負責，易造成二民意代表機關衝突之問題。

if he/she could sway more than half of the votes, the President would certainly nominate his/her preferential choice who shares his/her political convictions. Then no constitutionality issue would be created since the Premier in the coming days would closely follow every step the President takes. However, this does not come close to the claim that the President and the Premier have forged a single entity. Inferring from the point of single entity, the petition's conclusion that "the Vice President cannot act on those that cannot be acted upon by the President" is not sufficient to be adopted. Given the above-described relationship between the Vice President and the President, if and when the Vice President should concurrently be the Premier, it can hardly be said that the mechanism involving the power of countersignature under Article 37; reconsideration under Article 57, Subparagraphs 2 and 3 of the Constitution; and promulgating emergency orders under Article 2, Paragraph 4, of the Constitutional Amendments and other related provisions will be compromised. The check and balance between the powers and duties of the

President and the Premier lies upon the system under which two different individuals occupy each position respectively, rather than being determined by the incumbent's political connections or propositions. It is definitely not the case that the occupants of the Offices of the President and Premier must uphold contrasting political views or policies in order to comply with the design of and to uphold the Constitution. Furthermore, while the recall and refill [processes] do concern the power of the National Assembly, the Vice President does not have the duty [or obligation] to report the state of the country to or take advice from the National Assembly. Naturally, this will not result in a conflict between the National Assembly and the Legislative Yuan, as per the claim by the petitioner that concurrent service of the Premier requires that [the incumbent] be responsible to both bodies.

Article 49 of the Constitution provides that, in case the office of the President should become vacant, the Vice President shall succeed until the expiration of the original presidential term; in

憲法第四十九條規定：總統缺位時，由副總統繼任至總統任期屆滿為止。總統因故不能視事時，由副總統代行其職權。總統、副總統均不能視事時，由行政院院長代行其職權。總統、

case the President should be unable to attend to office in due cause, the Vice President shall be the Acting President. In case the offices of both the President and Vice President should become vacant, in accordance with Article 2, Paragraph 8, of the Constitutional Amendments, the Premier shall act for the President and, in accordance with Paragraph 1 of the same Article, call for the election of a new President and Vice President to serve out the term of the preceding President. While it is indeed likely that the positions of the President, Vice President and Premier will devolve on the same individual if the Vice President concurrently serves as the Premier and once the office of the President becomes vacant or the President cannot attend to his/her duties, as illustrated above, this obviously is not permitted by the Constitution under normal circumstances. Yet this so-called “trinity” phenomenon is likely to be found not only when the Vice President serves concurrently as the Premier, but also under Article 49 of the Constitution; Article 2, Paragraph 8, of the Constitutional Amendments; and Article 50 of the Constitution,

副總統均缺位時，依憲法增修條文第二條第八項規定，由行政院院長代行其職權，並依同條第一項規定補選總統、副總統，繼任至原任期屆滿為止。副總統兼任行政院院長一旦發生上述總統缺位或因故不能視事之情形，確將出現總統、副總統及行政院院長三個職位皆集於原本為副總統者一身，依前開說明顯非正常情況下憲法之所許。惟此種所謂「三位一體」之現象，並非僅於副總統兼任行政院院長時，始有發生之可能，憲法第四十九條、增修條文第二條第八項及憲法第五十條均係為三個職位集中於一人之機率而設。憲法第五十一條對行政院院長代行總統職權時，並明定其期限不得逾三個月。副總統兼任行政院院長一旦出現總統缺位之情形，以副總統身分繼任總統後應立即提名新院長人選，咨請立法院同意；其在立法院休會期間者，則適用憲法第五十五條第二項由副院長代理其職務，並於四十日內咨請立法院召集會議，行使同意權。若發生者非總統缺位而係因故不能視事，不能視事之事故如超過三個月，兼行政院院長之副總統或可類推亦受憲法第五十一條所定期間之限制，並有憲法第五十五條第二項之適用。由上所述，因副總統兼任行政院院長雖有發生繼任總統所

which are all designed to deal with the possibility of three positions being consolidated in one person. Article 51 expressly limits the Premier's term as Acting President to no more than three months. Once the Vice President who concurrently serves as Premier succeeds the President in case of vacancy, he/she must immediately nominate a new candidate for Premier and submit [the nomination] to the Legislative Yuan for confirmation. Should this occur during a recess of the Legislative Yuan, Article 55, Paragraph 2, of the Constitution applies, which states "the Vice Premier shall be the Acting Premier and shall submit a request within 40 days to the Legislative Yuan to convene and to exercise their consent power [in a make-up session]. If the succession is not due to vacancy but [the President's inability] to attend to office, if and when such cause lasts for more than three months, Article 51 of the Constitution should apply, *mutatis mutandis*, to the Vice President who concurrently serves as the Premier." Article 55, Paragraph 2, is also applicable. From the abovementioned analyses, while there may be questions about the acting

或代行職權之疑義問題，然非全無解決途徑，則聲請意旨主張兼任所造成之窒礙情形已達明顯違憲程度云云，尚有商榷之餘地。至憲法增修條文對一般公務人員及總統副總統之彈劾，設有不同程序，分別規定於第六條第三項及第五項。如副總統兼任行政院院長因失職行為而受監察院彈劾時，其適用之程序，本得以其失職行為係緣於副總統抑或行政院院長身分而發生為判斷標準，其後續之懲戒或罷免程序亦同。若與職務行為無關，則可由監察院決定採何種程序提案彈劾，雖不能謂完全不發生適用法律之疑義，然尚難以此遽認副總統兼任行政院院長已達顯不相容之情事。至聲請意旨有謂行政院院長或因施政疏失而遭監察院糾彈甚至去職，則其繼續擔任副總統之適當性將受質疑等語，乃係政治上之疑慮，非關法律問題。

eduties of a Vice President who concurrently serves as Premier and succeeds thPresident, they are apparently not without solution. Consequently, there is indeed room for discussion concerning the petition's claim that the obstacles created by the concurrent holding of two positions have apparently reached the level of unconstitutionality. Article 6, Paragraphs 3 and 5, of the Constitutional Amendments provide different procedures for dealing with the impeachment of government employees as opposed to those dealing with the President and Vice President.[18] In case the Vice President who concurrently holds the office of the Premier commits an impeachable offense, the applicable procedure shall be based upon the capacity in which the offense occurred, and the penalty and recall procedure thereafter shall be so based. If it is not related to [constitutional] duties, then the Control Yuan shall in its discretion decide which im-

[18] As of July 21, 1997, the fourth Constitution Amendments transferred the power of presidential and vice presidential impeachment to the Legislative Yuan and National Assembly (Article 2, Paragraph 10 of the Constitution Amendments) whereas the power of impeachment of other public officials remains in the Control Yuan (Article 7, Paragraph 3 of the Constitution Amendments).

peachment procedure is to follow. While this is not completely explicated in the application of laws, it is hardly the case to conclude abruptly that the [duties of the] Vice President have apparently become incompatible with being concurrently the Premier. As to the petitioner's claim that if and when the Premier is impeached by the Control Yuan or even resigns due to [gross] negligence in carrying out his/her duties, the appropriateness of [the same person] still serving as the Vice President is questionable, it is a matter of political concern, not a legal issue.

Article 44 of the Constitution proclaims, "In case of disputes between two or among more Yuans, except as otherwise provided by this Constitution, the President may convene meetings of the Presidents of the Yuans concerned for consultation with a view to reaching a solution." There are those who compare this to that of the power of neutrality for the head of state. The petition also argues that the President is exercising the power of the head of state that should be beyond and above the five powers, and that the

查憲法第四十四條稱：「總統對於院與院間之爭執，除本憲法有規定者外，得召集有關各院院長會商解決之。」此一規定論者有將之比擬為元首之中立權者，本件聲請意旨亦主張總統所行使者為元首權，應超然於五權之上，由副總統兼任行政院院長即形成「協調者」與「被協調者」之矛盾，喪失元首權超然中立之作用等語。惟不論憲法本條之規定是否等同於元首權或中立權，學理上尚無定論，且所謂元首權(pouvoirroyal)又稱中立權或調和權(pouvoir neutre, intermédiaire et régu-

neutrality of the head of state is lost due to the contradiction created between the "coordinator" and the "coordinated" when the Vice President concurrently serves as the Premier. Note that there is no scholarly conclusion on whether this provision of the Constitution is equivalent to the power of head of state or neutrality. As a means to maintain a monarchic constitutional system, the power of the head of state (pouvoir royal), also known as the power of neutrality or intermediation (pouvoir neutre or intermédiaire et régulateur), is a theory advocated by a few French scholars (such as B. Constant Clermont-Tonnerre) in the early nineteenth century, which reserves limited power to the monarchy as the head of state (See Carl Schmitt, DER HUETER DER VERFASSUNG, 3 Aufl., 1985, S. 133ff.). Such meaning does not fit the later developed political system of representative democracy, and has been criticized as a mere fiction (See Klaus von Beyme, DIE PARLAMENTARISCHEN REGIERUNGSSYTEME IN EUROPA, 2. Aufl., 1973, S. 89). There are also constitutional scholars who believe that it is

lateur)，乃十九世紀初年一、二法國學者(Clermont-Tonnerre, B. Constant)為維持在君主立憲體制之下，君主作為國家元首所保留之少許權力所提倡之學說（參看 Carl Schmitt, Der Hueter der Verfassung, 3. Aufl., 1985, S.133ff.），此種意義之中立權或調和權與日後代議民主政治發展之實情不符，而受批評為人為設想之名詞（參看 Klaus von Beyme, Die parlamentarischen Regierungssysteme in Europa, 2. Aufl., 1973, S.89.）；且憲法學者亦有認為無論國王或總統作為國家元首，政治上調和鼎鼐本無待憲法規定，可謂事物之本質者（參看 Carl Schmitt, Verfassungslehre , 8. Aufl., 1993, S.287.）。中立權是否已成為現代國家憲法上之建制，猶有爭論，並未形成普遍接受之權力分立理論，自不影響本件之解釋。況縱使總統行使憲法第四十四條之權限，視為元首之中立權，亦不生協調者與被協調者之矛盾。

the very nature of the matter and it goes without [expressed] constitutional regulation that the head of state must seek to reconcile and coordinate political differences, be that a king or a president (See Carl Schmitt, VERFASSUNGSLEHRE, 8 Aufl., 1993, S. 287). Hence, whether the power of neutrality has become the building block of modern constitutions remains controversial and has not become a widely accepted principle for the separation of powers. It naturally does not affect the interpretation of the present case. Even if the President's exercising of the power under Article 44 of the Constitution may be viewed as the power of neutrality for the head of state, there is no contradiction created between the coordinator and the coordinated.

[Judging] whether an act is unconstitutional is similar in nature to [judging] whether an act is illegal under other public laws. Before an act is held illegal per se under a given public law, which results in [that act] being ab initio and ipso facto ineffective, it must be clearly and grossly flawed (academically known as Gravitaets

憲法上行為是否違憲與其他公法上行為是否違法，性質相類。公法上行為之當然違法致自始不生效力者，須其瑕疵已達重大而明顯之程度（學理上稱為 Gravitaets- bzw. Evidenztheorie）始屬相當，若未達到此一程度者，則視瑕疵之具體態樣，分別定其法律上效果。是故設置憲法法院掌理違憲審查之國家

bzw. Evidenztheorie). If and when such level is not reached, then the legal effect of each act is determined by the nature and substance of the flaw, respectively (Theretarischen Regierungssysteme in Europa, 2, fore.). For countries that have the setting of a constitutional court to review the constitutionality (such as Germany and Austria), their judgments are not rendered in the simple, dichotomized form of constitutional-unconstitutional or valid-invalid. There may be a wide variety of cases where a law [or policy] is not in conformity with the constitution yet not declared invalid, [being declared] unconstitutional but becomes invalid only within a certain period of time, or while constitutional yet with an admonition to the related agency to take certain precautionary actions due to the likelihood that it may become unconstitutional. Throughout its history of interpreting the Constitution, this Yuan has not adopted the dichotomy of either completely constitutional or unconstitutional. Rather, it is a diverse model similar to the German and Austrian [system] established with many precedents. When there are no expressed constitutional

（如德國、奧地利等），其憲法法院從事規範審查之際，並非以合憲、違憲或有效、無效簡明二分法為裁判方式，另有與憲法不符但未宣告無效、違憲但在一定期間之後失效、尚屬合憲但告誡有關機關有轉變為違憲之虞，並要求其有所作為予以防範等不一而足。本院歷來解釋憲法亦非採完全合憲或違憲之二分法，而係建立類似德奧之多樣化模式，案例甚多，可資覆按。判斷憲法上行為之瑕疵是否已達違憲程度，在欠缺憲法明文規定可為依據之情形時，亦有上述瑕疵標準之適用（參照本院釋字第三四二號解釋）。所謂重大係指違背憲法之基本原則，諸如國民主權、權力分立、地方自治團體之制度保障，或對人民自由權利之限制已涉及本質內容而逾越必要程度等而言；所謂明顯係指從任何角度觀察皆無疑義或並無有意義之爭論存在。本件副總統兼任行政院院長，憲法並無禁止之明文規定，又未違反權力分立原則，從兩種職務性質而論，復無顯然不能相容或有利益衝突之處，而此一兼任問題，各方仍有仁智之見，則其兼任尚難認為瑕疵重大而明顯，已達顯然違憲程度。況依憲法增修條文第二條第三項之規定，行政院院長之免職命令，須新提名之行政院院長經立法院同意後

provisions to be based upon, the above criterion is also applicable in deciding whether the flaw of an act under the Constitution has reached the level of being unconstitutional (See Interpretation No. 342). "Grossly" means the flaw violates the basic principles of the Constitution, such as national sovereignty, separation of powers, guarantee for the organizations in the local self-rule system, or the restriction on the liberties and rights of the people has encroached upon their fundamental nature and exceeded the necessary degree. "Clearly" means free from the existence of any doubts or controversial merits from any perspective. In the present case, the Constitution does not expressly prohibit the Vice President from concurrently serving as the Premier, nor does the case violate the principle of separation of powers, nor is there any incompatibility or conflict of interest between the natures of the two positions. While each side still maintains different points of view on the issue of concurrent service, it can hardly be said that it is grossly and clearly flawed, hence, to have clearly reached the level of being unconstitutional. In accor-

生效，若原任行政院院長參與副總統競選，並獲當選，總統依法提名新行政院院長，在未經立法院同意前，副總統依上述規定尚須兼任行政院院長，其為憲法之所許，既無疑義，自不能將在特定條件下憲法所許可之行為，遽予解釋為違憲。朝野人士之所以對此一兼任問題之合憲性，各持己見者，主要肇因於現行憲法以五權分立之架構，分別採取內閣制與總統制下之若干建制融合而成，論者基於理念或對政制之偏好，其結論南轅而北轍，毋乃當然。憲法結構之調整應由有權修憲之機關衡情度勢，斟酌損益，非關釋憲機關之權限。惟憲法分設總統、副總統及行政院院長三種職位，其本意實應由不同之人分別擔任。又憲法原文對副總統缺位時，並無補選之規定，增修條文第二條第七項明定：「副總統缺位時，由總統於三個月內提名候選人，召集國民大會補選，繼任至原任期屆滿為止。」亦足證明修憲者對副總統職位之重視，不容其長期懸缺，俾維持總統缺位時得立即有法定繼任者，以確保元首職位之機能不致中斷。若遇有總統缺位時，兼任行政院院長之副總統繼任後或可援引憲法第五十一條及第五十五條第二項之規定，作為人事安排之依據，但難謂並無聲請意旨一再

dance with Article 2, Paragraph 3, of the Constitutional Amendments, the discharge order for the [original] Premier does not take effect until the Legislative Yuan confirms the new Premier. If the original Premier should participate in the vice presidential campaign and be elected, while there is no doubt that the Constitution does permit the Vice President to the Legislative Yuan is to confirm a new Premier nominated by the President in accordance with the law, naturally such constitutionally permissible act under that particular circumstance cannot be abruptly interpreted as being unconstitutional. That each side insists upon its point of view on the constitutionality of concurrent service is due primarily to the current Constitution's framework of the Five Powers Division, which adopts a number of [different] structures under the cabinet and presidential system, respectively. It is obvious that distinctively diverse conclusions can be drawn from the perspectives of different political ideologies or systems. Any adjustment of the constitutional structure should be carefully considered by the authorized body with the power to

指稱減損繼任「雙重保險機制」之疑慮。若副總統兼任行政院院長所遭遇之情形為總統不能視事，則尚不能直接從憲法條文中獲致解答。蓋在副總統與行政院院長分別由二人擔任之常態情形，副總統自可代行總統之職權，直至總統不能視事之原因消滅為止。如副總統與行政院院長同屬一人，其代行總統職權即有產生不能相容之情事，因代行職權者，既非以單純行政院院長身分為之，則與憲法第五十一條專指由行政院院長代行總統職權之規定有間。可見上開情形已不在憲法設計總統職權替代機制之範圍，或須以轉換適用之方式始能勉為因應；究與憲法上述三個職位應分別由不同之人擔任之常態設計不符，並對憲法所規定繼任或代行職權之機制有所影響。聲請意旨迭次執以指摘，自有相當理由。

amend the Constitution, which is not within the jurisdiction of the constitutional interpretation body. However, by separately installing three types of positions-- the President, the Vice President and the Premier, the original intent of the Constitution was to have different individuals serve [in each position], respectively. Furthermore, although the original text of the Constitution provides no provision for the [make-up] election of the Vice President should that office become vacant, Article 2, Paragraph 7, of the Constitutional Amendments expressly states, "[i]n case the office of the Vice President should become vacant, the President shall nominate a candidate or candidates within three months so that the Legislative Yuan may elect a new Vice President to serve the remainder of the original term." This is sufficient to demonstrate that the Constitution drafters did pay attention to the office of the Vice President, to ensure that it is not subject to prolonged vacancy so that there will be an immediate successor in case the office of the President should become vacant, and the functions of the head of state are not interrupted. While

the Vice President who concurrently serves as the Premier may make personnel arrangements in accordance with Article 51 and Article 55, Paragraph 2, of the Constitution if the office of the President becomes vacant, such can hardly dispel the concerns, as repetitively argued in the petitioner's arguments, that the "double insurance mechanism" for [power] succession is weakened. In the event the Vice President who concurrently serves as the Premier should encounter the situation that the President cannot attend to his/her office, the constitutional provisions do not offer a direct solution. This is because under normal circumstances where two different individuals respectively serve as the Vice President and the Premier, the Vice President can naturally be the Acting President until the cause of such inability diminishes. However, if the same person is to be both the Vice President and the Premier, the issue of incompatibility of duties will occur with the acting of the presidential power because as long as the acting capacity is not done purely by the status of the Premier, there is [then] a discrepancy with Article 51 of the Constitu-

tion, which exclusively stipulates the situation where the Premier serves as the Acting President. It is clear that the above situation is not within the scope of the powers and duties of the substitution mechanism under the Constitution and may barely be resolved by cross applications [of different provisions]. After all, this is not in line with the design that under normal circumstances different persons should serve in the three constitutionally mandated positions, respectively, and would affect the constitutional mechanism of power succession or acting. There are merits in the petitioner's repetitive criticisms in this regard.

In sum, the nature of the duties of the Vice President and the Premier are not obviously incompatible, yet for the same person to serve in both positions will affect the constitutional mechanism of power succession or acting in case the office of the President becomes vacant or the President is incapable of carrying out his/her duties. Therefore, having the Vice President concurrently serve as the Premier is not completely in conformity with

綜上所述，副總統與行政院院長二者職務性質尚非顯不相容，惟副總統及行政院院長二職位由一人兼任，如遇總統缺位或不能視事時，將影響憲法所規定繼任或代行職權之設計，故由副總統兼任行政院院長，與憲法設置此二職位分由不同之人擔任之本旨，未盡相符。引發本件解釋之事實，應依上開解釋意旨為適當之處理。

the Constitution's objective of having separate individuals assume the duties of the Vice President and Premier, respectively. The facts that triggered the present Interpretation should be properly disposed of in accordance with this ruling.

II.

The Constitution does not stipulate the term of the Premier. Thus, there are no clear guidelines on when the Premier should be retained or relieved of duties. Although Article 57 expressly provides that the Executive Yuan shall be responsible to the Legislative Yuan, given that the entire Legislative Yuan could not be re-elected in the past, the retaining or resignation of the Premier and his/her subordinates (the Vice Premier and all the ministers without portfolio) cannot be determined by public opinion, which is reflected in the result of such re-elections. To avoid [the situation] where the Premier is subject to no term limitations, a custom has been in place for over the past forty years that the Premier would submit a general resignation along with his/her subordinates to the new President after

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憲法對行政院院長之任期並未規定，因而關於行政院院長何時卸職或留任亦無明顯之規範可循。憲法第五十七條雖明定行政院對立法院負責，但以往因為立法院未能全面定期改選，故無從按立法院改選結果所反映之民意，定行政院院長及其僚屬（副院長及全體政務委員）之去留。為避免行政院院長毫無任期之限制，遂於每屆總統改選後，由院長率同僚屬向新任總統提出總辭，四十餘年來寖假成為例規。惟行政院須於新任總統就職時提出總辭，在現行憲法上尚無明確之依據。自八十一年起立法院已全面定期改選，第二屆立法院於翌年二月選出後，當時之行政院院長即提出辭職，八十四年十月十三日本院作成釋字第三八七號解釋，明白釋示基於民意政治與責任政治之原理，立法委員任期屆滿改選後第一次集會前，行政院院長應向總統提出辭職，此種辭職乃行政

each presidential election. Yet there is no clear basis under the current Constitution for the situation where the Premier should tender a general resignation at the inauguration of the new President. In 1992, the Legislative Yuan was undergoing regular re-election, so the Premier immediately tendered his resignation after the second Legislative Yuan was elected. This Yuan ssued its Interpretation No. 387 on October 13, 1995, which declares that as a constitutional obligation, the Premier shall tender his/her resignation to the President after the re-election but before the first session of the Legislative Yuan. In addition, if and when the Legislative Yuan disagrees with the Executive Yuan over an important policy, under Article 57, Subparagraphs 2 and 3, of the Constitution, the Legislative Yuan may, in the form of a resolution, request the Executive Yuan to alter that policy; the Executive Yuan, however, may, upon the presidential approval, transmit the resolution back [to the Legislative Yuan] for reconsideration; if the Executive Yuan should deem the Legislative Yuan's resolution on a given statute, budget, or treaty too diffi-

院院長憲法上之義務。除此之外，依憲法第五十七條第二款及第三款規定，立法院對於行政院之重要政策不贊同時，得以決議移請行政院變更之，行政院經總統之核可，移請覆議；或行政院對立法院決議之法律案、預算案、條約案，認為有窒礙難行時，經總統之核可，移請覆議，覆議時分別經出席立法委員三分之二維持原決議，若行政院院長不欲接受而向總統提出辭職時，亦屬憲法上義務性之辭職。對於行政院院長履行其憲法上義務之辭職，總統自無不予批准之理。至於行政院院長之其他辭職原因，本有多端，諸如因身體健康、政治情勢、領導風格等，其辭職均非憲法上義務；新任總統就任行政院院長所提出之辭職亦同。查國家元首更迭，無論君主立憲或共和國體，抑無論典型之內閣制或法國第五共和之雙首長制，自十九世紀以來，歐洲國家之內閣不乏向新就任元首提出辭職之例，故有禮貌性辭職之稱。禮貌性辭職元首是否批准因而更換內閣，各國並不一致，同一國家亦因各時期所遭遇情況而有不同（參看 Klaus von Beyme, a.a.O., S.720-727）。對於行政院院長非憲法上義務之辭職，總統自可盱衡國家政治情勢及其他情況，為適當之處理，包括核准辭職、退

cult to carry out, it may [also], upon the presidential approval, transmit the resolution back [to the Legislative Yuan] for reconsideration. If two-thirds of the members of the Legislative Yuan should decide to maintain the original resolution, the Premier shall tender his resignation to the President if he/she should decide not to accept it, and this is also a resignation as a matter of constitutional obligation. There is no reason why the President should not approve a Premier's resignation for carrying out his/her constitutional obligations. There may be a wide variety of other reasons to resign, such as physical health, political conditions, leadership style, and so forth. Yet those resignations are not constitutionally obligated, as is the Premier's resignation at the inauguration of the new President. Since the nineteenth century, regardless of whether it is a constitutional monarchy or republic, a typical cabinet or dual leadership system under the French Fifth Republic, there have been plenty of examples in European states where the cabinet submits its resignation to the newly- inaugurated head of state, hence the so-called courtesy resig-

回辭呈或批示留任等皆屬總統本於國家元首之憲法職責，作合理裁量之權限範圍，屬於統治行為之一種，尚非本院應作合憲性審查之事項。此部分聲請意旨有謂：在五權憲法架構下，總統與行政院院長間並無從屬關係，故行政院院長之辭職並無長官可以批示云云，核與憲法規定不符，蓋依憲法增修條文第二條第二項及第三項規定意旨，不僅行政院院長須經總統之任免，縱依憲法經國民大會或立法院同意任命人員（如大法官、考試委員、監察委員或審計長等），亦應由總統發布任免之命令，足證是否與總統有從屬關係無關。至於總統就任時，提出辭職之行政院院長亦同時就任副總統者，其涉及之憲法問題，已在同案另作解釋，此不贅述。

nation. There is no uniform rule among different nations on whether the head of state should approve such a courtesy resignation, thereby resulting in the change of the cabinet. Even within the same country there may be differences that depend upon the circumstances encountered in different periods (See Klaus von Beyme, a.a.O., S. 720-727). With regard to the Premier's resigning when it is not as a matter of constitutional obligation, the President should weigh the political situation of the nation and other circumstances in order to take proper disposition, including granting the resignation, returning the letter of resignation, or retaining the incumbent. These are all constitutional duties of the President [to carry out] as the head of state and within the reasonable discretionary scope of that power. As an act of governance, it is not a matter subject to constitutionality review by this Yuan. The petition claimed in this part that the President and the Premier do not have a superior- subordinate relationship under the framework of the Five Powers Division and there is no superior to approve the Premier's resig-

nation. That is not in accordance with the constitutional stipulation. Based upon the meaning and purpose of Article 2, Paragraph 2 and 3, of the Constitution Amendments, the Premier's appointment and relief of duties and those personnel who are confirmed by the National Assembly or the Legislative Yuan (such as the Justices of the Constitutional Court, members of the Examination and Control Yuan or the Comptroller [or Auditor-General]) must all be approved by the President. Suffice it to say that whether there is a subordinate relationship to the President is not relevant. With regard to the constitutional issues on a Premier, who has resigned, being inaugurated as the Vice President along with the President, interpretations have already been provided elsewhere in this case and will not be repeated here.

III.

Article 62 of the Constitution expressly stipulates that the Legislative Yuan is the highest legislative body of the country. Article 63 of the Constitution provides a general regulation on the pow-

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立法院為國家最高立法機關，憲法第六十二條定有明文。立法院之職權，憲法第六十三條有概括之規定：「立法院有議決法律案、預算案、戒嚴案、大赦案、宣戰案、媾和案、條約案

ers of the Legislative Yuan: "The Legislative Yuan shall have the power to decide by resolution upon statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, and other important affairs of the State." In addition, the President's nominations of the Premier in accordance with Article 55 of the Constitution and the Comptroller of the Control Yuan in accordance with Article 104 of the Constitution are both subject to the Legislative Yuan's confirmation. [Moreover,] both the Constitution and rules that have the effect of the Constitution expressly prescribe a broad scope of powers to the Legislative Yuan. [For example,] among other things, the resolution to request the President to terminate martial law under Article 39 of the Constitution; the right to listen to the Executive Yuan's in-session report on the administration's policies and to interpellate the Premier and Principal Officers [ministers] of the Cabinet under Article 57, Subparagraph 1, of the Constitution; the right to resolve to alter a critical policy of the Executive Yuan or to decide whether to override the

及國家其他重要事項之權。」之外，諸如總統依憲法第五十五條提名行政院院長、依第一百零四條提名監察院審計長，均應經立法院之同意；依憲法第三十九條決議移請總統解嚴；依憲法第五十七條第一款立法委員在開會時有聽取行政院施政報告並向行政院院長及行政院各部會首長質詢之權；依同條第二款案之權；依憲法第一百零五條規定審議及第三款有決議變更行政院重要政策及對行政院移請覆議事項決議是否維持原審計長所提出之決算審核報告之權；依憲法第一百十一條中央與地方遇有權限爭議時，亦規定由立法院解決；依憲法第一百七十四條第二款立法院亦得對憲法擬定修正案提請國民大會複決；又依憲法增修條文第二條第四項總統發布之緊急命令，須於十日內提交立法院追認；再者依本院釋字第三二五號解釋立法院院會就議案涉及事項，得決議向有關機關調閱文件原本，以上所舉皆屬憲法或有憲法效力之規範所明定屬於立法院之職權，內容甚為廣泛。上述憲法所定屬於立法院職權之事項，立法院依法定之議事程序所作各種決議，按其性質有拘束全國人民或有關機關之效力。惟任何國家機關之職權均應遵守憲法之界限，凡憲法依權力分立原則將特定職權

Executive Yuan's request for reconsideration under the same Article, Subparagraphs 2 and 3; the right to review the Comptroller's audit report on the final accounts of revenues and expenditures under Article 105 of the Constitution; to resolve disputes derived from the delineation of powers between the central and local authorities in accordance with Article 111 of the Constitution; to draft constitutional amendments and submit them for the National Assembly's referendum in accordance with Article 174, Subparagraph 2, of the Constitution;[19] also in accordance with Article 2, Paragraph 4, of the Constitutional Amendments, any emergency decree promulgated by the President must be submitted to the Legislative Yuan within ten days for ratification;[20] furthermore, in accordance with this Yuan's Interpretation No. 325, the General Conference of the Legislative Yuan may resolve to retrieve the original documents from the related [executive] agencies on matters related to a [given] agenda. These constitutionally

自立法、行政或司法等部門權限中劃歸其他國家機關行使；或依制憲者之設計根本不採為憲法上建制者，各個部門即有嚴格遵守之憲法義務。前者如一般國家屬於立法機關之調查權，在我國憲法上歸屬於監察權之範疇；後者如國會對內閣之不信任投票制度及內閣用以對抗之解散國會機制，亦為我國憲法所不採。至於行政院院長之任命，立法院雖有同意權，然必須基於總統提名並咨請立法院行使職權為前提，始得為之，憲法第五十五條之規定甚為明顯。又依憲法第五十七條第二款及第三款之規定，立法院對行政院之重要政策不贊同時，得決議移請行政院變更之；立法院決議之法律案、預算案、條約案，行政院如認為有窒礙難行時，行政院均得經總統之核可移請立法院覆議，覆議時，如經出席立法委員三分之二維持原決議時，行政院院長應即接受該決議或辭職。上述規定即屬制憲者為取代內閣制國家不信任投票及解散國會制度所為之設計，憲法歷次增修對此復未有所更改。倘認為立法院得以讀會及過半數之決議咨請總統提名新行政院院長人選，俾其行使

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[19] See also Article 1, Paragraph 2, Subparagraphs 1-3 of the Constitution Amendments.

[20] It is now codified as Article 2, Paragraph 3 of the Constitution Amendment.

mandated powers that belong to the Legislative Yuan and the various resolutions made by that Yuan through the legally mandated parliamentarian process in their very nature have binding effect on the entire population of the nation or related agen cies. Yet any state agency must abide bythe limits of the Constitution. For any particular power being taken out of the legislative, executive or judicial authority and transferred to another state agency to carry out in accordance with the separation-of-power principle, or mechanisms that the designers of the Constitution fundamentally do not adopt, each department has a constitutional obligation to strictly obey [those rules]. In the former situation, for instance, the investigative power that generally belongs to the legislature in other countries is under the authority of the Control Yuan under our Constitution;[21] in the latter, for instance, our Constitution does not adopt the system where the parliament may cast a no confidence vote to the cabinet and the cabinet's countermeasure to dissolve the

同意權，總統亦依其決議辦理，則無異創設為制憲者所不採之不信任投票制度。再依憲法之規定，向立法院負責者為行政院，立法院除上開憲法規定之事項外，並無決議要求總統為一定行為或不為一定行為之權限。是故立法院八十五年六月十一日所為「咨請總統儘速重新提名行政院院長，並咨請立法院同意」之決議，逾越憲法所定立法院之職權，僅屬建議性質，對總統並無憲法上之拘束力。

[21] See Article 95 of the Constitution.

parliament.[22] As to the appointment of the Premier, although the Legislative Yuan has the confirmation power, Article 55 of the Constitution clearly stipulates that such power must be exercised on the premises of the President's nomination and request the Legislative Yuan to carry out that power. Also in accordance with Article 57, Subparagraphs 2 and 3, of the Constitution, if the Legislative Yuan does not concur with an important policy of the Executive Yuan, it may, by resolution, request the Executive Yuan to alter that policy; if the Executive Yuan deems a resolution on a statutory, budgetary or treaty bill passed by the Legislative Yuan difficult to implement, it may, upon presidential approval, request the Legislative Yuan to reconsider; if two-thirds of the members of the Legislative Yuan present vote to sustain their original bill, the Premier must immediately accept that resolution or resign from office. This is the rule designed by the Constitution drafters to substitute for the no confidence vote and

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[22] As of July 21, 1997, the system of no-confidence vote and dissolution of the Legislative Yuan was adopted. See Article 2, Paragraph 5 of the Constitution Amendments.

dissolution of parliament mechanism found in a country with a cabinet system, and the various constitutional amendments never sought to change it. If the Legislative Yuan were able to pass a resolution, with readings and [at least] over half of the vote cast in favor, to request the President to nominate a new Premier candidate so that it could exercise the power of confirmation, and the President did it accordingly, then it would be like creating the no confidence voting system that the Constitution drafters did not adopt. Furthermore, in accordance with the Constitution, the Executive Yuan is responsible to the Legislative Yuan. Except as otherwise stipulated by the Constitution, the Legislative Yuan does not have the authority to pass a resolution requesting the President to undertake or not to undertake a certain act. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination for the Legislative Yuan's confirmation as soon as possible" exceeded the constitutional authority of the

Legislative Yuan and shall be considered as advisory [opinion only] that carries no constitutional binding power over the President.

Justice Hsiang-Fei Tung filed dissenting opinion and dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋董大法官翔飛提出不同及部分不同意見書；劉大法官鐵錚提出不同意見書。

【EDITOR'S NOTE】

In March 1996, the Republic of China held its first popular and direct election for its tenth President (which used to be elected by the National Assembly). Prior to that election, in an apparent attempt to sway the election outcome and to show its displeasure over the incumbent President Lee Tang-hui's visit to the United States in 1995, the People's Republic of China launched a series of military maneuvers across the Taiwan Strait, including two missiles testing within the close range of Taiwan's territorial water. These actions created enormous tensions and uncertainties in Taiwan and strong reactions from the United States. However, the election went forward and Lee Tang-

hui, Mainland China's least favored candidate, was reelected (by 54% of the vote in a four-way race). Soon after his inauguration, Lee created a constitutional crisis by insisting on nominating his vice president, Mr. Lien Chien, to continue to serve as the Premier of the Executive Yuan.

Although Lien's appointment was eventually confirmed by the Legislative Yuan (80 for, 65 opposed, and 3 abstention) in June, the issue of whether an incumbent Vice President may concurrently serve as the Premier under the Constitution, among other things, remained unresolved. This development quickly turned into a major political firestorm and resulted in a situation where the Legislative Yuan withdrew its invitation to have the Premier present his annual state of the country report before the Legislative Yuan. In fact, Mr. Lien became a persona non grata to the Legislative Yuan. The entire interpellation and budgetary process (Article 57 of the Constitution) was also seriously disrupted. This prompted more than 80 members of the Legislative Yuan to file separate petitions for a constitu-

tional clarification before the Council of Grand Justices. The Council finally issued this Interpretation on December 31, 1996, holding that although there is no direct prohibition in the Constitution against such appointment, it is nevertheless not in full conformity with the structure, design and purpose of the Constitution.

Before this Interpretation was issued, however, apparently in an attempt to resolve the situation while taking advantage of his election mandate, President Lee, who was also chairman of the KMT, called for a National Development Conference (not constitutionally sanctioned) in December 1996 to engage in political consultative process primarily with KMT's main opposition, the Democratic Progressive Party (DPP)(several other smaller opposition parties and individuals, especially the New Party, boycotted the event). They reached a "consensus" entailing five points for future reform: (1) the President shall appoint the Premier without the Legislative Yuan's approval; (2) the President shall have the power to dissolve the entire Legislative Yuan; (3)

elections at the provincial level shall be "frozen;" (4) township or village chief executives shall be appointed; and (5) the Legislative Yuan shall have the power to dissolve the entire Executive Yuan (or the Cabinet). As a result, the incumbent and a very popular governor of the Taiwan Province, James C. Sung, announced his intention to resign in protest, setting off yet another political firestorm. Sung eventually broke rank with the KMT.[23] In the mean time, Lien continued to serve as the Premier until August 31, 1997, when President Lee finally reshuffled the Cabinet at the conclusion of the KMT's 15th National Congress as a way to boost that party's image amid a number of high profile corruption charges involving senior officials and Mr. Lien's continuous image problem.[24] Lien and Sung eventually ran against each other in the 2000 presidential election and both lost to the DPP candidate, Mr. Chen Shuibian.

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[23] For details, see Government Information Office, THE REPUBLIC OF CHINA YEARBOOK 1996, Taipei, Taiwan: Shen's Art Printing Co., 1997, Appendix 1: Major Events.

[24] See New premier Named to Boost Regime's Image, CHICAGO TRIBUNE, August 29, 1997, p. 6. See also supra note 15.

J. Y. Interpretation No.420（January 17, 1997）*

ISSUE: Does the resolution of the en banc Conference of the Administrative Court stating that an enterprise with no investment in buying and selling securities specified in its business registration but engaging in such activities with returns far outweighing regular business income shall be subjected to business income tax violate the principle of taxation by law as provided in Article 19 of the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 27 of the Act of Encouragement of Investment（獎勵投資條例第二十七條）; Article 12 and Article 15, Paragraph 1, of the Company Act（公司法第十二條、第十五條第一項）; Article 32 of the Enforcement Rules of the Act of Encouragement of Investment（獎勵投資條例施行細則第三十二條）.

KEYWORDS:

taxation（租稅）, securities exchange tax（證券交易稅）, securities exchange income tax（證券交易所得稅）, tax reduction or exemption（減稅或免稅）, principle of tax per legislation（租稅法律主義）.**

HOLDING: In relation to laws involving taxation, they should be con-

解釋文：涉及租稅事項之法律，其解釋應本於租稅法律主義之精

* Translated by BAKER & McKENZIE.

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

strued in accordance with the principle of taxation by law and the respective purposes of the laws, balancing therewith the economic purposes and the principle of equality in substantive taxation. The en banc Conference of the Administrative Court dated October 14, 1992, resolved that: " 'those not in the profession of buying or selling of securities,' as referred to in Article 27 of the Act of Encouragement of Investment, should be factually determined according to the real operating situation of the enterprise for profit. Where the business scope indicated in the company registration or business registration does not include investment or its registered investment scope does not include buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, with its non-business income far outweighing its business income, then there is sufficient evidence to establish that its main business is in the buying or selling of securities, in which case, it cannot be viewed as one whose profession is not in the buying or selling of securities," and it does not fall within the parameters in which pay-

神：依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之。行政法院中華民國八十一年十月十四日庭長、評事聯席會議所為：「獎勵投資條例第二十七條所指『非以有價證券買賣為專業者』，應就營利事業實際營業情形，核實認定。公司登記或商業登記之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其非營業收入遠超過營業收入時，足證其係以買賣有價證券為主要營業，即難謂非以有價證券買賣為專業」不在停徵證券交易所得稅之範圍之決議，符合首開原則，與獎勵投資條例第二十七條之規定並無不符，尚難謂與憲法第十九條租稅法律主義有何牴觸。

ment of securities income tax is suspended. The foregoing is consistent with the principle set out in the beginning, is not incongruous with Article 27 of the Act of Encouragement of Investment, and does not contravene the principle of taxation by law provided for in Article 19 of the Constitution.

REASONING: The Act of Encouragement of Investment (which became ineffective on December 31, 1990, upon expiration of the implementation period) was formulated with the aims of encouraging investment and accelerating economic development. The main means of encouragement is through the benefit of tax deduction. The Act stipulates various conditions on which a benefit may be enjoyed, to prevent illegitimate receipt of the benefit of tax deduction by means of tax evasion activities, with a view to benefit fairly every manufacturing enterprise and enterprise for profit.

解釋理由書：按獎勵投資條例（七十九年十二月三十一日因施行期間屆滿而失效）之制定，係以獎勵投資，加速經濟發展為目的，藉稅捐減免之優惠為其主要獎勵方法。為期各種生產事業及營利事業均能公平同霑其利，並防止有以迴避租稅行為，獲取不正當減免稅捐優惠，該條例乃規定各種享受獎勵之條件，予以節制。

A company is a kind of enterprise for profit. To ensure its legal and normal operations, Article 12 and Article 15, Para-

公司為營利事業之一種，為確保其合法正常經營，公司法第十二條、第十五條第一項規定：「公司設立登記

graph 1, of the Company Act stipulate: "where a duly established and registered company has not registered some item required to be registered, or has not registered an amendment to some registered item, the company may not cite that item to defend against third parties," and "a company may not operate in business activities beyond its registered business scope." Where a company operates in certain business activities beyond its registered business scope, therefore falling short of the registration requirement of Article 12 of the Company Act and violating the restrictions of Article 15, Paragraph 1 of the same Act, then, despite the fact that the required items or changes have not been properly registered and are therefore ineffective against third parties and that the responsible person of the company is civilly or criminally liable, the fact of the company's operation in those businesses is not affected.

後，有應登記之事項而不登記，或已登記之事項有變更而不為變更之登記者，不得以其事項對抗第三人。」「公司不得經營登記範圍以外之業務。」公司如經營某種登記範圍以外之業務，而怠於公司法第十二條之登記並違反同法第十五條第一項所規定之限制，除前者不得以其事項對抗第三人，後者公司負責人應負民、刑事責任外，尚不影響該公司以經營該種事業為其營業之事實。

Article 27 of the Act of Encouragement of Investment amended and promulgated on January 26, 1987, stipulates that: "to facilitate the development of the capi-

七十六年一月二十六日修正公布之獎勵投資條例第二十七條規定：「為促進資本市場之發展，行政院得視經濟發展及資本形成之需要及證券市場之狀

tal market, the Executive Yuan may, upon consideration of the needs of economic development and capital formation and the situation of the securities market, decide to suspend taxation of part or all of the securities transaction tax, and to suspend taxation of part or all of the capital gain tax for securities from those whose profession is not in the buying or selling of securities." Pursuant to this stipulation, the Executive Yuan approved on December 1, 1987, Tai (76) Tsai No. 27947, under which the taxation of capital gain tax for securities of those whose profession is not in the buying or selling of securities is suspended from January 1, 1988, to December 31 of the same year. In relation to laws involving taxation, they should be construed in accordance with the principle of taxation by law and the respective purposes of the laws, balancing therewith the economic purposes and the principle of substantive fairness of taxation. On the basis of the principle of fair taxation, the reference to "those whose profession is not in the buying or selling of securities" in Article 27 of the Act of Encouragement of Investment should be determined in the

況，決定暫停徵全部或部分有價證券之證券交易稅，及暫停徵全部或部分非以有價證券買賣為專業之證券交易所得稅。」行政院依此規定，於七十六年十二月一日以台（七六）財第二七九四七號函核定自七十七年一月一日起至同年十二月三十一日止繼續停徵非以有價證券買賣為專業者之證券交易所得稅。涉及租稅事項之法律，其解釋應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之。是基於公平課稅原則，獎勵投資條例第二十七條所定「非以有價證券買賣為專業者」，自應就營利事業實際營業情形，核實認定。公司登記（包括商業登記）之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其買賣收入遠超過其已登記之營業收入，足認其為以有價證券之買賣為主要營業時，自不得以怠於公司法第十二條之登記義務或違反同法第十五條第一項所規定之限制等迴避租稅行為，主張其非以有價證券買賣為專業，而享受免徵證券交易所得稅之優惠。行政法院八十一年十月十四日庭長、評事聯席會議所為：「獎勵投資條例第二十七條所指『非以有價證券買賣為專業者』，

light of the real operating situation of the enterprise for profit. Where a company's registered business scope indicated in its company registration (including business registration) does not include investment or its registered investment scope does not include the buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, and its income generated from the buying or selling [of securities] is well beyond its income generated from its registered business activities, such that it may be said that its main business activities are in the buying or selling of securities, then it may not, through tax evading activities such as falling short of the registration requirement of Article 12 of the Company Act or violating the restrictions of Article 15, Paragraph 1, of the same Act, assert that its profession is not in the buying or selling of securities so as to enjoy the benefits of capital gain tax for securities exemptions. The en banc Conference of the Administrative Court dated October 14, 1992 resolved that: " 'those not in the profession of buying or selling of securities' as referred to in Article 27 of the Act

應就營利事業實際營業情形，核實認定。公司登記或商業登記之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其非營業收入遠超過營業收入時，足證其係以買賣有價證券為主要營業，即難謂非以有價證券買賣為專業」不在停徵證券交易所得稅之範圍之決議，符合首開原則，與獎勵投資條例第二十七條之規定並無不符，尚難謂與憲法第十九條租稅法律主義有何牴觸。

of Encouragement of Investment should be determined according to the real operating situation of the enterprise for profit. Where the business scope indicated in the company registration or business registration does not include investment or its registered investment scope does not include buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, with its non-business income far outweighing its business income, then there is sufficient evidence to establish that its main business is in the buying or selling of securities, in which case it cannot be viewed as one whose profession is not in the buying or selling of securities," and it does not fall within the parameters in which payment of securities income tax is suspended. The foregoing is consistent with the principle set out in the beginning, is not incongruous with Article 27 of the Act of Encouragement of Investment, and does not contravene the principle of taxation by law provided for in Article 19 of the Constitution.

As to Article 32 of the Enforcement 至獎勵投資條例施行細則第三十

Rules of the Act of Encouragement of Investment, which provides: "the statement 'those whose profession is in the buying and selling of securities' in Article 27 of this Act refers to dealers that are in the business of buying and selling of securities and to enterprises for profit whose profession is investment as indicated in their company registrations or business registrations," following the explanations provided above and to the extent it is incongruous with the statutory intention, it is herein expounded that this [Article 32] should not be applicable.

二條規定：「本條例第二十七條所稱『以有價證券買賣為專業者』，係指經營有價證券自行買賣業務之證券自營商及經公司登記或商業登記以投資為專業之營利事業」，依上開說明，與立法意旨未盡相符部分，應不適用，併予敘明。

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋孫大法官森焱提出不同意見書。

J. Y. Interpretation No.421（February 21, 1997）*

ISSUE: May regular remuneration be disbursed by the National Treasury to the Speaker and Vice Speaker of the National Assembly?

RELEVANT LAWS:

Articles 1, Paragraph 8 of the Amendments to the Constitution（憲法增修條文第一條第八項）; J. Y. Interpretations Nos. 282 and 299（司法院釋字第二八二號、第二九九號解釋）; the Act Governing the Compensation and Fees for the National Assembly Delegates（國民大會代表報酬及費用支給條例）.

KEYWORDS:

National Assembly（國民大會）; National treasury（國庫）; remuneration（報酬）; Central Government's budgets（中央政府總預算）.**

HOLDING: Article 1, Paragraph 8, of the Amendments to the Constitution, which was promulgated on August 1, 1994, stipulates that, commencing from the third term, the National Assembly shall inaugurate both the Speaker and the

解釋文：中華民國八十三年八月一日公布之憲法增修條文第一條第八項規定，國民大會自第三屆國民大會起設議長、副議長，由國民大會代表互選之。國民大會議長對外代表國民大會，對內綜理會務，並於開會時主持會議，

* Translated by David T. Liou.

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

Vice Speaker who will be elected by the Delegates to said Assembly from among their members. The Speaker of the National Assembly represents the National Assembly and internally the Speaker coordinates and manages the affairs of the National Assembly and presides over meetings of the National Assembly. Such post is of a regular nature and differs from that of the ordinary Delegates to the National Assembly; regular remuneration is disbursed by the National Treasury. The items and amount of the remuneration fall within the scope of the legislative authority so long as they are within reasonable limits. Therefore, the total budget of the Central Government which was passed by the Legislative Yuan in 1997, to the extent that it relates to the annual salaries, disbursements and special fees of the Speaker and the Vice Speaker, is not in conflict with the Constitution.

屬經常性之職位，與一般國民大會代表有異，自得由國庫支給固定報酬。至報酬之項目及額度，在合理限度內係屬立法機關之權限。是立法院通過八十六年度中央政府總預算中，關於議長、副議長之歲費、公費及特別費部分，與憲法尚無牴觸。

In view of the fact that the Speaker and Vice Speaker of the National Assembly hold governmental posts under the Constitution, which represent the National Assembly and that such posts are of a

國民大會議長、副議長，既為憲法上之國家機關，對外代表國民大會，且屬經常性之職位，復受有國庫依其身分、職務定期支給相當之報酬，除法律另有規定外，自不得兼任其他公職或執

regular nature, they shall be compensated by the National Treasury with remuneration comparable to their position and job duties on a regular basis. Moreover, unless otherwise prescribed by the law, they shall not assume other full-time positions of public service or operate a business.

REASONING: Article 1, Paragraph 8, of the Amendments to the Constitution, which was promulgated on August 1, 1994, stipulates that, commencing from the third term, the National Assembly shall inaugurate both the Speaker and the Vice Speaker who will be elected by the Representatives of the National Assembly from among their members. The Speaker of the National Assembly represents the National Assembly and internally coordinates and manages the affairs of the National Assembly and presides over meetings of the National Assembly. Such post is of a regular nature and differs from that of the ordinary Delegates to the National Assembly; therefore, the Speaker should be entitled to regular remuneration disbursed by the National Treasury. The

行業務，併此敘明。

解釋理由書：八十三年八月一日公布之憲法增修條文第一條第八項規定，國民大會自第三屆國民大會起設議長、副議長，由國民大會代表互選之。國民大會議長對外代表國民大會，對內綜理會務，並於開會時主持會議，屬經常性之職位，與一般國民大會代表有異，自得由國庫支給固定報酬。至報酬之項目及額度，在合理限度內係屬立法機關之權限。本院釋字第二八二號、第二九九號有關國民大會代表應否由國庫定期支給待遇之解釋，以及國民大會代表報酬及費用支給條例，均係在前開憲法增修條文修正前所為，既未包括支給議長、副議長之報酬在內，是以立法院於審查八十六年度中央政府總預算時，決議通過國民大會議長、副議長之歲費、公費及特別費，與憲法尚無牴觸。惟今後修正國民大會代表報酬及費用支

items and amount of the remuneration fall within the scope of the legislative authority so long as they are within reasonable limits. The Interpretations Nos. 282 and 299 of this Yuan which relate to whether representatives of the National Assembly should be remunerated by the National Treasury on a regular basis and the Act Governing the Compensation and Fees for the National Assembly Delegates were all made before the relevant provision in the Amendments to the Constitution was amended, therefore they did not include disbursement of remuneration to the Speaker and the Vice Speaker. Consequently, when the Legislative Yuan was reviewing the Central Government's annual budget for the year 1997 and passed the resolution on the annual salaries, disbursements and special fees payable to the Speaker and Vice Speaker of the National Assembly, such resolution was not in conflict with the Constitution. However, in the future, when the Act Governing the Compensation and Fees for the National Assembly Delegates is being amended, clear stipulations should be made with respect to the Speaker and the Vice Speaker so as to

給條例時，其有關議長及副議長之部分，自應予以明定，以為支給之依據。

provide a legal basis for remuneration.

It is hereby explicated that in view of the fact that the Speaker and Vice Speaker of the National Assembly are government authorities under the Constitution representing the National Assembly and that such posts are of a regular nature, payment should be disbursed by the National Treasury with remuneration comparable to their position and job duties on a regular basis. Moreover, unless otherwise prescribed by the law, they shall not take on other full-time positions of public service or operate a business.

國民大會議長、副議長，既為憲法上之國家機關，對外代表國民大會，且屬經常性之職位，復受有國庫依其身分、職務定期支給相當之報酬，除法律另有規定外，自不得兼任其他公職或執行業務，併此敘明。

J. Y. Interpretation No.422（March 7, 1997）*

ISSUE: Where the Constitution specifically protects the people's right of existence and the law further provides that the landlord shall not repossess the farmland leased to the tenant-farmer upon the expiration of a farm lease if the repossession might seriously affect the livelihood of the tenant-farmer and his family, are the directives issued by the Executive Yuan and the Ministry of the Interior constitutional in adopting the minimum living expense standard table for the military draftees' families as a basis to evaluate the tenant-farmer's annual living expense?

RELEVANT LAWS:

Articles 15 and 153 of the Constitution（憲法第十五條、第一百五十三條）; Article 19, Paragraph 1, Subparagraph 3, of the Act Governing the Reduction of Farm Rent to 37.5 Percent（耕地三七五減租條例第十九條第一項第三款）.

KEYWORDS:

tenant-farmers（佃農）; tenancy（租賃）; minimum living expense（最低生活費）; right of existence（生存權）; farm lease（農地租約）.**

HOLDING: Article 15 of the Constitution provides that the people's right to life shall be protected. Article 153

解釋文：憲法第十五條規定，人民之生存權應予保障；第一百五十三條復明定，國家為改良農民之生活，增

* Translated by Wellington L. Koo, and Formosa Transnational Attorney at Law.

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of the Constitution also provides that the State, in order to improve the livelihood of farmers and to improve their productive skill of farmers, shall enact laws therefore and carry out policies for their protection. Both articles declare explicitly that the State is obliged to protect the farmers' right to life and improve their standard of living. The Act Governing the Reduction of Farm Rent to 37.5 Percent (hereinafter the "Act") was therefore enacted. In order to protect tenant farmers and to prevent the livelihood of their family and right to life from being severely damaged by landlords' repossession of tenant farms, Article 19, Paragraph 1, Subparagraph 3, of the Act stipulates that if the landlord's repossession of a tenant farm would result in the tenant farmer's being unable to support his family, the landlord shall not repossess the tenant farm upon the expiration of the tenancy. Directive T. (49) N.T. No. 7226 of the Executive Yuan dated December 23, 1960, as well as Directive T.N. D.T. No. 266779 of the Ministry of the Interior dated November 1, 1984, stated that the standard of minimum living expense listed in Taiwan's (Taipei's,

進其生產技能，應制定保護農民之法律，實施保護農民之政策，明確揭示國家負有保障農民生存及提昇其生活水準之義務。耕地三七五減租條例即屬上開憲法所稱保護農民之法律，其第十九條第一項第三款規定，出租人因收回耕地，致承租人失其家庭生活依據者，耕地租約期滿時，出租人不得收回自耕，目的即在保障佃農，於租約期滿時不致因出租人收回耕地，嚴重影響其家庭生活及生存權利。行政院於中華民國四十九年十二月二十三日以台四九內字第七二二六號令及內政部七十三年十一月一日七十三台內地字第二六六七七九號函，關於承租人全年家庭生活費用之核計方式，逕行準用臺灣省（台北市、高雄市）辦理役種區劃現行最低生活費支出標準計算審核表（原役種區劃適用生活標準表）中，所列最低生活費支出標準金額之規定，以固定不變之金額標準，推計承租人之生活費用，而未斟酌承租人家庭生活之具體情形及實際所生之困窘狀況，難謂切近實際，有失合理，與憲法保護農民之意旨不符，應不再援用。

Kaohsiung's) Minimum Living Expense Standard Table for the Division of Conscription shall be used to estimate the annual family living expense for tenant farmers. However, it is neither realistic nor reasonable to apply fixed amounts to estimate the family living expense for individual tenant farmers without considering the actual family livelihood of the tenant farmer on a case-by-case basis and the difficulties a particular tenant farmer may encounter. Hence the abovementioned Directives are inconsistent with the constitutional intention to protect farmers and therefore shall not be applied.

REASONING: Article 15 of the Constitution provides that the people's right to life shall be protected. Article 153 of the Constitution also provides that the State, in order to improve the livelihood and productive skill of farmers, shall enact laws therefore and carry out policies for their protection. As such, the State shall have the responsibility to secure Farmers' right to life and raise farmers' standards of living.

解釋理由書：生存權應予保障；國家為改良農民之生活，增進其生產技能，應制定保護農民之法律，實施保護農民之政策，分別為憲法第十五條及第一百五十三條所明定，明確揭示國家負有保障農民生存及提昇其生活水準之義務。

The legislative purposes of the Act Governing the Reduction of Farm Rent to 37.5 Percent (hereinafter the "Act") are to improve the tenancy system, stabilize the society of agricultural communities, promote agricultural production, increase the income of farmers as well as to lay a foundation for the economic development of the country. In order to integrate Article 19 of the Act with the measures for overall agriculture land reform in 1983, it was therefore revised as "upon the expiration of the tenancy, the landlord may repossess the tenant farm for the purpose of expanding the scale of his family farms." However, in order to protect the right to life of tenant farmers who make livings by tenant farming, Article 19, Paragraph 1, Subsection 3, of the Act further provides that if the landlord's repossession of a tenant farm would result in the tenant farmer's being unable to support his family, the landlord shall not repossess the tenant farm upon the expiration of the tenancy. Directive T. (49) N.T. No. 7226 of the Executive Yuan dated December 23, 1960, stated that the Living Expense Standard Table for the Division of Con-

耕地三七五減租條例係為改善租佃制度，安定農村社會，同時亦為促進農業生產，提高農民所得，奠定國家經濟發展之基礎而制定。其後為配合國家整體農地改革之措施，於七十二年雖有就上開條例第十九條租約期滿時，地主為擴大家庭農場經營規模，得收回其出租耕地之相應性修正。惟同條例第十九條第一項第三款復規定「出租人因收回耕地，致承租人失其家庭生活依據者，耕地租約期滿時，出租人不得收回自耕」，用以保障仰賴承租耕地農作收入為生活憑藉之佃農的生存權。行政院四十九年十二月二十三日台四九內字第七二二六號令，關於承租人本人及其配偶與同一戶內之直系血親全年生活費用之核計方式，逕行準用臺灣省當年度辦理役種區劃適用生活標準表規定部分；內政部七十三年十一月一日台內地字第二六六七七九號函，關於承租人之收益與生活費用之審核標準，定為以耕地租約期滿前一年，承租人本人及其配偶與同一戶內之直系血親綜合所得總額與全年生活費為準，生活費用之計算標準則準用臺灣省（台北市、高雄市）辦理役種區劃現行最低生活費支出標準金額計算審核表（原役種區劃適用生活標準表）中所列最低生活費支出標準金額之規

scription of that year shall apply to estimate the annual living expense of the tenant farmer, spouse and lineal relatives who live in the same household; Directive T.N. D.T. No. 266779 of the Ministry of the Interior dated November 1, 1984, stated that the standard for reviewing the income and living expense of the tenant farmer, tenant farmer's spouse and lineal relatives of the tenant farmer who live in the same household shall be calculated with reference to their annual income and their annual living expense of the year before the expiration of the tenancy. Therefore, the standard of minimum living expense listed in Taiwan's Minimum Living Expense Standard Table for the Division of Conscription shall be used to estimate the family living expense of tenant farmers. However, it is neither realistic nor reasonable to apply fixed amounts to estimate the family living expense of individual tenant farmers without considering the commodity prices in different areas, the actual family livelihood and other individual circumstances of the tenant farmer on a case-by-case basis, such as necessary medical and insurance ex-

定，以固定不變之金額標準，推計承租人之生活費用，而未就不同地域物價水準之差異作考量，亦未斟酌各別農家具體收支情形或其他特殊狀況，諸如必要之醫療及保險相關費用之支出等實際所生困窘狀況，自難謂為切近實際，有失合理，與憲法保護農民之意旨不符，應不再援用。

penses or difficulties the tenant farmer may encounter. Hence the abovementioned Directives are inconsistent with the Constitutional intention to protect farmers and therefore shall not be applied.

J. Y. Interpretation No.423（March 21, 1997）*

ISSUE: Is it constitutional for the authority in charge of air pollution control to establish, without authorization by the enabling statute, criteria of fines to be imposed solely on the basis of the time the violator appears before the authority and to require payment of fine double the amount if he fails to appear within the time specified on the notification of violation?

RELEVANT LAWS:

Articles 23, Paragraph 1, and 43 Paragraphs 1 and 3 of the Air Pollution Control Act of the（空氣污染防制法第二十三條第一項、第四十三條第一項、第三項）; Article 5 of the Criteria of Fines for Emission of Air Pollutants by Transportation Means（交通工具排放空氣污染物罰鍰標準第五條）; Administrative Court Precedent P. T. 96 (1959)（行政法院四十八年判字第九十六號判例）.

KEYWORDS:

unilateral administrative action（單方行政行為）, administrative act（行政處分）, non-administrative act（非行政處分）, external legal consequence（對外法律效果）, standards of emission（排放標準）, air pollutants（空氣汙染物）, penalty for offense against the order of administration（行政秩序罰；秩序罰）, notification（通知書）, ad-

* Translated by Raymond T. Chu.

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

dressee（相對人）, criteria of fines（裁罰標準）, appear before the authority（到案）, enabling statute（母法）, legislative purposes（立法目的）, generalized provisions（概括條款）, purpose-specific（合目的性）.**

HOLDING: An administrative act taken unilaterally by an administrative agency in the exercise of its public authority in respect of a specific matter in public law with external legal consequence is by nature an administrative act regardless of the term or form used and whether or not there is any subsequent action or any written statement to disallow the raising of any objection. Where an administrative agency, having issued a notification that directly affects the relation of rights and duties of the people and has actually produced effects externally, considers the issue of such notification a non-administrative act on the grounds that there is subsequent action to be taken or that it contains a statement to disallow the raising of any objection, it is certainly inconsistent with the purpose of the Constitution in guaranteeing the people the

解釋文：行政機關行使公權力，就特定具體之公法事件所為對外發生法律上效果之單方行政行為，皆屬行政處分，不因其用語、形式以及是否有後續行為或記載不得聲明不服之文字而有異。若行政機關以通知書名義製作，直接影響人民權利義務關係，且實際上已對外發生效力者，如以仍有後續處分行為，或載有不得提起訴願，而視其為非行政處分，自與憲法保障人民訴願及訴訟權利之意旨不符。行政法院四十八年判字第九六號判例僅係就訴願法及行政訴訟法相關規定，所為之詮釋，與憲法尚無牴觸。

right to bring administrative appeal and proceedings. The Administrative Court Precedent P. T. 96 (1959), which merely interprets the relevant provisions of the Administrative Appeal Act and the Administrative Proceedings Act, is thus not in conflict with the Constitution.

The Air Pollution Control Act provides in Article 23, Paragraph 1, that: "A transportation means shall not emit air pollutants in excess of the amount permissible by the standards of emission." The Act further specifies in Article 43, Paragraph 1, the types of penalty and the maximum amounts of fines to be imposed in case of violation of such provisions, and Paragraph 3 of the same article enables the central government agency to establish criteria of fines. Under Article 5 of the Criteria of Fines for Emission of Air Pollutants by Transportation Means, the minimum amount of fine to be imposed is determined solely on the basis of "the time the violator appears and whether he appears before the authority" after he receives the notification of violation rather than based on any reasonable standard

空氣污染防制法第二十三條第一項規定：「交通工具排放空氣污染物，應符合排放標準。」同法第四十三條第一項對違反前開規定者，明定其處罰之方式與罰鍰之額度；同條第三項並授權中央主管機關訂定罰鍰標準。交通工具排放空氣污染物罰鍰標準第五條，僅以當事人接到違規舉發通知書後之「到案時間及到案與否」，為設定裁決罰鍰數額下限之唯一準據，並非根據受處罰之違規事實情節，依立法目的所為之合理標準。縱其罰鍰之上限並未逾越法律明定得裁罰之額度，然以到案之時間為標準，提高罰鍰下限之額度，與母法授權之目的未盡相符，且損及法律授權主管機關裁量權之行使。又以秩序罰罰鍰數額倍增之形式而科罰，縱有促使相對人自動繳納罰鍰、避免將來強制執行困擾之考量，惟母法既無規定復未授權，上開標準創設相對人於接到違規通知書起

laid down in light of the legislative purposes by taking into consideration the factual circumstances of the act. Even though the maximum amount of fine prescribed thereby does not exceed the limit permissible under law, raising the minimum fine on the basis of the time the violator appears before the authority is inconsistent with the purposes intended by the enabling statute and is detrimental to the exercise of the power of discretion authorized by law to the competent agency. A fortiori, imposition of a penalty in the manner of a punishment for offense against the order of administration by doubling the amount of fine, even if it may encourage the opposite party to pay the fine voluntarily so that the trouble of future enforcement may be avoided, is neither so prescribed nor authorized by the enabling statute. Furthermore, the criteria, by creating such a provision to require the opposite party to appear before the authority within ten days of receipt of the notification of violation or to pay a double fine upon lapse of such period, is contrary to the principle of legal reservation (Gesetzesvorbehaltprinzip). It is thus

十日內到案接受裁罰及逾期倍增之規定，與法律保留原則亦屬有違，其與本解釋意旨不符部分，應自本解釋公布之日起，至遲於屆滿六個月時失其效力。

ordered that the part of the provision inconsistent with the essence of this Interpretation be rendered null and void within six months from the date of this Interpretation.

REASONING: Our current system of administrative litigations is designed primarily to deal with actions for reversal [of unlawful administrative acts], and matters for which actions for reversal may be instituted are stated in the legislative form of generalized provisions. Where a person considers an administrative act unlawful or improper, thereby causing damage to his right or interest, he is entitled to bring administrative appeal or action. The so-called "administrative act" denotes an administrative act taken unilaterally by an administrative agency in the exercise of its public authority in respect of a specific matter in the area of public law with external legal effects, regardless of the term or form used and whether or not there is any subsequent action or any written statement to disallow the raising of any objection. Where an administrative agency, having issued a

解釋理由書：我國現行行政訴訟制度以撤銷訴訟為主，得提起撤銷訴訟之事項則採概括條款之立法形式，凡人民對於行政處分認為違法或不當致損害其權利或利益者，均得依法提起訴願或行政訴訟。所謂行政處分係指行政機關行使公權力，就特定具體之公法事件所為對外發生法律上效果之單方行為，不因其用語、形式以及是否有後續行為或記載不得聲明不服之文字而有異。若行政機關以通知書名義製作，直接影響人民權利義務關係，且實際上已對外發生效力者，諸如載明應繳違規罰款數額、繳納方式、逾期倍數增加之字樣，倘以仍有後續處分行為或載有不得提起訴願，而視其為非行政處分，自與憲法保障人民訴願及訴訟權利之意旨不符。遇有行政機關依據法律製發此類通知書，相對人亦無異議而接受處罰時，猶不認其為行政處分性質，於法理尤屬有悖。行政法院四十八年判字第九六號判例：「訴願法第一條所稱官署之處分，

notification that directly affects the relation of rights and duties of the people and has actually produced effects externally, such as one that sets out the amount of fine payable, the method of payment, or the requirement of payment double the amount upon lapse of a specified period, considers the issue of such notification a non-administrative act on the grounds that there is subsequent action to be taken or that it contains a statement to disallow the raising of any objection, it is certainly inconsistent with the purpose of the Constitution in guaranteeing the people the right to bring administrative appeal and proceedings. When considered from the viewpoint of the general principles of jurisprudence, the situation even appears absurd where such a notification is lawfully prepared and issued by an administrative agency and then accepted without objection by the opposite party, who does not even realize that it constitutes an administrative act. The Administrative Court Precedent P. T. 96 (1959) holds that "the expression in Article 1 of the Administrative Appeal Act 'an administrative act done by a government authority, resulting

損害人民之權利或利益者，限於現已存在之處分，有直接損害人民權利或利益之情形者，始足當之。如恐將來有損害其權利或利益之行政處分發生，遽提起訴願，預行請求行政救濟，則非法之所許。僅係就訴願法及行政訴訟法相關規定，所為之詮釋，與憲法尚無牴觸。

in injury to the right or interest of a person' refers only to the situation where an existing act causes direct damage to the right or interest of a person. The law does not permit the institution of an administrative appeal to seek administrative remedy in advance on the grounds of fear of a future administrative act with the possibility of causing damage to his right or interest," but merely interprets the relevant provisions of the Administrative Appeal Act and the Administrative Proceedings Act, and thus is not in conflict with the Constitution.

The Air Pollution Control Act provides in Article 23, Paragraph 1, that: "No transportation means shall emit air pollutants in excess of the amount permissible by the standards of emission." The Act further specifies in Article 43, Paragraph 1, the types of penalty and the maximum amounts of fines to be imposed in case of violation of such provisions, and Paragraph 3 of the same article enables the central government agency to establish criteria of fines. The purpose of the law in specifying the maximum amounts of fines

空氣污染防制法第二十三條第一項規定：「交通工具排放空氣污染物，應符合排放標準。」同法第四十三條第一項對違反前開規定者，明定其處罰之方式與罰鍰之額度；同條第三項並授權中央主管機關訂定罰鍰標準。法律既明定罰鍰之額度，又授權行政機關於該範圍內訂定裁罰標準，其目的當非僅止於單純的法適用功能，而係尊重行政機關專業上判斷之正確性與合理性，就交通工具排放空氣污染物不符排放標準者，視違規情節，依客觀、合理之認定，訂定合目的性之裁罰標準，並可避免於個

and at the same time enabling the administrative agency to establish criteria of fines is of course more than simply vesting such agency with the function of applying the law. It is meant to recognize the professional competence of the administrative agency in making correct and reasonable judgment while formulating purpose-specific criteria of fines for excessive emission of air pollutants by transportation means by taking into consideration the factual circumstances of the act and based on its objective and reasonable findings, and also to avoid possible unfair conclusions as a result of arbitrary decisions in individual cases. Conversely, under Article 5 of the Criteria of Fines for Emission of Air Pollutants by Transportation Means, as amended and promulgated by the competent authority on February 15, 1993, the minimum amount of fine to be imposed is determined solely on the basis of "the time the violator appears and whether he appears before the authority" after he receives the notification of violation rather than based on any reasonable standard laid down in light of the legislative purposes by taking into consideration

案裁決時因恣意而產生不公平之結果。主管機關於中華民國八十二年二月十五日修正發布之交通工具排放空氣污染物罰鍰標準第五條，僅以當事人接到違規舉發通知書後之「到案時間及到案與否」，為設定裁決罰鍰數額下限之唯一準據，並非根據受處罰之違規事實情節，依立法目的所為之合理標準。縱其罰鍰之上限並未逾越法律明定得裁罰之額度，然以到案之時間為標準，提高罰鍰下限之額度，與母法授權之目的未盡相符，且損及法律授權主管機關裁量權之行使。又以秩序罰罰鍰數額倍增之形式而科罰，縱有促使相對人自動繳納罰鍰、避免將來強制執行困擾之考量，惟母法既無規定復未授權，上開標準創設相對人於接到違規通知書起十日內到案接受裁罰及逾期倍增之規定，與法律保留原則亦屬有違，其與本解釋意旨不符部分，應自本解釋公布之日起，至遲於屆滿六個月時失其效力。

the factual circumstances of the act. Even though the maximum amount of fine prescribed thereby does not exceed the limit permissible under law, raising the minimum fine on the basis of the time the violator appears before the authority is inconsistent with the purposes intended by the enabling statute and is detrimental to the exercise of the power of discretion authorized by law to the competent agency. A fortiori, imposition of a penalty in the manner of a punishment for an offense against the order of administration by doubling the amount of fine, even if it may encourage the opposite party to voluntarily pay the fine so that the trouble of future enforcement may be avoided, is neither so prescribed nor authorized by the enabling statute. Furthermore, the criteria, by creating such a provision to require the opposite party to appear before the authority within ten days of receipt of the notification of violation or to pay a double fine upon lapse of such period, is contrary to the principle of legal reservation (Gesetzesvorbehaltprinzip). It is thus ordered that the part of the provision inconsistent with the essence of this Inter-

pretation be rendered null and void within six months from the date of this Interpretation.

Justice Sen-Yen Sun filed concurring opinion and dissenting opinion in part.

Justice Chi-Nan Chen filed dissenting opinion in part.

本號解釋孫大法官森焱提出協同意見書及部分不同意見書；陳大法官計男提出部分不同意見書。

J. Y. Interpretation No.424（March 21, 1997）*

ISSUE: An MOF letter states that the entire farmland possessed by the person giving it to one of his heirs, who is capable of self-tilling and plans to utilize it as such, is exempt from gift tax, but gift tax shall still be assessed if only a parcel of the land is given. Does the said proviso violate the legal principle of taxation by law as provided in Article 19 of the Constitution?

RELEVANT LAWS:

Articles 19 of the Constitution（憲法第十九條）; Article 20 of the Estate and Gift Taxes Act（遺產及贈與稅法第二十條）; Article 31 of the Agricultural Development Act（農業發展條例第三十一條）; Article 1138 of the Civil Code（民法第一千一百三十八條）.

KEYWORDS:

family farm（家庭農場）, agricultural land（農業用地）, heir（繼承人）, gift（贈與）, gift tax（贈與稅）, gift tax exemption（免徵贈與稅）, principle of tax per legislation（租稅法律主義）, to assess tax（課稅）.**

HOLDING: The February 26, 1994, Interpretative Letter Tai-Tsai-Hsu No. 822304850 from the Ministry of Fi-

解釋文：財政部中華民國八十三年二月十六日台財稅字第八二二三〇四八五〇號函釋：「贈與人所有之全部

* Translated by BAKER & McKENZIE.

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

nance, which states " The entire farmland possessed by the person giving it away as a gift is exempt from gift tax, if the land has been given away in separate parcels at different times to the same person who has the right to inherit the land and has the ability to cultivate the farmland himself/herself and continues to operate the agricultural production business. However, a gift tax shall still be assessed for each gift of a separate parcel of the land prior to a gift of the last parcel of the land, and upon giving away the last parcel of the land, a tax refund may be applied for provided that the entire farmland is given to the same person," is an interpretation given by the authority in charge to its subordinate agency relating to the gift tax exemption procedure for the agricultural land of a family farm in order to enforce Article 20 of the Estate and Gift Taxes Act and Article 31 of the Agricultural Development Act. The interpretation is in compliance with the principle of the aforementioned laws and is not inconsistent with Article 19 of the Constitution.

農業用地，經分次贈與能自耕之具有繼承人身分中之同一人，且繼續經營農業生產者，全部農地均准免徵贈與稅，惟最後一次以前各該次贈與仍應先予核課贈與稅，俟最後一次為贈與，全部農業用地均歸同一受贈人後，再辦理退稅」，係主管機關為執行遺產及贈與稅法第二十條第五款及農業發展條例第三十一條規定之必要，就家庭農場之農業用地免徵贈與稅之作業，對所屬機關所為之釋示，與上開法律規定之意旨相符，於憲法第十九條之規定尚無牴觸。

REASONING: Article 20, Sub-

解釋理由書：家庭農場之農業

paragraph 5, of the Estate and Gift Taxes Act expressly stipulates that the agricultural land of a family farm, given away to a spouse or one of the heirs, as specified in Article 1138 of the Civil Code, who has the ability to cultivate the farmland himself/ herself and continues to operate the agricultural production business, is not included in calculating the gift amount. Furthermore, the first sentence of Article 31 of the Agricultural Development Act also stipulates that "The agricultural land of a family farm that is passed to or inherited by a single heir who has the ability to cultivate the land himself/herself and continues to operate the agricultural business is exempt from estate and gift tax." The gift tax exemption allowed for agricultural land of a family farm is applicable not only when the heir has the ability to cultivate the land himself/herself and continues to operate the agricultural business, but also when the land is to be inherited by or given away to a single heir. The February 26, 1994 Interpretative Letter titled Tai-Tsai-Hsu No. 822304850 from the Ministry of Finance, which states " The entire farmland possessed by the

用地，贈與由能自耕之配偶或民法第一千一百三十八條所定繼承人一人受贈而繼續經營農業生產者，不計入贈與總額，為遺產及贈與稅法第二十條第五款所明定；又農業發展條例第三十一條前段亦規定：「家庭農場之農業用地，其由能自耕之繼承人一人繼承或承受，而繼續經營農業生產者，免徵遺產稅或贈與稅」。是家庭農場之農業用地其贈與免徵贈與稅者，除繼承人須有自耕能力並繼續經營農業生產外，尚須由繼承人一人單獨繼承或受贈，始有其適用。財政部八十三年二月十六日台財稅第八二二三〇四八五〇號函：「贈與人所有之全部農業用地，經分次贈與能自耕之具有繼承人身分中之同一人，且繼續經營農業生產者，全部農地均准免徵贈與稅，惟最後一次以前各該次贈與仍應先予核課贈與稅，俟最後一次為贈與，全部農業用地均歸同一受贈人後，再辦理退稅」，係主管機關針對全部農業用地作分次贈與、如何適用上開法律規定，課徵贈與稅所為之必要釋示，以供所屬機關執行之依據，符合各該法條規定免徵贈與稅之要件，與農業發展條例禁止耕地分割及移轉為共有之立法意旨亦屬相符，於憲法第十九條之規定尚無牴觸。

person giving it away as a gift is exempt from gift tax, if the entire land has been given away in separate parcels at different times to the same person who has the right to inherit the land and has the ability to cultivate the farmland himself/herself and continues to operate the agricultural production business. However, a gift tax shall still be assessed for each gift of a separate parcel of the land prior to a gift of the last parcel of the land, and upon giving away the last parcel of the land, a tax refund may be applied for provided that the entire farmland is given to the same person," is the interpretation provided by the authority in charge to its subordinate agency, necessary as a basis of enforcement, on the applicability of the aforementioned laws and assessment of gift tax with respect to an entire piece of agricultural land given away in separate parcels at different times. The interpretation is in compliance with the gift tax exemption requirement of the various laws and meets the policy goal of the Agricultural Development Act of preventing the severance and transfer of cultivated land, which results in common ownership by several

parties. It is also not inconsistent with Article 19 of the Constitution.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.425（April 11, 1997）*

ISSUE: Does Article 16 of the Supplemental Regulation on Laws and Regulations of Eminent Domain providing that the validity of eminent domain shall not be affected if the government fails to pay the compensation therefor due to its pending petition for the interpretation of law conflict with the purpose and intent of the said law, thus contravening the constitutional protection of property rights as enunciated in Article 15 of Constitution?

RELEVANT LAWS:

Article 15 of Constitution（憲法第十五條）; J. Y. Interpretation Nos. 110 and 400（司法院釋字第一一〇號、第四〇〇號解釋）; Articles 231, 233 and 235 of the Land Act（土地法第二百三十一條、第二百三十三條及二百三十五條）; Article 16 of the Supplemental Regulation on Laws and Regulations of Eminent Domain（土地徵收法令補充規定第十六條）; T. N. T. No. 661991, Ministry of the Interior, January 5, 1989（內政部七十八年一月五日台內字第六六一九九一號令）.

KEYWORDS:

eminent domain（土地徵收）, reasonable compensation（合理補償）, special sacrifice（特別犧牲）.**

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* Translated by Jer-Shenq Shieh.

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

HOLDING: Eminent domain means that the government takes constitutionally protected private property for public use according to legal procedure. Such expropriation and its procedural law must meet the principle of proportionality *(Verhältnismäßigkeitsprinzip)*, and fair compensation must be paid within a reasonable period. Before compensation is delivered or legally deposited, the owner of the condemned property still holds the title of the property. However, eminent domain, for said owner, is a special sacrifice for the public interest, so the delivery of compensation should not be delayed too long. Based on this intent, Article 233 of the Land Act stipulates that compensation must be paid within 15 days after the expiration of the post period. This legally preset period must be strictly abided by (See Interpretation No. 110), unless the property owner disagrees with the compensation, and submits his petition legally to the land authority concerned within the post period, and the authority concerned submits it for an appraisal decision, or appraisal meeting, or the property owner agrees to the delayed delivery.

解釋文：土地徵收，係國家因公共事業之需要，對人民受憲法保障之財產權，經由法定程序予以剝奪之謂。規定此項徵收及其程序之法律必須符合必要性原則，並應於相當期間內給予合理之補償。被徵收土地之所有權人於補償費發給或經合法提存前雖仍保有該土地之所有權，惟土地徵收對被徵收土地之所有權人而言，係為公共利益所受特別犧牲，是補償費之發給不宜遷延過久。本此意旨，土地法第二百三十三條明定補償費應於「公告期滿後十五日內」發給。此法定期間除對徵收補償有異議，已依法於公告期間內向該管地政機關提出，並經該機關提交評定或評議或經土地所有權人同意延期繳交者外，應嚴格遵守（參照本院釋字第一一〇號解釋）。內政部中華民國七十八年一月五日台內字第六六一九九一號令發布之「土地徵收法令補充規定」，係主管機關基於職權，為執行土地法之規定所訂定，其中第十六條規定：「政府徵收土地，於請求法律解釋期間，致未於公告期滿十五日內發放補償地價，應無徵收無效之疑義」，與土地法第二百三十三條之規定未盡相符，於憲法保障人民財產權之意旨亦屬有違，其與本解釋意旨不符部分，應不予適用。

The Supplemental Regulation on Laws and Regulations of Eminent Domain (T. N. T. No. 661991, Ministry of the Interior, January 5, 1989) are stipulated by the authority concerned based on its authority to enforce the Land Act. Article 16 of the Regulation, which provides that "in taking private property, due to the request of interpretation of law, at the interim period, if the government does not deliver the compensation at the end of the post, it will not be considered an invalid expropriation" does not accord fully with the intent of Article 233 of the Land Act and violates the intent of the constitutional protection of private property. Those portions of said Regulation, which do not accord with the intent of this Interpretation, shall no longer be applied.

REASONING: Eminent domain means that the government takes constitutionally protected private property for public use according to legal procedure. Such expropriation and its procedural law must meet the principle of proportionality *(Verhältnismäßigkeitsprinzip)*, and fair compensation must be paid within a rea-

解釋理由書：土地徵收，係國家因公共事業之需要，對人民受憲法保障之財產權，經由法定程序予以剝奪之謂。規定此項徵收及其程序之法律必須符合必要性原則，並應於相當期間內給予合理之補償，方符憲法保障人民財產權之意旨，前經本院釋字第四〇〇號解釋在案。土地法第二百三十五條前段及

sonable period, and it will then accord with the intent of constitutional protection of private property. This issue was interpreted by this Yuan before in Interpretation No. 400. The first sentences of Article 235 and Article 231 of the Land Act provide that "the rights and duties of the owner of the condemned property to his land will continue until such compensation be paid in full, and before compensation is paid in full, said property owner has the right to continue to use his land," and "the condemner should not enter the condemned land to begin work until the land price and other compensation are paid in full," and they express that the title change of the condemned property would not be effectuated until compensation is paid in full. However, eminent domain, for the owner of the condemned property, is a special sacrifice for the public interest, so the delivery of compensation should not be delayed too long. Based on this intent, the first sentence of Article 233 of the Land Act stipulates that such condemned land price and other compensation must be paid within 15 days after the expiration of the post period. This

第二百三十一條前段雖規定：「被徵收土地之所有權人，對於其土地之權利義務，於應受之補償發給完竣時終止，在補償費未發給完竣以前，有繼續使用該土地之權」；「需用土地人應俟補償地價及其他補償費發給完竣後，方得進入被徵收土地內工作」，明示物權變動之效力，須待補償費發給完畢始行發生。惟土地徵收對被徵收土地之所有權人而言，係為公共利益所受特別犧牲，是補償費之發給不宜遷延過久。本此意旨，土地法第二百三十三條前段規定：「徵收土地應補償之地價及其他補償費，應於公告期滿後十五日內發給之」。此項法定期間，自應嚴格遵守，業經本院釋字第一一〇號解釋解釋文第二項釋示：「需用土地人不於公告期滿完畢後十五日內將應補償地價及其他補償費額繳交主管地政機關發給完竣者，依照本院院字第二七〇四號解釋，其徵收土地核准案固應從此失其效力。但於上開期間內，因對補償之估定有異議，而由該管縣市地政機關依法提交標準地價評議委員會評定，或經土地所有人同意延期繳交有案者，不在此限」，從而土地徵收補償費之發給，除對徵收補償有異議，已依法於公告期間內向該管地政機關提出，並經該機關提交評定或評議或經土

legally preset period must be strictly abided by, and it was interpreted in the second paragraph of the holding of Interpretation No. 110 of this Yuan, which holds: if the condemner does not submit the payment of the land price and other compensation to the land authority concerned and the authority then delivers it to the property owner within 15 days after the expiration of the post period, according to Interpretation No. 2704 of this Yuan, such eminent domain case would be void thereafter; however, at the post period, if the property owner disagrees with the appraisal of compensation, and the municipal land authority concerned legally submits it to the Standard Land Value Determination Committee for an appraisal decision, or the property owner agrees to the delayed delivery, then the expropriation case would not be considered void. Therefore, the delay of delivery of compensation is a per se infringement of private property rights, unless the property owner disagrees with the compensation, and submits his petition legally to the land authority concerned within the post period, and the authority concerned sub-

地所有人同意延期繳交者外，如有延誤，自屬對人民財產權之侵害。行政機關基於職權，執行法律，雖得訂定命令補充法律之規定，惟其內容須符合法律意旨。內政部七十八年一月五日台內字第六六一九九一號令發布之「土地徵收法令補充規定」第十六條：「政府徵收土地，於請求法律解釋期間，致未於公告期滿十五日內發放補償地價，應無徵收無效疑義」，與土地法第二百三十三條強制規定未盡相符，有違憲法第十五條保障人民財產權之意旨，於本解釋不符部分，應不予適用。

mits it for an appraisal decision, or appraisal meeting, or the property owner agrees to the delayed delivery. The administrative agency, based on its authority to enforce the law, can stipulate orders to complement the law, but their content must accord with the intent of the law. Article 16 of the Supplemental Regulation on Laws and Regulations of Eminent Domain (T. N. T. No. 661991, Ministry of the Interior, January 5, 1989), which provides that "in taking private property, due to the request of the interpretation of law, at the interim period, if the government does not deliver the compensation at the end of the post, it will not be considered an invalid expropriation" does not accord fully with the intent of Article 233 of the Land Act and violates the intent of protection of private property of Article 15 of the Constitution. Those portions of said Regulation which do not accord with the intent of this Interpretation shall no longer be applied.

J. Y. Interpretation No.426（May 9, 1997）*

ISSUE: Is the assessment of air pollution control fees under the Regulation on the Assessment of Air Pollution Control Fees established by the relevant supervising authority as authorized by the Air Pollution Control Act constitutional?

RELEVANT LAWS:

Article 9, Paragraph 2, of the Amendments to the Constitution（憲法增修條文第九條第二項）; Articles 8, 10, 23, 24, 25, 26 and 27 of the Air Pollution Control Act（空氣污染防制法第八條、第十條、第二十三條、第二十四條、第二十五條、第二十六條及第二十七條）; Article 4 of the Regulation on the Assessment of Air Pollution Control Fees（空氣污染防制費收費辦法第四條）; J.Y. Interpretation Nos. 391 and 394（司法院釋字第三九一號及第三九四號解釋）.

KEYWORDS:

air pollution control fee（空氣污染防制費）, special common levies（特別公課）, air pollution control fund（空氣污染防制基金）, pollution source（污染源）, air pollutants（污染）, stationary pollution source（固定污染源）, mobile pollution sources（移動污染源）, the principle of the polluter pays（污染者付費原則）, behavior constraint（行為制約）.**

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* Translated by Raymond T. Chu.

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

HOLDING: The Regulation on the Assessment of Air Pollution Control Fees is established by the competent authority under the authorization of Article 10 of the Air Pollution Control Act, and the air pollution control fees charged thereunder are by nature special common levies rather than taxes and dues. Nevertheless, special common levies are, after all, moneys charged to the payers as a burden thereon. As such, the purposes and application of the levies as well as the persons to whom such levies are charged must of course be prescribed by law. It will also be constitutional if such matters are prescribed by administrative ordinances as authorized by law in a specific and unequivocal manner. The authorization of the statute mentioned above, as judged from the viewpoint of the relevancy as expressed by the Air Pollution Control Act in its entirety, does not appear to lack specificity and clarity. Furthermore, to the extent that those classes of fees being levied currently are entered under the "Air Pollution Control Fund" as an agency budget established by the competent authority in pursuance of the

解釋文：空氣污染防制費收費辦法係主管機關根據空氣污染防制法第十條授權訂定，依此徵收之空氣污染防制費，性質上屬於特別公課，與稅捐有別。惟特別公課亦係對義務人課予繳納金錢之負擔，其徵收目的、對象、用途自應以法律定之，如由法律授權以命令訂定者，其授權符合具體明確之標準，亦為憲法之所許。上開法條之授權規定，就空氣污染防制法整體所表明之關聯性意義判斷，尚難謂有欠具體明確。又已開徵部分之費率類別，既由主管機關依預算法之規定，設置單位預算「空氣污染防制基金」加以列明，編入中央政府年度總預算，經立法院審議通過後實施，與憲法尚無違背。有關機關對費率類別、支出項目等，如何為因地制宜之考量，仍須檢討改進，逕以法律為必要之規範。至主管機關徵收費用之後，應妥為管理運用，俾符合立法所欲實現之環境保護政策目標，不得悖離徵收之目的，乃屬當然。

Budget Act and being implemented upon adoption by the Legislature as a part of the general annual budget of the central government, they are not against the Constitution. Even so, the competent authority must endeavor to make review of and improvements to the classification of fees, items of expenditure, etc., in the light of the local conditions and establish by law necessary regulations thereof. It goes without saying that all fees collected by the competent authority must be managed and applied well so as to be consistent with the aim of the environmental protection policy as contemplated by the legislation without any departure from the purposes for which such fees are assessed.

What the Air Pollution Control Act is designed to prevent and control are pollution sources that emit air pollutants, including stationary pollution sources installed at public places and private premises and mobile sources of pollution composed of pollutants emitted by motor vehicles, as explicitly provided by the Act under Articles 8, 23 to 27, and other relevant articles. Article 4 of said Regulation

空氣污染防制法所防制者為排放空氣污染物之各類污染源，包括裝置於公私場所之固定污染源及機動車輛排放污染物所形成之移動污染源，此觀該法第八條、第二十三條至第二十七條等相關條文甚明。上開收費辦法第四條規定按移動污染源之排放量所使用油（燃）料之數量徵收費用，與法律授權意旨無違，於憲法亦無牴觸。惟主管機關自中華民國八十四年七月一日起僅就油

requiring payment of fees to be assessed on the basis of the volume of pollutants emitted by mobile sources of pollution in line with the quantity of fuel consumed thereby is not contrary to the purpose of authorization of the law; nor is it in conflict with the Constitution. Nevertheless, since July 1, 1995, the competent authority has been charging fees on fuel consumption only, ignoring other pollutants emitted by stationary pollution sources. This is obviously contrary to the principle of fair payment of common levies, and must be promptly reviewed and corrected by relevant authority.

（燃）料徵收，而未及固定污染源所排放之其他污染物，顯已違背公課公平負擔之原則，有關機關應迅予檢討改進，併此指明。

REASONING: By Amendment to the Constitution, Article 9, Paragraph 2, which provides that "environmental and ecological protection shall be given equal consideration with economic and technological development," the state is charged with the duty to maintain the living environment and the natural ecology. To put air pollution under control is one of the important undertakings. The enactment of the Air Pollution Control Act is consistent with the purpose embodied in the Consti-

解釋理由書：憲法增修條文第九條第二項規定：「經濟及科學技術發展，應與環境及生態保護兼籌並顧」，係課國家以維護生活環境及自然生態之義務，防制空氣污染為上述義務中重要項目之一。空氣污染防制法之制定符合上開憲法意旨。依該法徵收之空氣污染防制費係本於污染者付費之原則，對具有造成空氣污染共同特性之污染源，徵收一定之費用，俾經由此種付費制度，達成行為制約之功能，減少空氣中污染之程度；並以徵收所得之金錢，在環保

tution. On the principle of "the polluter pays", the air pollution control fees charged under said Act are fees levied on sources of pollution with the common characteristics of producing air pollution, with the hope of minimizing the air pollution through the function of behavior constraint to be realized by payment of fees. An Air Pollution Control Fund is also established under the competent environmental protection agency with the money so collected to be applied for the exclusive purpose of improving the quality of the air to insure the health of the nation. As the fees are burdens imposed upon nationals with specific legal relation to meet the need of the state for specific policies and are subject to limitations in terms of their application, they are called in jurisprudence theories "special common levies" and are mechanisms widely adopted by modern industrialized nations. Special common levies are different from taxes in that taxes are levied on ordinary citizens to meet the expenditure for the implementation of the government's regular or special policies and are collected by taxing authorities insofar as the elements

主管機關之下成立空氣污染防制基金，專供改善空氣品質、維護國民健康之用途。此項防制費既係國家為一定政策目標之需要，對於有特定關係之國民所課徵之公法上負擔，並限定其課徵所得之用途，在學理上稱為特別公課，乃現代工業先進國家常用之工具。特別公課與稅捐不同，稅捐係以支應國家普通或特別施政支出為目的，以一般國民為對象，課稅構成要件須由法律明確規定，凡合乎要件者，一律由稅捐稽徵機關徵收，並以之歸入公庫，其支出則按通常預算程序辦理；特別公課之性質雖與稅捐有異，惟特別公課既係對義務人課予繳納金錢之負擔，故其徵收目的、對象、用途應由法律予以規定，其由法律授權命令訂定者，如授權符合具體明確之標準，亦為憲法之所許。所謂授權須具體明確應就該授權法律整體所表現之關聯意義為判斷，而非拘泥於特定法條之文字（參照本院釋字第三九四號解釋理由書）。空氣污染防制法第十條第一項：「各級主管機關應依污染源排放空氣污染物之種類及排放量，徵收空氣污染防制費用」，第二項：「前項污染源之類別及收費辦法，由中央主管機關會商有關機關定之」，依此條文之規定，再參酌上開法律全部內容，其徵收目

for tax payment specifically prescribed by law are met, that all taxes collected are turned in to the National Treasury and that the revenue of taxes may be expended in pursuance of the regular budgetary procedure; whereas special common levies, although different from taxes by nature, are after all monetary burdens imposed on those liable to pay, and as such, the purposes and application of the levies as well as the persons on whom such levies are charged must of course be prescribed by law. It will also be constitutional if such matters are prescribed by administrative ordinances as authorized by law in a specific and unequivocal manner. The so-called specific and unequivocal authorization of law must be judged from the viewpoint of the relevancy as expressed by the enabling statute in its entirety rather than being judged by rigid adherence to the language of any particular provision (see our J.Y. Interpretation No. 394). When read within the context of the Air Pollution Control Act as a whole, the text of Article 10, Paragraph 1, of the Act: "The competent authority at each level of the government shall levy air pollution

的、對象、場所及用途等項，尚難謂有欠具體明確。行政院環境保護署據此於八十四年三月二十三日發布空氣污染防制費收費辦法，就相關事項為補充規定。而已開徵部分之費率類別連同歲入歲出科目金額，既由主管機關依預算法之規定，設置單位預算「空氣污染防制基金」加以列明，編入中央政府年度總預算，經立法院通過後實施，徵收之法源及主要項目均有法律與預算為依據，與憲法尚無違背。但預算案有其特殊性，與法律案性質不同，立法機關對預算案與法律案審議之重點亦有差異（參照本院釋字第三九一號解釋理由書），空氣污染防制費之徵收尚涉及地方政府之權限，基金支出尤與地方環保工作攸關，預算案受形式及內容之限制，規定難期周全，有關機關對費率類別、支出項目等，如何為因地制宜之考量，仍須檢討改進，逕以法律為必要之規範。至主管機關徵收費用之後，自應妥為管理運用，俾符合立法所欲實現之環境保護政策目標，不得悖離徵收特別公課之目的，乃屬當然。

control fees based on the type of pollutants and quantity of emission from pollution sources"; and Paragraph 2: "The classes of pollution sources and payment of fees as referred to in the preceding paragraph shall be established by the central competent authority upon consultation with other agencies concerned" can hardly be deemed to lack specificity and clarity in the purposes, places and application of the levies as well as the persons on whom such levies are charged. Under the Act, the Environmental Protection Administration under the Executive Yuan promulgated on March 23, 1995, the Regulation on the Assessment of Air Pollution Control Fees to supplement the Act. To the extent that the rates and classes of the fees being assessed currently are entered by the competent authority into the Air Pollution Control Fund as an agency budget together with the amounts of anticipated revenue and annual expenditure and incorporated into the general annual budget of the central government as required by the Budget Act and are put under implementation upon adoption by the Legislature, such assessment and the items as-

sessed are based on law and budget and are not in conflict with the Constitution. Nevertheless, there are certain particularities to a budgetary bill that make it different from statutory bills. There are also differences in the key points to be reviewed by the legislature in cases of budgetary bills and statutory bills (See J.Y. Interpretation No. 391). The assessment of air pollution control fees also involves the power of local governments, and the expenditure of the Fund is especially relevant to the local environmental protection work. The provisions of a budgetary bill are by no means comprehensive because such a bill is subject to certain limitations on its form and substance. Thus, the competent authority must endeavor to make review of and improvements to the classification of fees, items of expenditure, etc., in the light of the local conditions and set out by law necessary regulation thereof. It goes without saying that all fees collected by the competent authority must be managed and applied well so as to be consistent with the aim of the environmental protection policy as contemplated by the legislation

without any departure from the purposes for which such special common levies are assessed.

What the Air Pollution Control Act is designed to prevent and control are pollution sources that emit air pollutants, including stationary sources of pollution installed at public places and private premises and mobile sources of pollution composed of pollutants emitted by motor vehicles, as explicitly provided by the Act under Articles 8, 23 to 27, and other relevant articles. As mobile air pollutants are not precluded by Article 10 of the Act, mobile pollution sources such as automobiles and motorcycles are undoubtedly included for the purpose of assessment of air pollution control fees. Article 4 of the Regulation on the Assessment of Air Pollution Control Fees requiring payment of fees on the basis of the volume of pollutants emitted by mobile sources of pollution in line with the quantity of fuel consumed thereby is reasonable because the emission of pollutants is closely related with the quantity of fuel consumed. And, viewed from the point that both technical

空氣污染防制法所防制者為排放空氣污染物之各類污染源，包括裝置於公私場所之固定污染源及機動車輛排放污染物所形成之移動污染源，此觀該法第八條、第二十三條至第二十七條等相關條文甚明。該法第十條並未將空氣污染之移動污染排除在外，則徵收污染防制費應包括汽車機車等移動污染源在內，應無疑義。空氣污染防制費收費辦法第四條規定，按移動污染源之排放量所使用油（燃）料之數量徵收費用，因污染排放量與油（燃）料用量密切相關，尚屬合理，且基於執行法律應兼顧技術及成本之考量。與上開空氣污染防制法之授權意旨並無牴觸。惟有關機關仍應儘速建立移動污染源定期檢驗系統及更具經濟誘因之收費方式，又主管機關自八十四年七月一日起即就油（燃）料徵收，而未及固定污染源所排放之其他污染物，有違背此項公課應按污染源公平負擔之原則，並在公眾認知上易造成假行為制約之名，為財政收入徵收公課之誤解，有關機關應迅即採取適當措施以謀改進，特此指明。

and cost issues must be taken into consideration in the implementation of a law, we do not consider said article to be against the purpose of authorization of the law. Even so, it is desirable that the competent authority establishes promptly a periodical inspection system for mobile pollution sources and a system of assessment with more encouraging economic reasons. Since July 1, 1995, the competent authority has been charging fees on fuel consumption only, ignoring other pollutants emitted by stationary pollution sources. This is obviously contrary to the principle of fair payment of common levies based on pollution sources and is apt to lead to the misunderstanding by the general public that collecting common levies for the real purpose of financial revenue is in the guise of behavior constraint. The competent authority must therefore promptly take appropriate actions to make improvements.

Justice Tong-Schung Tai filed dissenting opinion in part.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋戴大法官東雄提出部分不同意見書；蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.427（May 9, 1997）*

ISSUE: May pre-merger losses of the companies involved in a merger be applied as deductions in the calculation of the surviving company's business income, or should only post-merger profits and losses be considered as such?

RELEVANT LAWS:

Articles 24, Paragraph 1, and 39, the first sentence of the Income Tax Act（所得稅法第二十四條第一項、第三十九條前段）; Tai-Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977（財政部六十六年九月六日台財稅字第三五九九五號函）.

KEYWORDS:

income tax（所得稅）, tax deduction（稅捐扣除額）, tax returns（申報納稅）.**

HOLDING: Pursuant to Article 24, Paragraph 1, and the first sentence of Article 39 of the Income Tax Act, a company's business income of the current year is its net profit, calculated by deducting from the gross income of the company in the current year, against its costs, ex-

解釋文：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，以往年度營業之虧損，不得列入本年度計算，所得稅法第二十四條第一項及第三十九條前段定有明文。同法第三十九條但書旨在建立誠實申報納稅制

* Translated by David T. Liou.

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

penditures, losses, taxes and donations incurred in the same year; business losses incurred in previous years shall not be taken into account when calculating the business income of the current year. The intention of the proviso to Article 39 of the Income Tax Act is to set up an honest tax return system and the deductions of losses provided thereunder are applicable only to companies not involved in a merger during the period in which the deductions are claimed. Where a company has been involved in a merger, the post-merger profits and losses of the surviving company shall only be calculated from the cut-off date of the merger, and shall not be retrospectively traced to pre-merger profits and losses of the respective merging companies for deductions. The Tai-Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977, is consistent with the statutory intention expounded above, and is not incongruous with the Constitution. As to whether tax benefits should be granted in relation to corporate mergers, this is within the plenary powers of the legislature to resolve.

度，其扣除虧損只適用於可扣抵期間內未發生公司合併之情形，若公司合併者，則應以合併基準時為準，更始計算合併後公司之盈虧，不得追溯扣抵合併前各該公司之虧損。財政部中華民國六十六年九月六日台財稅字第三五九九五號函與上開法條規定意旨相符，與憲法並無牴觸。至公司合併應否給予租稅優惠，則屬立法問題。

REASONING: Pursuant to Article 24, Paragraph 1, and the first sentence of Article 39 of the Income Tax Act, a company's business income of the current year is its net profit, calculated by deducting from the gross income of the company in the current year, against its costs, expenditures, losses, taxes and donations incurred in the same year; business losses incurred in previous years shall not be taken into account when calculating the business income of the current year. To encourage the honest filing of tax returns, the proviso to Article 39 of the Income Tax Act states that "taxation of a corporate business entity, which keeps complete sets of records and receipts of account, shall be made after deducting from its net profits of the current year, against its tax collection authority-verified losses of the 5 years (which was amended to 3 years on December 30, 1989) immediately preceding the date of examination by the tax collection authority, provided that the annual filings have been timely made with either the blue filing forms referred to in Article 77 or certifications from accountants upon audit."

解釋理由書：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，以往年度營業之虧損，不得列入本年度計算，所得稅法第二十四條第一項及第三十九條前段定有明文。惟為鼓勵誠實申報納稅，所得稅法第三十九條但書乃規定：「公司組織之營利事業，會計帳冊簿據完備，虧損及申報扣除年度均使用第七十七條所稱藍色申報書或經會計師查核簽證，並如期申報者，得將經該管稽徵機關核定之前五年（七十八年十二月三十日修正前為前三年）內各期虧損，自本年純益額中扣除後，再行核課」。其本旨係認公司組織之營利事業，其前五年內各期虧損之扣除，須該公司本年度內有盈餘，且在可扣抵期間內未發生公司合併並符合上開要件時，始有適用；若公司合併者，則應以合併基準時更始計算合併後公司之盈虧，不得追溯扣抵合併前各該公司之虧損。財政部六十六年九月六日台財稅字第三五九九五號函釋：「依所得稅法第三十九條規定意旨，公司組織之營利事業前三年內各期虧損之扣除，以各該公司本身有盈餘時，才能適用，旨在使前三年經營發生虧損之公司，於轉虧為盈時，可以其盈餘先彌補虧損，俾健全其

The intention of this proviso is that, for a corporate business entity to deduct losses incurred in the 5 preceding years, the company must have a net profit in the current year, and must not have been involved in a merger that occurred during the period in which the deductions are claimed. Where a company has been involved in a merger, its profits accrued and losses incurred shall only be calculated from the cut-off date of the merger, and shall not be retrospectively traced to pre-merger profits and losses of the respective merging companies for deductions. The Tai- Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977, elaborates that "In line with the intention of the requirements of Article 39 of the Income Tax Act, deductions of losses incurred by corporate business entities in the preceding 3 years are applicable only to companies with net profits. The purpose of the foregoing is for a company to strengthen its financial footings, after the company has turned its position of loss into a profitable one, by applying its retained earnings to make up for business losses incurred in the preceding 3

財務。公司如因被合併而消滅，合併後存續之公司與合併而消滅之公司並非同一公司，自不得扣除因合併而消滅之公司前三年內經該管稽徵機關查帳核定之虧損」，符合上開立法意旨，於租稅法律主義並無違背，與憲法亦無牴觸。至公司合併應否給予租稅優惠，則屬立法問題，併此指明。

years. Where a company ceases to exist upon a merger, the surviving company remains separate from the merged company, and, as such, the tax collection authority-verified losses incurred by the merged company in the 3 years preceding the merger shall not be deductible." This is consistent with the statutory intention expounded above, and is not in contravention with the statutory principles of taxation or incongruous with the Constitution. As an obiter dictum, the issue of whether tax benefits should be granted in relation to corporate mergers is within the plenary powers of the legislature to resolve.

J. Y. Interpretation No.428（May 23, 1997）*

ISSUE: (1) Is Article 25 of the Act Governing the Administration of Post Offices constitutional in setting a limitation on the liability of the postal administration, whereby indemnity is available only for the loss of certain categories of registered mails and parcels?

(2) Do Articles 227 and 228 of the Regulation Governing the Administration of Post Offices go beyond the scope of authorization under the Act Governing the Administration of Post Offices in prescribing that the duty of the post office ends when a piece of mail is duly delivered or received by the addressee, who has made no statement with respect to any defect in the mail at the time of receipt thereof?

RELEVANT LAWS:

Articles 15, 23 and 144 of the Constitution（憲法第十五條、第二十三條及第一百四十四條）; Articles 1, 3, 25, 27 and 28 of the Act Governing the Administration of Post Offices（郵政法第一條、第三條、第二十五條、第二十七條及第二十八條）; Articles 227 and 228 of the Regulation Governing the Administration of Post Offices（郵政規則第二百二十七條、第二百二十八條）; Universal Postal Convention, Final Protocol（萬國郵政公約最後議定書）.

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* Translated by Raymond T. Chu.

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

KEYWORDS:

public utilities（公用事業）, state-operated business（國營事業）, performance administration（給付行政）, postal services（郵政事業）, postal administration（郵政機關）, indemnity for loss of mails（郵件損失補償）, delivery（郵件投遞）, value-declared mail（報值郵件）, value-insured mail（保價郵件）, addressee（收件人）, sender（寄件人）.**

HOLDING: The Constitution provides explicitly in the first sentence of Article 144 that all public utilities shall in principle be operated by the government. While engaging in the operation of public utilities for the purpose of supplying the people with general and reliable services as needed at reasonable rates under its duty to protect the public interest as a part of its function of *Leistungsverwaltung*, the state may set reasonable limitations on the indemnity for the loss or liability for damages incurred by such public utilities in connection with the operation of their business. As such limitations concern the rights of the people, they must of course be specified to the extent consistent with Article 23 of the Constitution. Article 25

解釋文：公用事業，以公營為原則，憲法第一百四十四條前段定有明文。國家基於對人民生存照顧之義務、達成給付行政之功能，經營各類公用事業，期以合理之費率，普遍而穩定提供人民所需之各項服務，得對公用事業因經營所生之損失補償或損害賠償責任予以相當之限制，惟因涉及人民之權利，自須符合憲法第二十三條之規定。郵政法第二十五條各類掛號郵件之補償僅限於遺失或被竊，而不及於毀損，旨在維持郵政事業之經營，為增進公共利益所必要，尚未逾越立法權自由形成之範圍，與憲法並無牴觸。惟對於特殊類型郵件之投遞與交寄程序、收費標準、保管方式、損失補償要件與範圍等須否加以規定，應由主管機關檢討改進。又郵政規則第二百二十七條及第二百二十八

of the Act Governing the Administration of Post Offices, which prescribes to the effect that indemnity may be given only if registered mail of certain categories is lost or stolen and that no indemnity may be given in case of damage or destruction thereof, is intended to keep the postal services in continuous operation, which is essential to the promotion of the public interest, and does not go beyond the sphere formed by discretion of the legislative power, and is thus not in conflict with the Constitution. However, whether there is any need to make rules on the process of delivery and posting, rates of charges, manner of safekeeping, prerequisites for and coverage of indemnity for loss of mail of special categories is an issue to be reviewed by the competent authority for the purpose of improvement. Moreover, the purpose of Articles 227 and 228 of the Regulation Governing the Administration of Post Offices is to define the elements required for the liability of indemnity for loss of mail. These provisions do not exceed the scope of authority under Article 27 of the Act Governing the Administration of Post Offices, nor do they set any

條之規定，乃在確定郵件損失補償責任之要件，並未逾越郵政法第二十七條之授權，亦未增加郵政法關於郵件補償規定所無之限制，與憲法亦無牴觸。

extra restriction nonexistent in the Act on the indemnity in respect of mail. Accordingly, such articles are not in conflict with the Constitution.

REASONING: The transport of mail is one of the postal services that consists of delivery of mail and parcels posted by the general public, and is a type of public utility for rendering to the general populace the services needed for their daily life. Under Article 144 of the Constitution, the business shall in principle be operated by the government, although it may also be operated by private citizens if permitted by law. Article 1 of the Act Governing the Administration of Post Offices provides that the postal service shall be a state-owned enterprise under the control of the Ministry of Transport and Communications. While engaging in the operation of public utilities for the purpose of supplying the people with general and reliable services needed for their daily life, such as water, electricity and gas supply, mail delivery, and transportation, at reasonable rates under its duty to protect the public interest as a part of its func-

解釋理由書：郵件運送為郵政業務之一種，以遞送公眾交寄之信件或包裹為服務內容，屬於提供一般人民日常生活所需之公用事業，依憲法第一百四十四條規定，以公營為原則，其經法律許可者，亦得由國民經營之。郵政法第一條規定，郵政為國營事業，由交通部掌管。國家基於對人民生存照顧之義務、達成給付行政之功能，經營公用事業，期以合理之費率，普遍而穩定提供人民日常所需，如水、電、瓦斯、郵遞、交通運輸等各項服務，對公用事業之經營，課予特別義務，加強政府監督並在經濟上給予相當之優惠，如獨占權之給予、稅捐之減免、對損失補償或損害賠償責任予以限制等。惟此等措施，涉及相關人民之權利，自須依憲法第二十三條之規定，於增進公共利益之必要範圍內以法律為之。

tion of performance administration, the state may impose special duty on, intensify government supervision over, and grant such reasonable incentives as monopoly and tax exemption or reduction to the operation of public utilities, and set limitations on the indemnity for loss or liability for damage incurred by such public utilities. As such limitations concern the right of the people, they must of course be specified by law to the extent that is necessary for the furtherance of the public interest as required under Article 23 of the Constitution.

Article 25 of the Act Governing the Administration of Post Offices provides that if registered mail is lost or stolen, including the situation where a registered parcel, value-declared mail or value-insured mail is lost, stolen, partly or totally damaged or destroyed, the postal administration shall forthwith pay indemnity to the sender of the mail, with the exception of the circumstances specified in Article 28 of the Act. By the authority granted under Article 27 of the Act, the amounts of indemnity for each category of

郵政法第二十五條規定，各類掛號郵件遺失或被竊：掛號包裹、報值郵件、保價郵件全部或一部遺失、被竊或毀損時，如無同法第二十八條所定各項情形，郵政機關即須向寄件人為補償。而各類郵件補償之金額及其方法，則依同法第二十七條之授權，於郵政規則中定之。顯見郵政法對於郵件之毀損並非完全未設補償之規定。至於掛號郵件毀損之補償範圍僅限於掛號包裹之毀損，而不及於一般掛號郵件全部或一部毀損，乃因此類郵件多屬文件或信函，由寄件人自行封緘後向郵局交寄，其價值

mail and the manner in which indemnity will be paid are specified in the Regulation Governing the Administration of Post Offices. Evidently, the Act is not completely silent with respect to indemnity for damage or destruction of mail. The reason that indemnity is available only for damage to and destruction of registered parcels, exclusive of either totally or partly damaged or destroyed ordinary registered mail, is because most of such ordinary registered mail contains mainly documents and letters, which are sealed by the senders themselves before being handed over to the post office, and the value of these pieces of mail is based on the subjective view of the senders, rather than being easily ascertainable as are the value-declared mail, value-insured mail, and registered parcels. In excluding the ordinary registered mail from the items for which indemnity is available, Article 25 of the Act Governing the Administration of Post Offices is formulated by taking into consideration the balance among such factors as the fees charged, the nature of the services, the operating cost, and the degree of injury to the interest of the

亦易受主觀因素影響而不若報值、保價郵件或掛號包裹等容易認定。是郵政法第二十五條排除一般掛號郵件毀損之補償，乃就其所收取費用、服務性質、經營成本、人民權益所受侵害之程度等因素為衡平考量，並為維持郵政事業之經營所必須，增進公共利益所必要，尚未逾越立法權自由形成範圍，符合憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之規定亦無牴觸。惟特殊類型之郵件，如集郵品等，損害價值之認定缺乏客觀標準，易滋爭議，其投遞交寄之程序、收費標準、保管方式、損失補償之要件與範圍須否加以規定，應由主管機關檢討改進。

people, and is necessary for maintaining the operation of the postal services and essential to the furtherance of the public interest. The statute does not go beyond the sphere formed by the discretion of the legislative power, and is consistent with the principle of proportionality *(Verhältnismäßigkeitsprinzip)* embodied in Article 23 of the Constitution; nor is it in conflict with Article 15 of the Constitution in the protection of the property right of the people. Nevertheless, whether there is any need to make rules on the process of delivery and posting, rates of charges, manner of safekeeping, prerequisites for and coverage of indemnity for loss of mail of special categories such as stamp collections, of which the amount of damage, if any, is liable to dispute due to the lack of objective criteria for value appraisement, is an issue to be reviewed by the competent authority for the purpose of improvement.

Furthermore, Article 227 of the Regulation Governing the Administration of Post Offices, which provides that the duty of the post office ends when a piece

郵政規則第二百二十七條規定，各類郵件一經照章投遞或由收件人領取，郵局責任即為完畢。同規則第二百二十八條規定，收件人接收郵件時，未

of mail is duly delivered according to postal rules or received by the addressee, and Article 228 of the Regulation, which provides that if the addressee makes no statement with regard to defects in the mail at the time of accepting the mail against the issue of a receipt he may not claim for indemnity thereafter, are intended to set out the prerequisites for the liability of indemnity for the loss of mail. Article 3 of the Act Governing the Administration of Post Offices prescribes: "Where there are provisions in international postal conventions or agreements applicable to any category of mail or postal service, such provisions shall govern; if, however, any provision thereof is in disagreement with this Act, then this Act shall be applicable except for cases of international mails and postal services." The Universal Postal Convention, Final Protocol, signed in Seoul, Korea, on September 14, 1994, effective as of January 1, 1996, contains rules identical to those included in the aforesaid Regulation. While the Republic of China is not a signatory to said Convention, the clauses therein set forth may be accepted by us as general

當場聲明有瑕疵，並已出據領取郵件者，事後不得請求補償，係為確定郵件損失補償責任之要件所為之規定。依郵政法第三條規定：「關於各類郵件或其事務，如國際郵政公約或協定有規定者，依其規定。但其規定如與本法相牴觸時，除國際郵件事務外，適用本法之規定。」一九九四年九月十四日於韓國漢城簽訂，於一九九六年一月一日起正式生效之萬國郵政公約最後議定書（Universal Postal Convention,Final Protocol），即有與前開郵政規則相同之規定。我國雖非此公約之締約國，仍可視之為國際間通郵之一般規範。該公約第三十五條第一項規定，掛號函件、保險函件及其他證明函件，凡經按照國內就同類函件所定規章之條件予以投遞者，郵局之責任即告終止。惟同條項第二款規定，收件人或郵件退回原局時之寄件人，於國內規章所許可之情況下，對於被竊或毀損郵件（向郵局）提出保留聲明者，郵局仍須負責。亦即依該公約之規定，各類郵件如經照章投遞而收件人於領取郵件時並未提出保留權利之聲明者，各郵局即無須負責。是郵政規則第二百二十七條及第二百二十八條之規定，與國際公約之規定相符，並未逾越郵政法第二十七條之授權，亦未增加郵

rules of international postal transport. Article 35(1) of the Convention provides that the responsibility of the post office ends when a registered letter, insured letter and any other letter of attestation is delivered in the same manner as required by rules governing delivery of domestic mail of the same category. However, Article 35(2) of the Convention requires that the post office be held responsible if the addressee or the sender of a piece of mail returned to the original post office has presented (to the post office) a reservation of his right in respect of the mail being stolen, damaged or destroyed where it is permissible under domestic regulations. In other words, a post office has no responsibility under the Convention if a piece of mail is delivered as required by postal regulations and the addressee has made no reservation of his right at the time of acceptance of the mail. It follows therefore that Articles 227 and 228 of the Regulation Governing the Administration of Post Offices are in accord with said international convention and do not exceed the scope of authority under Article 27 of the Act Governing the Administration of Post

政法關於郵件補償規定所無之限制，與憲法尚無牴觸。

Offices, nor do they set any extra restriction nonexistent in the Act on the indemnity in respect of mail. Accordingly, such articles are not in conflict with the Constitution.

J. Y. Interpretation No.429（June 6, 1997）*

ISSUE: Is Article 4, Paragraph 2, of the Regulation Governing the Training of Public Functionaries Passing High Level or Ordinary Level Civil Test? Examination, which confers no exemption of practical training, in contravention to the Public Functionaries Examination Act and the Constitution?

RELEVANT LAWS:

Articles 7 and 18 of the Constitution（憲法第七條、第十八條）; Article 20, Paragraph 1, of the Public Functionaries Examination Act（公務人員考試法第二十條第一項）; Article 4, Paragraph 2, of the Regulation Governing the Training of Public Functionaries Passing High Level or Ordinary Level Civil Test（公務人員高等暨普通考試訓練辦法第四條第二項）.

KEYWORDS:

public functionaries（公務人員）, high level civil service examination（高等考試）, ordinary level civil service examination（普通考試）, qualification（及格）, basic training（基礎訓練）, practical training（實務訓練）, assign（分發）, appoint（任用）, waiver（抵免）, exempt（免除）, commissioned（實授）. **

* Translated by Professor Spenser Y. Hor.

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

HOLDING: Article 21, Paragraph 1, of the Public Functionaries Examination Act, implemented on January 24, 1986, states that, "Training shall be given to those who pass the high level or ordinary level civil service examinations, according to each respective examinee's qualified category. Certificates, assignments and appointments shall only be issued or made to those who satisfactorily complete the training." (The wording in Article 20, Paragraph 1, of the same Act currently in force stipulates the same.) Accordingly, public functionaries, after passing the high level or ordinary level civil service written examination, shall receive training and after receiving satisfactory training scores, shall have completed the examination procedures. Since training is part of the statutory examination procedures, unless otherwise provided in other laws or regulations, no waiver of training shall be allowed. Article 4, Paragraph 2, of the Regulation Governing the Training of Public Functionaries Passing High Level or Ordinary Level Civil Test prescribing that no waiver is allowed for practical training is

解釋文：中華民國七十五年一月二十四日公布之公務人員考試法第二十一條第一項規定：「公務人員高等考試與普通考試及格者，按錄取類、科，接受訓練，訓練期滿成績及格者，發給證書，分發任用」（現行法第二十條第一項之規定意旨亦同）是公務人員高普考試筆試及格後，須經訓練，訓練期滿成績及格，始完成考試程序。訓練既為法定考試程序之一部分，除法令另有規定外，自不得抵免。公務人員高等暨普通考試訓練辦法第四條第二項就實務訓練無免除之規定，符合上述立法意旨，與憲法尚無牴觸。

consistent with said legislative intent [of Article 21, Paragraph 1, of the Public Functionaries Examination Act], and is not in contravention to the Constitution.

REASONING: Article 21, Paragraph 1, of the Public Functionaries Examination Act, implemented on January 24, 1986, states that, "Training shall be given to those who have passed the high level or ordinary level civil service examination, according to the respective examinee's qualified category. Certificates, assignments and appointments shall only be issued or made to those who satisfactorily complete the training." (The wording in Article 20, Paragraph 1, of the same Act currently in force stipulates the same.) Article 21, Paragraph 1, prescribes the procedures of civil service examinations, i.e., after passing the written examination and completing the training, the examination procedure will be completed. Article 21, Paragraph 2, of the same Act authorizes the promulgation of the Regulation Governing the Training of Public Functionaries Passing High Level or Ordinary Level Civil Test in order to ensure

解釋理由書：七十五年一月二十四日公布之公務人員考試法第二十一條第一項規定：「公務人員高等考試與普通考試及格者，按錄取類、科接受訓練，訓練期滿成績及格者，發給證書，分發任用。」（現行法第二十條第一項之規定意旨亦同）是公務人員高普考筆試及格後，須經訓練，訓練期滿成績及格，始為完成法定考試程序。依同法條第二項授權訂定之公務人員高等暨普通考試訓練辦法，旨在增進工作知能，加強考用之配合。同辦法第四條第一項規定：「本訓練分基礎訓練與實務訓練兩階段，其期間合計四個月至一年。」其第二項規定：「本辦法實施前曾應公務人員高等、普通考試及格之現任或曾任公務人員；或曾依本辦法之規定接受基礎訓練成績及格者，得免除基礎訓練，惟實務訓練期間與分兩階段實施者同。」明示公務人員高等及普通考試筆試錄取人員之訓練分為兩階段實施，前階段之基礎訓練係以充實初任公務人員應具備之基本觀念及有關業務之一般知

the competence of future civil servants and strengthen the connection between examinations and appointments. Article 4, Paragraph 1, of the said Regulation provides that: "The period of training, lasting from four months to a year, can be divided into two portions, basic training and practical training." Said Article 4, Paragraph 2, further states that: "those current or former public functionaries who qualified after passing the high level or ordinary level civil service examination before the implementation of the said Regulation or completed the basic training after the said implementation, may be exempted from basic training; whereas, the length of the practical training for those exempted public functionaries is the same as that of regular ones." Consequently, training for qualified candidates who have passed the high level or ordinary level civil service examination can be divided into two parts. The first part of basic training is designed to instill the basic concepts and knowledge of new public functionaries; the second part of practical training is designed to strengthen job-related professional knowledge and skills.

識為主，而後階段之實務訓練則以增進有關工作所需知能為專業訓練之重點。實務訓練既基於特殊目的而實施，自與筆試錄取人員先前是否曾有服公職經驗或年資等未必相涉，上開辦法第四條第二項對此並無抵免規定，對所有公務人員高等或普通考試及格人員一體適用，與憲法第七條及第十八條尚無牴觸。惟應考人在筆試錄取前已取得與錄取類科相當之合格實授公務人員身分，且與擬任職務之工作性質亦屬雷同者，是否一律不得以其實際經驗抵免實務訓練，宜由主管機關檢討改進。

Since practical training is based upon special purposes, the fact of whether a given candidate qualified for the high level or ordinary level civil service examination and served in the civil service before, or whether he/she has certain years of experience is not necessarily relevant. Article 4, Paragraph 2, does not make such distinctions and does not provide any exemptions. It shall apply to everyone who qualifies for the high level or ordinary level civil service examination, and is not in contravention to Articles 7 and 18 of the Constitution. Nevertheless, the question of whether examinees who served equivalent civil service as commissioned public functionaries before taking the high level or ordinary level civil service examination in a specific category are absolutely prohibited from waiving the practical training may be further reviewed by the competent authority.

J. Y. Interpretation No.430（June 6, 1997）*

ISSUE: May active service military officers who file petitions for remaining on active duty according to pertinent rules and whose petitions are rejected following orders of discharge seek remedies by lodging administrative appeals and bringing administrative proceedings following the respective due procedures?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 1 of the Administrative appeals Act（訴願法第一條）.

KEYWORDS:

administrative appeal（訴願）, litigation（訴訟）, right to lodge administrative appeal（訴願權）, right to institute legal proceedings（訴訟權）, status（身分）, occupation（職業）, public functionary（公務員）, administrative act（行政處分）, administrative proceeding（行政爭訟）, active service military officer（現役軍官）, petition（聲請）, remain on active duty（繼續服役）, discharge（退伍）, perform public service（服公職）, combat duty（作戰任務）, duty of obedience（服從義務）, right of military command（軍事指揮權）, right to award and discipline（賞罰權）, final and binding judgment（確定終局判決）.**

* Translated by Professor Spenser Y. Hor.

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

HOLDING: Article 16 of the Constitution guarantees the people the right to lodge administrative appeals and the right to institute legal proceedings. When the people's rights or interests protected by law are infringed, their rights to lodge administrative appeals or to institute legal proceedings following proper legal procedures cannot be limited simply because of their posts or occupations. We have already repeatedly stated that whether civil servants who are subject to administrative acts due to their posts can bring administrative proceedings depends on the contents of such administrative acts issued. Military officers are in a broad sense civil servants and have public law relationships with the State due to their official posts. Active service military officers who file petitions for remaining on active duty according to pertinent rules and whose petitions are rejected following orders of discharge, if they question the orders, may seek remedies by lodging administrative appeals and bringing administrative proceedings following the respective due procedures since the orders of discharge affect their military statuses

解釋文：憲法第十六條規定人民有訴願及訴訟之權，人民之權利或法律上利益遭受損害，不得僅因身分或職業關係，即限制其依法律所定程序提起訴願或訴訟。因公務員身分受有行政處分得否提起行政爭訟，應視其處分內容而定，迭經本院解釋在案。軍人為廣義之公務員，與國家間具有公法上之職務關係，現役軍官依有關規定聲請續服現役未受允准，並核定其退伍，如對之有所爭執，既係影響軍人身分之存續，損及憲法所保障服公職之權利，自得循訴願及行政訴訟程序尋求救濟，行政法院四十八年判字第十一號判例與上開意旨不符部分，應不予援用。

and may result in violation of the constitutional guarantee of the right to perform public service. The part of Supreme Administrative Court Precedent No. 11 (Pantze No. 11), Supreme Administrative Court of 1959, which is in contravention to this Interpretation, shall no longer be applicable.

REASONING: Article 16 of the Constitution guarantees the people the right to lodge administrative appeals and the right to bring legal action. When the people's rights or interests protected by law are infringed, their rights to lodge administrative appeals or to bring legal action following proper legal procedures cannot be limited simply because of their posts or occupations. We have already stated in Interpretations Nos. 187, 243, 298, and 338 that whether civil servants who are subject to administrative acts due to their posts can bring administrative proceedings depends on the contents of the administrative acts issued. If the administrative act will affect a civil servant's status or his rights and interests thereof, he may exercise his abovemen-

解釋理由書：憲法第十六條規定人民有訴願及訴訟之權，人民之權利或法律上利益遭受損害，不得僅因身分或職業關係，即限制其依法律所定程序提起訴願或訴訟。因公務員身分受有行政處分得否提起行政爭訟，應視處分內容而定，其足以改變公務員身分或對於公務員權益有重大影響之處分，受處分之公務員自得行使上開憲法第十六條之權利，請求司法機關救濟，迭經本院釋字第一八七號、第二四三號、第二九八號及第三三八號等分別釋示在案。軍人負有作戰任務，對軍令服從之義務，固不能與文官等同視之。惟軍人既屬廣義之公務員，與國家之間具有公法上之職務關係，倘非關軍事指揮權與賞罰權之正當行使，軍人依法應享有之權益，自不應與其他公務員，有所差異。現役軍官依有關規定聲請續服現役未受允准，

tioned rights under Article 16 of the Constitution to seek remedies from the judicial branch. Military officers have combat duties during wartime, and their duty of obedience cannot be equated to that of ordinary public officials. However, since military officers are in a broad sense civil servants and have public law relationships with the State due to their official posts, except for the due exercise of rights of military command and for awards and discipline, their legal rights shall not differ from those of other civil servants. Active service military officers who file petitions for remaining on active duty according to pertinent rules and whose petitions are rejected following orders of discharge, if they question the orders, may seek remedies by lodging administrative appeals and bringing administrative proceedings following the respective due procedures. Supreme Administrative Court Precedent No. 11 (Pan-tze No. 11), Supreme Administrative Court of 1959, provides that, "Administrative appeals can be brought only when administrative acts issued by government branches are illegal or inappropriate so as to infringe upon people's

並核定其退伍，如對之有所爭執，既係影響軍人身分之存續，損及憲法所保障服公職之權利，自得循訴願及行政訴訟程序尋求救濟。行政法院四十八年判字第十一號判例：「提起訴願，限於人民因官署之處分違法或不當，而損害其權利或利益者，方得為之。至若基於特別權力關係所生之事項，或因私法關係發生爭執，則依法自不得提起訴願」，與上開意旨不符部分，應不予援用。查具有軍人身分者，申請志願退伍或繼續服役未受允准，係影響其軍人身分關係是否消滅之重大不利益處分，應得循行政爭訟程序，請求救濟，雖經行政法院民國八十五年四月十七日庭長評事聯席會議決議在案，惟上開判例既為本件據以聲請解釋之確定終局裁判所引用，仍應受理解釋，併此說明。

rights or interests. As to administrative acts issued due to special authority relationships or due to disputes rising from private law relationships, there is no legal ground for administrative appeals." The foregoing is in contravention to this Interpretation and shall no longer be applicable. On April 17, 1996, the Judges Joint Committee of the Supreme Administrative Court's Chief Judges made a resolution that those active service officers who file petitions for voluntary discharge or for remaining on active duty and whose petitions are rejected may follow the administrative procedure to seek remedies, because the rejections are adverse administrative acts and will affect their military statuses. Since the Supreme Administrative Court Precedent No. 11 (Pan-tze No. 11), Supreme Administrative Court of 1959, was cited by the final and binding judgment which gave rise to this Interpretation, it is noteworthy that we should review this petition accordingly.

Justice Chi-Nan Chen filed dissenting opinion.

本號解釋陳大法官計男提出不同意見書。

J. Y. Interpretation No.431（June 6, 1997）*

ISSUE: Does the Enforcement rules of the Act Governing the Handling of Land Grant Certificates to Soldiers regarding the verification of the status of armed forces non-duty officers contradict the Constitution?

RELEVANT LAWS:

Article 10 of the Act Governing the Handling of Land Grant Certificates to Soldiers（戰士授田憑據處理條例第十條）; Article 3, Subparagraph 16 of the Enforcement Rules of the Act Governing the Handling of Land Grant Certificates to Soldiers（戰士授田憑據處理條例施行細則第三條第十六款）.

KEYWORDS:

Land Grant Certificates to Soldiers（戰士授田憑據）, Armed Forces Non-Duty Officers（無職軍官）.**

HOLDING: The Act Governing the Handling of Land Grant Certificates to Soldiers does not define and set out the scope for the "Armed Forces Non-Duty Officers" as referred to in Article 10 of said Act. Under Paragraph 16 of Article 3 of the Enforcement Rules of said Act:

解釋文：戰士授田憑據處理條例對同條例第十條之「無職軍官」未規定其定義及範圍，該條例施行細則第三條第十六款：「無職軍官指依行政院四十八年七月十四日台四十八防字第三八八二號令訂定之陸海空軍無軍職軍官處理辦法，於四十八年十月十八日以前在

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

"The Armed Forces Non-Duty Officers refers to those who, per the Regulation Governing the Handling of Armed Forces Non-Duty Officers, promulgated per the Decree issued by the Executive Yuan Ref. No. Tai-(48)-Fang-3882 dated July 14, 1959, registered on record with the Ministry of National Defense prior to October 18, 1959, with a Discharge Order issued, and have been verified by the Office of Deputy Chief-Personnel of the General Staff of the Ministry of National Defense as having met the criteria for Armed Forces Non-Duty Officers". The foregoing is a supplemental provision for the determination of the status of Armed Forces Non-Duty Officers and does not violate the legislative purpose of said Act; nor does it contradict the Constitution.

國防部登記處理有案，發給退除役令，並經國防部人事參謀次長室認定符合無職軍官身分者」，係就無職軍官身分之認定所為之補充規定，並未違背該條例之立法意旨，與憲法亦無牴觸。

REASONING: The purpose of the Act Governing the Handling of Land Grant Certificates to Soldiers, as enacted on April 23, 1990, and which took effect on January 1, 1991, is to take back the Land Certificates that Soldiers received per the Land Grants to the Anti-Communist/Anti- Soviet Soldiers Act and

解釋理由書：中華民國七十九年四月二十三日制定，八十年一月一日施行之戰士授田憑據處理條例，係為收回已依反共抗俄戰士授田條例領取之戰士授田憑據，分別情形給與不同基數之補償金而制定。其核發對象原以領有戰士授田憑據之人員為範圍，依反共抗俄戰士授田條例第十一條規定：「現在陸

to pay compensation in accordance with the basis points based on individual situations. The recipients covered by said Act are those that originally received the Land Grant Certificates to Soldiers. Under Article 11 of the Land Grants to the Anti-Communist/Anti-Soviet Soldiers Act, "Soldiers who have served in the Armed Forces for more than two years" are the intended recipients of the Land Grant Certificates to Soldiers. For those who formerly were military officers in mainland China but, after coming to Taiwan on personal initiative or with the army, did not duly go through the formal discharge procedures or left the military employer when the registration of non-duty officers was still being processed, their absence from the military camp makes receiving a Land Grant Certificate to Soldiers practically difficult. Hence the provision in Article 10 of said Act: "Those people who, before the Land Grants to the Anti-Communist/Anti-Soviet Soldiers Act was promulgated and implemented, participated in the conflicts against communists and the Soviet Union, excluding those who have been sentenced for treason or

海空軍部隊服務二年以上之戰士」始為發給授田憑據之對象；在大陸時期曾任軍官，自行來臺或隨軍隊來臺後，未辦理正式退伍或在辦理無職軍官登記清理中脫離軍職等人員，因未在營，其領取戰士授田憑據，有事實上之困難，乃於該處理條例第十條規定：「反共抗俄戰士授田條例公布施行前，曾參加反共抗俄作戰，除因有叛國行為或逃亡而被判有期徒刑以上之刑者外，其餘在臺離營之退除役無職軍官，領有退伍除役證明書，且現居住臺灣地區者，視同已發給授田憑據，依本條例之規定處理」，以保障其權益。所謂「無職軍官」之定義及範圍，戰士授田憑據處理條例雖未另為規定，惟觀其立法意旨，係指行政院四十八年七月十四日台四十八防字第三八八二號令發布之陸海空軍無軍職軍官處理辦法所規定者而言，該辦法第二條第一項規定：「本辦法所稱無職軍官，包括左列人員：一、外職停役者、二、編餘者、三、辭職資遣者、四、作戰失散或被俘來歸者、五、免職停職者、六、撤職者、七、免官停役者、八、刑事停役者、九、其他因故離職而未辦退除役或假退除役者」，同條第二項規定：「前項人員以中華民國四十七年六月三十日以前居住政府控制地區為

desertion, have been discharged, are Armed Forces Non-Duty Officers, have received the Discharge Certificate, and are now living in Taiwan, are deemed as having been issued the Land Grant Certificates to Soldiers and should be handled per the provisions of this Act", so as to protect the rights and interests of those people. Said Act does not separately define and prescribe the scope for the so-called "Armed Forces Non-Duty Officer". Judging from the legislative purpose of said Act, however, "Armed Forces Non-Duty Officer" refers to those who are subject to the Measures Governing the Handling of Armed Forces Non-Duty Officers, promulgated per the Decree issued by the Executive Yuan Ref. No. Tai-(48)-Fang-3882 dated July 14, 1959. Paragraph 1 of Article 2 of said Measures provides: "The Armed Forces Non-Duty Officers as referred to in the Measures include those who are: 1) dismissed and suspended from service, 2) redundant, 3) resigned or terminated, 4) missing in battle or returned prisoners of war, 5) dismissed and put on leave of absence, 6) removed from office, 7) dismissed from an officer posi-

限」。同辦法第二十一條復規定：「無職軍官，在規定調查期間，不參加調查者，爾後概不處理，並作為退除役論」。國防部四十八年五月二十八日（四八）雷露字第二六四四號公告無職軍官辦理調查登記之期間為四十八年六月八日至同年十月十八日。該辦法因登記期間屆滿，經行政院五十三年五月十五日台五三人字第三四一二號令廢止，則戰士授田憑據處理條例施行細則第三條第十六款規定：「無職軍官指依行政院四十八年七月十四日台四十八防字第三八八二號令訂定之陸海空軍無軍職軍官處理辦法，於四十八年十月十八日以前在國防部登記處理有案，發給退除役令，並經國防部人事參謀次長室認定符合無職軍官身分者」，係就無職軍官身分之認定所為之補充規定，為執行上開條例所必要，且未違背該條例之立法意旨，與憲法亦無牴觸。

tion and suspended from service, 8) suspended from service due to criminal proceedings, and 9) otherwise resigned but did not complete the discharge procedures or provisional discharge procedures". Paragraph 2 of said Article provides: "The preceding Paragraph shall apply only to those who have lived in the areas controlled by the Government before June 30, 1948". Article 21 of said Measures further provides: "Those Armed Forces Non-Duty Officers who, during the prescribed investigation period, failed to participate in said investigation, shall not be processed later and shall be deemed as having been discharged". The period set for the investigation and registration of Armed Forces Non-Duty Officers was between June 8, 1949 and October 18, 1949, per the Pronouncement issued by the Ministry of National Defense Ref. No. (48)-Lay-Lu-2644 dated May 28, 1959. The aforesaid Measures, upon expiration of the registration period, were repealed per the Decree issued by the Executive Yuan Ref. No. Tai-(53)-Ren-3412 dated May 15, 1964. Accordingly, the provision of Subparagraph 16 of Article 3 of the Enforce-

ment Rules of said Act regarding "An Armed Forces Non-Duty Officer refers to those who, per the Measures Governing the Handling of Armed Forces Non-Duty Officers, promulgated per the Decree issued by the Executive Yuan Ref. No. Tai-(48)-Fang-3882 dated July 14, 1959, registered on record with the Ministry of National Defense prior to October 18, 1959, with a Discharge Order issued, and have been verified by the Office of Deputy Chief-Personnel of the General Staff of the Ministry of National Defense as having met the criteria for Armed Forces Non-Duty Officer" is a supplemental provision for the determination of the status of Armed Forces Non-Duty Officer. The foregoing meets the need to enforce the aforesaid Act, and does not violate the legislative purpose of said Act; nor does it contradict the Constitution.

J. Y. Interpretation No.432（July 11, 1997）*

ISSUE: Is the term "other violations" used by the Certified Public Accountant Act as a basis for disciplinary measures so indefinite and generalized as to contradict the principle of clarity and definiteness of law (*Rechtsbestimmtheitprinzip*), thus rendering it unconstitutional?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 17 and 39 of the Certified Public Accountant Act（會計師法第十七條、第三十九條）.

KEYWORDS:

principle of clarity and definiteness of law（法律明確性原則）, predictability of law（法律之可預見性）, disciplinary measures（懲戒處分）, accountants（會計師）, indefinite concepts of law（不確定法律概念）, general clauses of law（概括條款）, professional duties（職業上之義務）.**

HOLDING: When professionals are subject to disciplinary measures due to their breach of duties that are required in the practice of professional services, the principle of clarity and definiteness of law

解釋文：專門職業人員違背其職業上應遵守之義務，而依法應受懲戒處分者，必須使其能預見其何種作為或不作為構成義務之違反及所應受之懲戒為何，方符法律明確性原則。對於懲戒

* Translated by Pijan Wu.

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*(Rechts*bestimmtheitprinzip) is observed only if there is a predictability regarding which acts or omissions constitute breach of duty and the corresponding disciplinary measures. Even though the legal requirements of disciplinary measures may be expressed in abstract terms, the principle of clarity and definiteness of law *(Rechtsbestimmtheitprinzip)* shall still be maintained where indefinite concepts or general clauses are used. The requirement of legal clarity is not meant to be a formal requirement that all legal terms must be definite and exhaustive. During legislation, the legislators may apply indefinite concepts of law or general clauses to address the complexity of social activities (to be regulated by the law) and the adequacy of the application of the law in specific cases. With respect to the use of abstract terms in the codes of conduct and disciplinary laws governing professionals, the aforementioned principle is not violated if: the meanings of the abstract terms are not incomprehensible, they are predictable for the regulated persons, and they could be scrutinized and defined by the judiciary. Article 39, Subparagraph 6,

處分之構成要件，法律雖以抽象概念表示，不論其為不確定概念或概括條款，均須無違明確性之要求。法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念或概括條款而為相應之規定。有關專門職業人員行為準則及懲戒之立法使用抽象概念者，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與前揭原則相違。會計師法第三十九條第六款規定：「其他違反本法規定者」，以違反會計師法為構成會計師之懲戒事由，其範圍應屬可得確定。同法第十七條規定：「會計師不得對於指定或委託事件，有不正當行為或違反或廢弛其業務上應盡之義務」，係在確立會計師之行為標準及注意義務所為之規定，要非會計師作為專門職業人員所不能預見，亦係維護會計師專業素質，增進公共利益所必要，與法律明確性原則及憲法第十五條保障人民工作權之意旨尚無違背。

of the Certified Public Accountant Act provides that "other violations of the provision of this Act" [are subject to disciplinary measures]; the scope of the application is ascertainable since the basis for disciplinary measures taken against accountants is limited to the violation of the Act. Also, Article 17 of the same Act provides that: "With respect to mandated or entrusted matters, accountants may not engage in improper conduct, or violate or omit the duties of their profession." Its objective is to establish standards of conduct for accountants. The term "other violations" is not unpredictable and is necessary to maintain the professionalism of accountants and to promote the public interest. Accordingly, it does not violate the principle of clarity and definiteness of law (Rechtsbestimmtheitprinzip) or the protection of the people's right to work under Article 15 of the Constitution.

REASONING: When professionals are subject to disciplinary measures due to their breach of duties that are required in the practice of the professional services, the principle of clarity and defi-

解釋理由書：專門職業人員違背其職業上應遵守之義務，而依法應受懲戒處分者，必須使其能預見其何種作為或不作為構成義務之違反及所應受之懲戒為何，方符法律明確性原則。對於

niteness of law (Rechtsbestimmtheitprinzip) is observed only if there is a predictability regarding which acts or omissions constitute breach of duty and the corresponding disciplinary measures. Even though the legal requirements of disciplinary measures may be expressed in abstract terms, the principle of clarity and definiteness of law (Rechtsbestimmtheitprinzip) shall still be maintained where indefinite concepts or general clauses are used. The requirement of legal clarity is not meant to be a formal requirement that all legal terms must be definite and exhaustive. During legislation, the legislators may apply indefinite concepts of law or general clauses to address the complexity of social activities (to be regulated by the law) and the adequacy of the application of the law in specific cases. With respect to the use of abstract terms in the codes of conduct and disciplinary laws governing professionals, the aforementioned principle is not violated if: the meanings of the abstract terms are not incomprehensible, they are predictable for the regulated persons, and they could be scrutinized and defined by the judiciary.

懲戒處分之構成要件，法律雖以抽象概念表示，不論其為不確定概念或概括條款，均須無違明確性之要求。法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念或概括條款而為相應之規定。有關專門職業人員行為準則及懲戒之立法使用抽象概念者，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與前揭原則相違。

Article 39 of the Certified Public Accountant Act provides for the causes of disciplinary actions taken against accountants, among which Subparagraph 6 provides “other violations of the provision of this Act.” As it is limited to the duties under the Act, its scope is ascertainable and thus satisfies the principle of clarity and definiteness of law (Rechtsbestimmtheitprinzip). Article 17 of the same Act provides that: “With respect to mandated or entrusted matters, accountants may not engage in improper conduct, or violate or omit the duties of their profession.” Its objective is to establish standards of conduct for accountants. Among them, “omit the duties of their profession” refers to the situation where an accountant ought to have acted but failed to do so or failed to meet the standard required of accountants. On the one hand, this article is based on the consideration that the professional duties of accountants cannot be enumerated exhaustively. On the other hand, in light of the fact that accountants are professionals qualified to practice after passing the national exams, they are able to judge, with their professional knowl-

會計師法第三十九條規定會計師應付懲戒之各種事由，其中第六款「其他違反本法規定者」，既限於會計師法所定義務，其範圍應屬可得確定，符合法律明確性原則。同法第十七條規定：「會計師不得對於指定或委託事件，有不正當行為或違反或廢弛其業務上應盡之義務」，其目的在確立會計師之行為標準及注意義務，其中「廢弛其業務上應盡之義務」，係指應為而不為，及所為未達會計師應有之水準而言。此項規定一方面基於會計師之職業義務無從窮舉之考量；一方面則鑒於會計師為經國家考試及格始得執行業務之專門職業人員，於其執行業務時何種作為或不作為構成業務上應盡義務之違反或廢弛，足以損及當事人之權益暨大眾之交易安全，可憑其專業知識予以判斷，並非難以理解，對於懲戒權之發動亦非不能預見，縱其內容及範圍具有某程度之不確定性或概括性，惟個案事實是否屬該規定所欲規範之對象，仍可經由司法程序依照社會上客觀價值、職業倫理等，按具體情況加以認定及判斷，要無礙於法安定性之要求。會計師法第十七條對於會計師職業義務之規定，第三十九條對違反此項注意義務之懲戒規定，係為維持會計師專業水準，增進公共利益而採

edge, which acts or omissions would constitute the violation of professional duties and are likely to cause damages to the client's rights or interests as well as the safety of transactions among the general public. Accordingly, the term "other violations" is not incomprehensible and the application of disciplinary power is not unpredictable. Although there is a certain degree of indefiniteness and generality in the content and scope of the article, the requirement of legal certainty is not compromised since, in specific cases, the applicability of the law may be judged through the judicial process according to the objective values and professional ethics of the society as well as the specific circumstances of the cases. Article 17 of the Act, regarding the professional duties of accountants, and Article 39, regarding the disciplinary measures for violating this duty of care, are necessary to maintain the professionalism of accountants and to enhance the public interest. Therefore, they do not violate the aforementioned principle and the protection of the people's right to work under Article 15 of the Constitution.

取之必要措施，符合首開意旨，與憲法第十五條工作權之保障尚無違背。

J, Y. Interpretation No.433（July 25, 1997）*

ISSUE: (1) Are Articles 2 and 9 of the Public Functionaries Discipline Act, delineating how civil servants' actions or inactions constitute laches of duties or other misdemeanors and what corresponding disciplinary sanctions are associated, in contravention to the Constitution?

(2) Are Articles 11 and 12 of the same law stipulating disciplinary sanctions of dismissals from public service and from posts in contravention to the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 1, 2, 9, 10, 11 and 12 of the Public Functionaries Discipline Act（公務員懲戒法第一條、第二條、第九條、第十條、第十一條、第十二條）; Article 57 of the Criminal Code（刑法第五十七條）.

KEYWORDS:

public functionary（公務員）, authority to institute disciplinary sanction（懲戒權）, decision of sanction（懲戒處分）, element（構成要件）, laches of duties（廢弛職務）, misdemeanor（失職行為）, dismissal from public service（撤職）, dismissal from one's post（休職）, demotion（降級）, salary cut（減俸）, cap（上限）, retirement pension（退休

* Translated by Professor Spenser Y. Hor.

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金）, demerit recorded（記過）, disciplinary warning（申誡）, *nullum crimen sine lege, nulla poena sine lege*（罪刑法定主義）, delineate（列舉）, power of criminal punishment（刑罰權）.**

HOLDING: The State's authority to institute disciplinary sanctions against civil servants because there is a civil service public law relationship between civil servants and the State is not exactly the same as the State's power of criminal punishment against criminals for criminal violations. With respect to the former, the Legislature enjoys more discretion in formulating the elements of violations and their legal effects resulting in decisions of sanction when compared with the latter. Not in contravention to the Constitution, Articles 2 and 9 of the Public Functionaries Discipline Act are general provisions delineating how civil servants' actions or inactions constitute laches of duties or other misdemeanors, and what corresponding disciplinary sanctions are associated. Likewise, Articles 11 and 12 of the same Act stipulating disciplinary

解釋文：國家對於公務員懲戒權之行使，係基於公務員與國家間公法上之職務關係，與對犯罪行為科予刑罰之性質未盡相同，對懲戒處分之構成要件及其法律效果，立法機關自有較廣之形成自由。公務員懲戒法第二條及第九條雖就公務員如何之違法、廢弛職務或其他失職行為應受何種類之懲戒處分僅設概括之規定，與憲法尚無牴觸。至同法第十一條、第十二條關於撤職及休職處分期間之規定，旨在授權懲戒機關依同法第十條所定之標準，就具體個案為適當之處分，於憲法亦無違背。惟撤職停止任用期間及休職期間該法均無上限之規定，對公務員權益不無影響，應由有關機關檢討修正，俾其更能符合憲法保障公務員之意旨。

sanctions of dismissals from public service and from posts are enacted to authorize the Commission on Disciplinary Sanctions of Public Functionaries to render appropriate disciplinary sanctions in any given case following the standards set forth in Article 10, and are not in contravention to the Constitution. However, the abovementioned law does not stipulate caps on the periods of dismissals from public service and from posts, and may affect the rights of civil servants. As a consequence, the relevant authorities shall review and amend the said law to provide caps in order to be in conformity with the constitutional guarantee of protecting the rights of civil servants.

REASONING: The State is a public legal entity whose thoughts and actions are expressed or exercised through civil servants serving as the State's branches and sub-branches. The relationship between civil servants and the State is one of civil service public law. The State owes civil servants the duty to ensure their livelihood and to protect their rights by way of paying salaries, retire-

解釋理由書：國家為公法人，其意思及行為係經由充當國家機關之公務員為之。公務員與國家之間係為公法上職務關係，國家對公務員有給予俸給、退休金等照顧其生活及保障其權益之義務，公務員對國家亦負有忠誠、執行職務等義務。為維護公務員之紀律，國家於公務員有違法、廢弛職務或其他失職行為時，得予以懲戒。此一懲戒權之行使既係基於國家與公務員間公法上

ment pensions, etc.; on the other hand, civil servants owe the State the duties of loyalty and performing civil service. For the purposes of maintaining civil servants' discipline, the State has the authority to institute disciplinary sanctions against civil servants when there are laches of duties or other misdemeanors. The exercise of the authority to institute disciplinary sanctions is based upon the civil service's public law relationship between civil servants and the State, and is not exactly the same as the State's power of criminal punishment against criminals for criminal violations. Besides, the degree of strictness of legal conformation when exercising the authority of disciplinary sanctions is not completely consistent with that of its criminal counterpart which requires nullum crimen sine lege, nulla poena sine lege and expresses the delineation of legal elements and effects of each crime.

之權利義務關係，與國家對人民犯罪行為所科處之刑罰不盡相同，而懲戒權行使要件及效果應受法律嚴格規範之要求，其程度與刑罰之適用罪刑法定主義，對各個罪名皆明定其構成要件及法律效果者，亦非完全一致。

Article 1 of the Public Functionaries Discipline Act provides that civil servants are not subject to disciplinary sanctions unless under this law; such language is

公務員懲戒法第一條規定，公務員非依本法不受懲戒，係指公務員之權益非經法定程序不受剝奪之意。同法第二條就公務員有違法、廢弛職務或其他

adopted to ensure that civil servants cannot be deprived of their rights and interests unless there is a legal proceeding. Article 2 of the same Act prescribes that civil servants are subject to disciplinary sanctions when there are laches of duties or other misdemeanors; Article 9 sets forth kinds of disciplinary sanctions, including dismissals from public service, dismissals from posts, demotions, salary cuts, demerits recorded, and disciplinary warnings. Nevertheless, Articles 2 and 9 are both general provisions delineating how civil servants' actions or inactions associate with corresponding disciplinary sanctions; Articles 11 and 12 of the same Act also do not stipulate caps on the periods of dismissals from public service and from posts, but authorize the Commission on Disciplinary Sanctions of Public Functionaries to decide appropriate disciplinary sanctions in any given case. This is so because the degrees and categories of civil servants' actions or inactions in violation of their civil service duties are often different, and may require various degrees of disciplinary sanctions according to individual cases' disparities, and cannot

失職行為應受懲戒處分設有規定；第九條明定懲戒處分之種類為撤職、休職、降級、減俸、記過及申誡等。惟就公務員違反職務上義務之行為與其所應受懲戒處分間之關連，僅設概括之規定，第十一條及第十二條就撤職停止任用及休職處分之最高期間，亦未規定，旨在授權懲戒機關就具體個案為適當之裁量，此係因公務員違反職務上義務之行為態樣及程度均屬多端，依個案之差異情形，容有為不同程度處罰之必要，難以由法律預先加以列舉明定，且國家對公務員之懲戒，與國家刑罰權之行使須嚴格遵守罪刑法定主義，而就犯罪之構成要件與處罰範圍皆須予以明定之情形，有所不同，已如前述。公務員懲戒法於中華民國七十四年五月三日修正公布時，已參酌刑法第五十七條之立法意旨，於第十條規定要求懲戒機關辦理懲戒案件，應審酌一切情狀，尤應注意被付懲戒人行為之動機、目的、手段及行為所生之損害或影響等事項，視其違反情節與輕重而為妥適之懲戒，是公務員懲戒法第二條、第九條、第十一條及第十二條於憲法均無違背。惟撤職停止任用期間及休職處分期間該法均無上限之規定，對公務員權益不無影響，應由有關機關檢討修正，俾其更能符合憲法保

expressly be delineated in advance by law. Moreover, as stated above, the exercise of the authority of disciplinary sanctions is not completely consistent with that of its criminal counterpart which requires nullum crimen sine lege, nulla poena sine lege and expresses the delineation of legal elements and effects of each crime. When the Public Functionaries Discipline Act was amended and made public on May 3, 1985, its Article 10 was amended taking into account Article 57 of the Criminal Code to require the Commission on the Disciplinary Sanctions of Functionaries to consider all circumstances when trying disciplinary sanction cases and pay special attention to parties' motives, purposes, means, and the damages or effects caused and to decide appropriate disciplinary sanctions in accordance with the degrees of parties' violations. Articles 2, 9, 11 and 12 are not in contravention to the Constitution. However, the abovementioned law does not stipulate caps on the periods of dismissals from public service and from posts, and may affect the rights of civil servants. Therefore, the relevant authorities shall

障公務員之意旨。

review and amend the said law to provide caps in order to be in conformity with the constitutional guarantee of protecting the rights of civil servants.

J. Y. Interpretation No.434（July 25, 1997）*

ISSUE: Does the absence of any provision in the Public Functionaries Insurance Act for the return of insurance premiums or retirement benefits for employees leaving for reasons other than retirement, violate Article 15 of the Constitution for the protection of the people's property right?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 2, 3, 6, 8, Paragraph 1, and 9, 16, Paragraph 1 of the Public Functionaries Insurance Act（公務人員保險法第二條、第三條、第六條、第八條第一項、第九條、第十六條第一項）.

KEYWORDS:

property right（財產權）, government employee insurance（公務人員保險）, insurance premium old age benefit（養老給付保險金）, separating employee（離職人員）.**

HOLDING: Public Functionaries Insurance is a social welfare system based on the theory that the country should provide benefits to government employees for childbirth, retirement, sickness, death and other reasons. All enrolled, remuner-

解釋文：公務人員保險係國家為照顧公務人員生老病死及安養，運用保險原理而設之社會福利制度，凡法定機關編制內之有給人員及公職人員均為被保險人。被保險人應按公務人員保險法第八條第一項及第九條規定繳付保險

* Translated by Professor S. M. Yu.

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

ated personnel and public service personnel of legally established government institutions are considered as the insured. The insured should pay premiums pursuant to Article 8, Paragraph 1, and Article 9 of the Public Functionaries Insurance Act. The insuring institution, in accordance with Article 3 of the same Act, provides childbirth, sickness, personal injury, disability, retirement, death, dependent death and burial service benefits, with the last three items transferred to the National Health Insurance Program after the enactment of the National Health Insurance Act. The premium to be paid under the Public Functionaries Insurance Act is shared between the government and the insured according to a certain ratio, to provide the funding of the insurance benefits paid out by the insuring institution. Such premium not only provides the funding sources of benefit payout of the individual insured, but also shares, collectively, the liability for payout of the other individuals insured. The fact that there is no provision for the return of premiums already paid does not violate the Constitution. However, with regard to that portion

費，承保機關按同法第三條規定提供生育、疾病、傷害、殘廢、養老、死亡及眷屬喪葬七項給付，前三項給付於全民健康保險法施行後，已列入全民健康保險。公務人員保險法規定之保險費，係由被保險人與政府按一定之比例負擔，以為承保機關保險給付之財務基礎。該項保險費，除為被保險人個人提供保險給付之資金來源外，並用以分擔保險團體中其他成員之危險責任。是保險費經繳付後，該法未規定得予返還，與憲法並無牴觸。惟被保險人所繳付之保險費中，關於養老保險部分，承保機關依財政部核定提存準備辦法規定，應提撥一定比率為養老給付準備，此項準備之本利類似全體被保險人存款之累積。公務人員保險法於第十六條第一項關於養老給付僅規定依法退休人員有請領之權，對於其他離職人員則未規定，與憲法第十五條保障人民財產權之意旨不符，應即檢討修正。

of the premium paid by the insured relating to retirement insurance, the insuring institution, according to the provision of the reserve rules mandated by the Ministry of Finance, should allocate a certain ratio as retirement benefit reserve, the principal and interest of which resemble the cumulative deposits of all the insured. Article 16, Paragraph 1, of the Public Functionaries Insurance Act provides for retirement benefits only to regular retirees, but not to other departing employees. Such neglect contravenes the purpose of Article 15 of the Constitution for the protection of the people's property right and should be reviewed and amended forthwith.

REASONING: Public Functionaries Insurance is a social welfare system based on the theory that the country should provide benefits to government employees for childbirth, retirement, sickness, death and other reasons. According to Articles 2 and 6 of Public Functionaries Insurance Act, all enrolled, remunerated personnel and public service personnel are considered as the insured. The insured,

解釋理由書：公務人員保險係國家為照顧公務人員生老病死及安養，運用保險原理而設之社會福利制度，依公務人員保險法第二條及第六條規定，凡法定機關編制內之有給人員及公職人員，應一律參加保險為被保險人。被保險人應按同法第八條第一項及第九條規定繳付應自付之保險費，並另由政府補助一定比例之保險費。承保機關則按同法第三條規定提供生育、疾病、傷害、

according to Article 8, Paragraph 1, and Article 9 of the same Act, shall contribute his/her portion of the insurance premium, with the balance contributed by the government as a subsidy. The insuring institution, shall, according to Article 3 of the same Act, provide childbirth, sickness, personal injury, disability, retirement, death and dependent death and burial service benefits. When the National Health Insurance Act was implemented on August 9, 1994, the last three items were transferred to the National Health Insurance Program. The insurance premium provided under the Public Functionaries Insurance Act is shared between the insured and the government under a certain ratio to provide for the funding basis of benefits payout by the insuring institution. Once paid, the premium joins the flow of funds in the insurance operation of the insurer and serves as the source of funds for benefits payout once an insurance peril occurs. Except as otherwise provided, the insured has no right to ask for a refund. Thus the fact that the Act does not provide for the refund of paid-in premium is not unconstitutional. However, among the

殘廢、養老、死亡及眷屬喪葬七項給付。全民健康保險法於中華民國八十三年八月九日施行後，已將前三項給付列入全民健康保險。公務人員保險法規定之保險費，係由被保險人與政府按一定之比例負擔，以為承保機關保險給付之財務基礎。而保險費經繳付後，即由承保機關運用於該保險事務之中，並於保險事故發生時，作為保險給付之基金，除別有規定外，被保險人自不得請求返還。是保險費經繳付後，該法未規定得予返還，與憲法並無牴觸。惟上述保險給付中，關於養老、死亡兩項保險部分，類似終身保障型之定額給付保險。故被保險人所繳付之保險費中，關於養老保險部分，依財政部四十九年二月十九日（四九）台財錢發字第〇一四六三號令核定提存準備辦法規定，承保機關應提撥一定比率（四十九年二月為百分之十四點九、五十一年一月為百分之十、五十七年一月回復為百分之十四點九，參照財政部金融局八十六年七月十九日台融局物第八六二一九四九五號函）為養老給付準備。此項準備之本利，類似全體被保險人存款之累積，非承保機關之資產。從而被保險人繳足一定年限之保險費後離職時，自有請求給付之權。公務人員保險法於第十六條第

abovementioned insurance benefits, those of retirement and death resemble the fixed amount benefit of the whole-life protection type. Thus, the portion of premium paid by the insured relating to retirement insurance, according to the provision of the reserve rules mandated via the Ministry of Finance Executive Order No. (49) Tai-Fin-Mon-Fa 01463 dated February 19, 1960, the insuring institution shall allocate a certain ratio (14.9% in February 1960, 10% in January 1962, and back to 14.9% in January 1968; See the Ministry of Finance, Bureau of Monetary Affairs, letter Tai-Yun-Bureau (2) No. 86219495 dated July 19, 1997) as retirement benefits reserve. The principal and interest of such reserve resemble the cumulative deposits of all the insured and are not items of assets of the insuring institution. Thus the departing insured, after payment of a certain number of years of premium, earns his/her right to benefits accrual. Article 16, Paragraph 1, of the Public Functionaries Insurance Act provides only retirement benefits to regular retirees and not to other departing employees. Such neglect contravenes the purpose of Article 15 of the

一項關於養老給付僅規定依法退休人員有請領之權，對於其他離職人員則未規定，與憲法第十五條保障人民財產權之意旨不符，應即檢討修正。至其請領之要件及金額如何，則屬立法問題。

Constitution for the protection of the people's property right and should be reviewed and amended forthwith. The condition and amount of such benefits should be left to the legislature to decide.

Justice Chi-Nan Chen filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋陳大法官計男提出部分不同意見書；劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.435（August 1, 1997）*

ISSUE: What are the reasons for, and what is the extent of, Article 73 of the Constitution? What types of improper speech or conduct by a member of the Legislative Yuan are protected by the principles of parliamentary self-discipline and immunity of legislative speech? Under what circumstances can the judicial agency exercise its power to investigate and adjudicate such conduct?

RELEVANT LAWS:

Article 73 of the Constitution（憲法第七十三條）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

Member of legislative Yuan（立法委員）, self-discipline principle（自律原則）, immunity of speech（言論免責權）.**

HOLDING: Article 73 of the Constitution provides that "no member of the Legislative Yuan shall be responsible outside the Yuan for opinions expressed or votes cast in the Yuan." Its purpose is

解釋文：憲法第七十三條規定立法委員在院內所為之言論及表決，對院外不負責任，旨在保障立法委員受人民付託之職務地位，並避免國家最高立法機關之功能遭致其他國家機關之干擾

* Translated by Nigel N.T. Li and Richard M. L. Guo.

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to preserve the power derived from the member status that is granted by the people, and to prevent intervention and influence from other government agencies that could jeopardize the exercise of legislative functions. To ensure that a member feels less inhibited when acting as a member, the boundaries of the immunity of speech conferred by the Constitution should be construed as liberally as possible. Accordingly, all statements, questioning, motions, voting and directly related conduct made in sessions or committees, such as party negotiations and statements expressed in public hearings, should thereby be protected. However, conduct beyond such extent and irrelevant to the exercise of the member's authority is not protected, such as the use of an intentional physical movement that is obviously improper to express opinions and that impairs others' legally protected interests. Whether a member's conduct transgresses the protective boundaries in a specific case should be subject to the decision of the Legislative Yuan based upon its self-disciplinary practice in maintaining congressional order. But, for the purpose of

而受影響。為確保立法委員行使職權無所瞻顧，此項言論免責權之保障範圍，應作最大程度之界定，舉凡在院會或委員會之發言、質詢、提案、表決以及與此直接相關之附隨行為，如院內黨團協商、公聽會之發言等均屬應予保障之事項。越此範圍與行使職權無關之行為，諸如蓄意之肢體動作等，顯然不符意見表達之適當情節致侵害他人法益者，自不在憲法上開條文保障之列。至於具體個案中，立法委員之行為是否已逾越保障之範圍，於維持議事運作之限度，固應尊重議會自律之原則，惟司法機關為維護社會秩序及被害人權益，於必要時亦非不得依法行使偵審之權限。

maintaining the social order and protecting a victim's rights, the judiciary can also exercise its authority to investigate and adjudicate such conduct if necessary.

REASONING: Article 73 of the Constitution provides that "no member of the Legislative Yuan shall be responsible outside the Yuan for opinions expressed or votes cast in the Yuan." Its purpose is to preserve the power derived from the member status that is granted by the people, and to prevent influence from other government agencies that could jeopardize the exercise of legislative functions. Under such protection, which is meant to create an environment free from fear and concerns of communication obstacles, legislative members can freely express their viewpoints, substantially speak for their constituents, and represent different ideas emerging from a dynamic society. By doing so, the rational policy-making that is substantial to a system of representative democracy and the duty to oversee government operations are fulfilled. The boundaries of the immunity of speech conferred by the Constitution should be

解釋理由書：憲法第七十三條規定：「立法委員在院內所為言論及表決，對院外不負責任。」旨在保障立法委員受人民付託之職務地位，並避免國家最高立法機關之功能遭致其他國家機關之干擾而受影響。立法委員得藉此保障，於無所瞻顧及無溝通障礙之情境下，暢所欲言，充分表達民意，反映多元社會之不同理念，形成多數意見，以符代議民主制度理性決策之要求，並善盡監督政府之職責。故此項言論免責權之保障範圍，應作最大程度之界定，舉凡立法委員在院會或委員會之發言、質詢、提案、表決以及與此直接相關之附隨行為，如院內黨團協商、公聽會之發言等均屬應予保障之事項。其中所謂對院外不負責任，係指立法委員不因行使職權所為之言論及表決而負民事上損害賠償責任或受刑事上之訴追，除因其言行違反內部所訂自律之規則而受懲戒外，並不負行政責任，業經本院釋字第四〇一號解釋釋示在案。

construed as liberally as possible. Accordingly, all statements, questioning, motions, voting and directly related conduct made in sessions or committees, such as party negotiations and statements expressed in public hearings, are thereby protected. The phrase "no responsibility outside the Yuan" immunizes a member from civil liability or criminal prosecution resulting from opinions expressed or votes cast when exercising the member's duty. Only when a member's conduct violates the Yuan's internal self-discipline rules shall the member be liable for administrative responsibility (See Interpretation No. 401).

Since the purpose of the Constitution to protect members' speech and to immunize them from various types of legal liabilities is to preserve their ability to exercise their duties, conduct beyond the abovementioned extent and irrelevant to the exercise of their duties is not protected, such as the use of an intentional physical movement that is obviously improper to express opinions and that impairs others' legally protected interests.

憲法保障立法委員之言論，使豁免於各種法律責任，既係基於維護其職權之行使，若行為已超越前述範圍而與行使職權無關，諸如蓄意之肢體動作等，顯然不符意見表達之適當情節致侵害他人法益者，自不在憲法上開條文保障之列。至於具體個案中，立法委員之行為是否已逾越範圍而應負刑事責任，於維持議事運作之限度內，司法機關依民主憲政之常規，固應尊重議會自律之原則，惟遇有情節重大而明顯，或經被

Whether a member's conduct transgresses the boundaries and thus carries criminal responsibility in a specific case should be subject to the decision of the Legislative Yuan based upon its self-disciplinary practice in maintaining congressional order. But whenever the situation becomes grave and/or obvious, or the victim files a complaint or private prosecution, the judiciary can also exercise its authority to investigate and judge such conduct, for the purpose of maintaining the social order and protecting a victim's rights.

害人提出告訴或自訴時，為維護社會秩序及被害人權益，亦非不得依法行使偵審之權限。

This interpretation is made upon the application of the letter ruling of the Legislative Yuan dated May 13, 1996. Another applicant, Wei Yao Chien, petitioning for interpretation of the Criminal Judgment E.T. No. 5120 (TPE D.Ct., 1996) and questioning the constitutionality thereof, does not meet the requirement of Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act. However, it is noted here that his petition is identical to the above interpretation and need not be separately disposed.

本件係就立法院於中華民國八十五年五月十三日函送之聲請案而為解釋；另案聲請人魏耀乾為台灣台北地方法院八十一年度易字第五一二〇號刑事判決有違憲疑義聲請解釋，與司法院大法官審理案件法第五條第一項第二款規定未盡相符。惟其聲請解釋之事項與本件已作成之解釋係屬同一，不須另為處理，併此敘明。

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

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

RELEVANT LAWS:

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

KEYWORDS:

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

HOLDING: It states in Article 8, Paragraph 1, of the Constitution that physical freedom shall be guaranteed to the people and that no person shall be tried or punished otherwise than by a

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

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* Translated by Chi-chang Yu.

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

court of law in accordance with the procedure prescribed by law. It also provides in Article 16 of the Constitution that the people shall have the right of instituting legal proceedings. Active-duty soldiers are also "the people" and thus deserve the abovementioned protection. In addition, it stipulates in Article 9 of the Constitution: "except for those who are in active military service, no person shall be subject to trial by a military tribunal." Given that active-duty soldiers have the special obligation of protecting the country, a military tribunal is established for the crimes committed by said soldiers for the purpose of national security and military need. It shall not be interpreted such that military tribunals have the exclusive jurisdiction upon the crimes committed by active-duty soldiers. There is no stipulation in the Constitution concerning military trial; nevertheless, such system may be established under the law. The initiation and operation of the military trial, which is within the power of punishment of the nation, shall meet the minimum requirement of the due process of law, which requirement includes an independent and

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

just tribunal and procedure and the compliance with constitutional principles as stated in Articles 77 and 80 of the Constitution. The laws governing the procedure of a military trial which limit the rights of active-duty soldiers shall be in compliance with the principle of proportionality (Verhältnismäßigkeitsprinzip) as stated in Article 23 of the Constitution. In light of the spirit of protecting physical freedom and the right of instituting legal proceedings and the provision of Article 77, the defendant receiving the sentence of imprisonment in a final and conclusive judgment made by the military tribunal in peacetime shall be permitted to appeal directly to a normal court on the ground that the judgment received is in violation of the law. Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act and the rest of the Act which state that the defendant is not permitted to appeal to the normal court on the ground that the judgment received from the military tribunal is in violation of the law are unconstitutional and shall be invalidated two years after the announcement of this Interpretation, at the latest. The relevant authority shall,

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

within the two-year period, revise relevant laws based on this principle, adjust the relevant appeal system, improve the separation of prosecution and trial in the military trial system and improve the criteria to appoint army officers to participate in military tribunals and the status protection of military judges to meet the principle of independent trial.

REASONING: Physical freedom is a basic human right under the Constitution and deserves the most thorough protection. Interpretation of the Constitution and establishment of the law shall both be in compliance with this principle. It states in Article 8, Paragraph 1, of the Constitution that physical freedom shall be guaranteed to the people and that no person shall be tried or punished otherwise than by a court of law in accordance with the procedure prescribed by law. It also provides in Article 16 of the Constitution that the people shall have the right of instituting legal proceedings. Active-duty soldiers are also "the people" and thus deserve the abovementioned protection. In addition, it stipulates in Article

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

9 of the Constitution: “except for those who are in active military service, no person shall be subject to trial by a military tribunal.” Given that active-duty soldiers have the special obligation of protecting the country, a military tribunal is established for the crimes committed by said soldiers for the purpose of national security and military need. It shall not be interpreted such that military tribunals have the exclusive jurisdiction upon the crimes committed by active-duty soldiers. There is no stipulation in the Constitution concerning military tribunals; nevertheless, such system may be established in the law. The initiation and operation of the military tribunal, which is within the power of punishment of the nation, shall meet the minimum requirement of the due process of law, which requirement includes an independent and just tribunal and procedure and the compliance of the constitutional principle as stated in Article 77, “the Judicial Yuan is the highest judicial body of the nation,” and Article 80, “judges shall, in accordance with the law, hold trials independently, free from any interference” of the Constitution. The

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

laws governing the procedures of military tribunals which limit the rights of military servicemen shall be in compliance with the principle of proportionality (Verhältnismäßigkeitsprinzip) as stated in Article 23 of the Constitution.

In light of the spirit of protecting physical freedom and the right of instituting legal proceedings and the provision of Article 77, the military tribunal system shall be regulated differently in wartime and in peacetime. The defendant receiving the sentence of imprisonment in a final and conclusive judgment made by a military tribunal in peacetime shall be permitted to appeal directly to a normal court on the ground that the judgment received is in violation of the law. Article 11 of the Military Justice Act states that the Ministry of National Defense is the highest military tribunal body that empowers the military department to control military trials fully, which has the nature of exercising judicial power, and thus is in violation of the principle of separation of powers. Article 133, Paragraphs 1 and 3, of the Military Justice Act provides that sen-

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

ior officers of the military tribunal shall have the right to approve and review the judgment. In addition, Article 158 of the Military Justice Act stipulates that a military tribunal shall be formed upon the approval of the commander that empowers the administrative power to intervene in the judicial power. Articles 11, 133, Paragraphs 1 and 3, and 158 of the Military Justice Act and the rest of the Act where the dependent is not permitted to appeal to the normal court on the ground that the judgment received from the military tribunal is in violation of the law are unconstitutional and shall be invalidated two years after the announcement of this Interpretation, at the latest. The relevant authority shall, within the two-year period, revise the relevant laws based on this principle, adjust the relevant system, improve the separation of prosecution and trial in the military trial system, and improve the criteria to appoint army officers to participate in military tribunals and the status protection of military judges to meet the principle of independent trial.

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

Justice Chi-Nan Chen filed concurring opinion.

Justice Hsiang-Fei Tung filed concurring opinion.

Justice Tze-Chien Wang filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion in part.

Justice Young-Mou Lin filed dissenting opinion in part.

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

J. Y. Interpretation No.437（October 17, 1997）*

ISSUE: Is the Supreme Court precedent consistent with the Constitution in holding that a person who, without the right of inheritance, declares himself to be an heir and thereby exercises right to the estate may be considered to have infringed upon the right of inheritance only if there existed at the time of death of the decedent facts of encroachment upon the status of the true heir and that if an infringement upon the estate occurs after the beginning of inheritance, the injured party is not entitled to claim for restitution of inheritance under Article 1146 of the Civil Code?

RELEVANT LAWS:

Article 1146, 1147 and 1148 of the Civil Code（民法第一千一百四十六條、第一千一百四十七條、第一千一百四十八條）; Supreme Court's Precedent T.T. 592 (Supreme Court, 1964)（最高法院五十三年台上字第五九二號判例）.

KEYWORDS:

inheritance（繼承）, heir（繼承人）, decedent（被繼承人）, decedent's estate（被繼承人財產）, estate of inheritance（繼承財產）, right of inheritance（繼承權）, claim for restitution of inheritance（繼承回復請求權）, cause of inheritance（繼承原因）, estate（遺產）, right to the estate（遺產上權利）.**

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* Translated by Raymond T. Chu.

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

HOLDING: Inheritance begins with the death of the decedent. Unless it is otherwise provided in the Civil Code, an heir assumes at the moment the inheritance begins all rights and obligations pertaining to the decedent's estate without the necessity of making any manifestation of his intention to inherit, excluding those rights and obligations belonging exclusively to the decedent. Whether the right of inheritance has been encroached upon must be determined by the fact of whether or not there is, after the occurrence of the cause of inheritance, a challenge from another person to the heir's status as such, whereby the heir is deprived of the possession, management or disposal of the estate of inheritance. Insofar as a person with no right of inheritance who, at the time of or after the inheritance begins, declares himself to be a true heir or where a true heir objects to the right of inheritance of another co-heir, thereby preventing such co-heir from taking possession or exercising management and disposal of the estate, the act per se constitutes an infringement of the right of inheritance, and the injured party or his statutory agent

解釋文：繼承因被繼承人死亡而開始。繼承人自繼承開始時，除民法另有規定及專屬於被繼承人本身之權利義務外，承受被繼承人財產上之一切權利義務，無待繼承人為繼承之意思表示。繼承權是否被侵害，應以繼承人繼承原因發生後，有無被他人否認其繼承資格並排除其對繼承財產之占有、管理或處分為斷。凡無繼承權而於繼承開始時或繼承開始後僭稱為真正繼承人或真正繼承人否認其他共同繼承人之繼承權，並排除其占有、管理或處分者，均屬繼承權之侵害，被害人或其法定代理人得依民法第一千一百四十六條規定請求回復之，初不限於繼承開始時自命為繼承人而行使遺產上權利者，始為繼承權之侵害。最高法院五十三年台上字第五九二號判例之本旨，係認自命為繼承人而行使遺產上權利之人，必須於被繼承人死亡時即已有侵害繼承地位事實之存在，方得謂為繼承權被侵害態樣之一；若於被繼承人死亡時，其繼承人間對於彼此為繼承人之身分並無爭議，迨事後始發生侵害遺產之事實，則其侵害者，為繼承人已取得之權利，而非侵害繼承權，自無民法第一千一百四十六條繼承回復請求權之適用。在此範圍內，該判例並未增加法律所無之限制，與憲

is entitled to claim restitution of inheritance under Article 1146 of the Civil Code. Thus, infringement of the right of inheritance is not limited to the situation where a self-declared heir exercises rights to the estate at the time the inheritance begins. The Supreme Court's Precedent T.T. 592 (Supreme Court, 1964) holds essentially that a person who declares himself to be an heir and thereby exercises right to the estate may be considered to have committed one of the types of infringement of the right of inheritance only if there existed at the time of death of the decedent facts of encroachment upon the status of the heir. If there was no dispute among the heirs over the status of each one as an heir at the time of death of the decedent, but thereafter an infringement upon the estate occurs, what is injured is the right already acquired by the heir rather than the right of inheritance. Accordingly, the provision of Article 1146 of the Civil Code with respect to claim for restitution of inheritance is inapplicable. To this extent, the Precedent in question has added no restriction not prescribed by law, and is thus not in conflict with the

法尚無牴觸。

Constitution.

REASONING: The purpose of the inheritance system is to protect the interest of heirs by enabling those with a specific personal relationship with the decedent to acquire the decedent's estate after the death of the decedent. It is explicitly provided in Articles 1147 and 1148 of the Civil Code that inheritance begins with the death of the decedent and that unless it is otherwise provided in the Civil Code, an heir assumes at the moment the inheritance begins all rights and obligations pertaining to the decedent's estate, excluding those rights and obligations belonging exclusively to the decedent. In the event of infringement of the right of inheritance, the heir is entitled to claim restitution under the law. To enable the heir to claim restitution in case of encroachment upon his right of inheritance, the Civil Code, by setting forth in Paragraph 1 of Article 1146 that "in the event of infringement of the right of inheritance, the injured party or his statutory agent is entitled to claim restitution," requires that the heir only needs to prove that he is a

解釋理由書：遺產繼承制度，旨在使與被繼承人具有特定身分關係之人，於被繼承人死亡之後，因身分而取得被繼承之財產，藉以保障繼承人之權利。繼承因被繼承人死亡而開始，繼承人自繼承開始後，除民法另有規定及專屬於被繼承人本身之權利義務外，承受被繼承人財產上之一切權利義務，民法第一千一百四十七條及第一千一百四十八條定有明文。繼承權如被侵害，應許繼承人依法請求回復之。我國民法為使繼承人於繼承權受侵害時，只須證明其係真正繼承人即得請求回復其繼承權而不必逐一證明其對繼承財產之真實權利，以及繼承權之回復應有一定之時效限制，乃設繼承回復請求權之制度，於民法第一千一百四十六條第一項規定：「繼承權被侵害者，被害人或其法定代理人得請求回復之」，第二項規定：「前項回復請求權，自知悉被侵害之時起，二年間不行使而消滅。自繼承開始時起逾十年者，亦同」，以有別於物上返還請求權。

true heir, without the necessity of proving one by one his actual rights to the estate of inheritance. Furthermore, to put a limitation of prescription on the claim for restitution of the right of inheritance, the Code provides in Paragraph 2 of the same Article that "such claim for restitution is extinguished if not exercised within two years from the date of discovering such infringement," and that "the same rule applies where ten years has elapsed from the time the inheritance begins." The provisions have thus created a system of claim for restitution of the right of inheritance distinguishable from the right of claim for return of things.

Whether the right of inheritance has been encroached upon must be determined by the fact of whether or not there is, after the occurrence of the cause of inheritance, a challenge from another person to the heir's status as such, whereby the heir is deprived of the possession, management or disposal of the estate of inheritance. Insofar as a person with no right of inheritance who, at the time of or after the inheritance begins, declares him-

繼承權是否受侵害，應以繼承人於繼承原因事實發生後，有無被他人否認其繼承資格並排除其對繼承財產之占有、管理或處分為斷。凡無繼承權而於繼承開始時或開始後僭稱為真正繼承人否認其他共同繼承人之繼承權，並排除其占有、管理或處分等情形，均屬繼承權之侵害，初不以於繼承開始時自命為繼承人而行使遺產上之權利者為限。蓋繼承回復請求權與個別物上返還請求權係屬真正繼承人分別獨立而併存之權

self to be a true heir and objects to the right of inheritance of another co-heir, thereby preventing such co-heir from taking possession or exercising management and disposal of the estate of inheritance, the act per se constitutes an infringement of the right of inheritance. It is not limited to the situation where a self-declared heir exercises rights to the estate at the time the inheritance begins. It should be noted that the right to claim restitution of the inheritance and the right to claim return of individual things are separate and independent, but concurrent, rights of the true heir. The Supreme Court's Precedent T.T. 592 (Supreme Court, 1964) holds: "The acquisition of a property right by reason of inheritance is based on operation of law. Once inheritance begins, all rights and obligations pertaining to the decedent's estate pass to the heir, without the need for the heir to make any manifestation of his intention to inherit. Hence, a person who declares himself to be an heir and thereby exercises right to the estate may be considered to have infringed upon the right of inheritance only if such facts existed at the time the inheritance began.

利。最高法院五十三年台上字第五九二號之判例認：「財產權因繼承而取得者，係基於法律之規定，繼承一經開始，被繼承人財產上一切權利義務，即為繼承人所承受，而毋須為繼承之意思表示，故自命為繼承人而行使遺產上權利之人，必須於繼承開始時，即已有此事實之存在，方得謂之繼承權被侵害。若於繼承開始後，始發生此事實，則其侵害者，為繼承人已取得之權利，而非侵害繼承權，自無民法第一千一百四十六條之適用」，旨在說明自命為繼承人而行使遺產上權利之人，必須於被繼承人死亡時即已有侵害繼承地位事實之存在，方得謂為繼承權被侵害態樣之一，若於被繼承人死亡時，其繼承人間對於彼此為繼承人之身分並無爭議，迨事後始發生侵害遺產之事實，則其侵害者，為繼承人已取得之權利，而非侵害繼承權，自無民法第一千一百四十六條繼承回復請求權之適用。在此範圍內，該判例並未增加法律所無之限制，與憲法尚無牴觸。

If the facts of infringement occurred after the inheritance began, what is injured is the right already acquired by the heir, in which case Article 1146 of the Civil Code is inapplicable." In essence, the decision is meant to explain that a person who declares himself to be an heir and thereby exercises right to the estate may be considered to have committed one of the types of infringement of the right of inheritance only if there existed at the time of death of the decedent facts of encroachment upon the status of the heir. If there was no dispute among the heirs over the status of each one as an heir at the time of death of the decedent, but thereafter an infringement upon the estate occurs, what is injured is the right already acquired by the heir rather than the right of inheritance. Accordingly, the provision of Article 1146 of the Civil Code with respect to claim for restitution of inheritance is inapplicable. To this extent, the Precedent cited has added no restriction not prescribed by law, and is thus not in conflict with the Constitution.

Justice Tze-Chien Wang filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion in part, in which Justice Chi-Nan Chen, Justice Huey-Ing Yang, Justice Vincent Sze and Justice Young-Mou Lin joined.

本號解釋王大法官澤鑑提出協同意見書；孫大法官森焱、陳大法官計男、楊大法官慧英、施大法官文森與林大法官永謀共同提出部分不同意見書。

J. Y. Interpretation No.438（October 30, 1997）*

ISSUE: Does the Regulation on the Audit of Income Taxes on Profit-making-Enterprises conflict with the Constitution in prescribing a three percent limit on payment of overseas sales commission that may be verified by the tax authority against the production of receipt?

RELEVANT LAWS:

Articles 7, 15, 19, and 23 of the Constitution（憲法第七條、第十五條、第十九條、第二十三條）; Article 92, Subparagraph 5, Item 5 of the Guidelines for the Audit of Income Taxes on Profit-making-Enterprises（營利事業所得稅查核準則第九十二條第五款第五目）; Tai-Shui-Yi-Fa No. 861912671 Directive by the Department of Taxation, Ministry of Finance dated August 16, 1997（財政部賦稅署八十六年八月十六日台稅一發第八六一九一二六七一號函）.

KEYWORDS:

final business income tax return（營利事業所得稅結算申報）, business entity（營利事業）, tax authority（稅捐機關）, tax collection office（稽徵機關）, overseas commission（國外佣金）, tax burdens（稅負）, doctrine of taxation as per law（租稅法律主義）, principle of fairness（公平原則）.**

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* Translated by Raymond T. Chu.

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

HOLDING: The Guidelines for the Audit of Income Taxes on Profit-making-Enterprises issued by the Ministry of Finance on December 30, 1993, are intended to regulate the investigation and review of, and other matters in connection with, final business income tax returns. The Guidelines set forth in Article 92, Paragraph 5, Subparagraph 5, that "where an overseas commission is paid locally in New Taiwan dollars, a receipt issued in the name of the overseas agent or distributor must be produced for verification purposes, to the extent that the amount of such commission does not exceed three percent of the selling price of the goods exported." The clause is meant to regulate such technical details as the verification and proof of such commission payment, and is necessary in order to simplify the tax collection operation and to prevent superfluous declaration of overseas commission payment. It does not go beyond the relevant provisions of the Income Tax Act and other laws, nor does it place any additional taxations on the people, and is therefore not in conflict with Articles 15, 19, and 23 of the Constitution. Further-

解釋文：財政部於中華民國八十二年十二月三十日發布之營利事業所得稅查核準則，係規定有關營利事業所得稅結算申報之調查、審核等事項。該準則第九十二條第五款第五目規定「在台以新台幣支付國外佣金者，應在不超過出口貨物價款百分之三範圍內，取具國外代理商或代銷商名義出具之收據為憑予以認定」，乃對於佣金之認定與舉證方式等技術性、細節性事項加以規定，為簡化稽徵作業、避免國外佣金浮濫列報所必要，並未逾越所得稅法等相關之規定，亦未加重人民稅負，與憲法第十五條、第十九條與第二十三條尚無牴觸。對於在台灣地區以新台幣支付國外佣金，與同準則第九十二條中其他規定之國外佣金，僅就認定標準為斟酌事實情況差異所為之不同規定，與憲法第七條之平等原則亦無違背。

more, the clause is not contrary to the principle of equality enunciated by Article 7 of the Constitution in specifying a different standard of verification for overseas commission paid in the Taiwan area in New Taiwan dollars from the payment of overseas commissions otherwise specified in the same article by taking into account the differences in factual circumstances.

REASONING: Article 19 of the Constitution provides that the people shall have the duty to pay taxes as required by law. And, as we have made clear in our J. Y. Interpretation No. 420, laws relating to tax matters must be interpreted in such a manner as to follow the spirit of the principle of taxation by law and to conform with the legislative purposes of the respective statute by taking into consideration the economic meaning and the principle of equality in actual assessment of tax. The Guidelines for the Audit of Income Taxes on Profit-making-Enterprises issued by the Ministry of Finance on December 30, 1993, are intended to regulate the investigation and review of, and other matters in connection with, final business

解釋理由書：人民有依法律納稅之義務，憲法第十九條定有明文。涉及租稅事項之法律，應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則解釋之，亦為本院釋字第四二〇號解釋所揭示。財政部於八十二年十二月三十日發布之營利事業所得稅查核準則，係規定有關營利事業所得稅結算申報之調查、審核等事項。該準則第九十二條第四款規定國外佣金超過百分之五者，應另提出正當理由證明文據，核實認定；第五款第三目規定不予認定之支付對象；第四目規定證明支付佣金之文件等，皆屬有關國外佣金之舉證方法與認定要件。其中同條第五款第五目規定「在台以新台幣支付國外佣金者，應在不超過出口貨物價款百分之三範圍內，

income tax returns. Under Subparagraph 4 of Article 92 of the Guidelines, payment of overseas commission in excess of five percent must be proved with the production of additional supporting documents, showing therein good reasons for the payment, for the authority's verification. Item 3 of the Subparagraph 5 sets forth recipients of commissions that are unacceptable for verification purposes, and Item 4 specifies documents required to prove the payment of commissions. These are all clauses on the manner of proving and the requisites for verifying payment of overseas commissions. To deal with the difficulty in investigating into and determining whether payment for overseas commission is actually made in the case of payment declared to have been made locally in New Taiwan dollars, Item 5 of Subparagraph 5 of the same Article of the Guidelines provides that "where an overseas commission is paid locally in New Taiwan dollars, a receipt issued in the name of the overseas agent or distributor must be produced for verification purposes, to the extent that the amount of such commission does not exceed three

取具國外代理商或代銷商名義出具之收據為憑予以認定」，係考量營利事業在台灣地區以新台幣支付國外佣金者，是否有支付之事實，因查證困難，故斟酌以往外匯管制時外匯主管機關規定得逕行辦理押匯之限額，以出口貨物價款百分之三為認定標準，營利事業向稅捐機關所需提出之證據與舉證之程度，因是否超出此標準而有別。又財政部賦稅署八十六年八月十六日台稅一發第八六一九一二六七一號函亦稱，營利事業在台灣地區以新台幣支付國外佣金如未超過出口貨物價款百分之三，稽徵機關得依其所提出之國外代理商或代銷商名義出具之收據及雙方簽訂之合約加以認定；至超過出口貨物價款百分之三者，除能提出上開收據及合約以外之其他相關證明文件，如雙方往來函電、傳真文件、國外人員來台護照影本等，以及國外代理商或經銷商確已收到該新台幣款項或存入其帳戶之證明，如轉交、匯付、或沖轉其在臺貨款之證明等資料，經稽徵機關查核相符亦得予以認定。綜上可知，營利事業所得稅查核準則第九十二條第五款第五目乃對於佣金之認定與舉證方式等技術性、細節性事項加以規定，為簡化稽徵作業、避免國外佣金浮濫列報所必要，並未逾越所得稅法等相

percent of the selling price of the goods exported." This clause to make three percent of the export price of the goods a line of demarcation was devised by taking as a benchmark the limit set by the authority in charge of foreign exchange control in the past on the percentage for which foreign exchange settlement was allowed without requiring application for government approval. As a result, the evidence that a business entity is required to produce to the tax authority and the degree of proof required will differ, depending on whether the amount of commission payment exceeds the three percent standard. Furthermore, Directive Tai-Shui-Yi-Fa No. 861912671 issued on August 16, 1997, by the Department of Taxation, Ministry of Finance, states that, "where the overseas commission paid in Taiwan by a business entity in New Taiwan dollars does not exceed three percent of the selling price of the goods exported, it may be verified by the tax collection office against the receipt issued in the name of its overseas agent or distributor together with the agreement executed by both parties, and that, where the payment of commission exceeds three

關之規定，亦未加重人民稅負，與憲法第十五條、第十九條與第二十三條尚無牴觸。對於在台灣地區以新台幣支付國外佣金，與同準則第九十二條其他規定之國外佣金，僅就認定標準為斟酌事實情況之差異所為之不同規定，對於超過標準部分，仍許營利事業提出其他證明文件予以認定，與憲法第七條之平等原則亦無違背。

percent of the export price, the portion above three percent may be verified provided that the business entity can produce, in addition to the aforesaid receipt and agreement, other relevant documents such as correspondence, telegrams, facsimiles, and photocopies of passports of the foreign personnel visiting Taiwan, together with documents showing that the New Taiwan dollars payment was truly received by its overseas agent or distributor or was deposited into his bank account, e.g., documents evidencing payment in care of someone, by remittance, or for offsetting the recipient's purchase price in Taiwan, and the documents are found by the tax collection office to be true and correct." From the above, we conclude that the text of Item 5 quoted above is meant to regulate such technical details as the verification and proof of the commission payment, and is necessary in order to simplify the tax collection operation and to avoid superfluous declaration of overseas commission payment. It does not go beyond the relevant provisions of the Income Tax Act and other laws, nor does it place any additional taxations on the peo-

ple, and is therefore not in conflict with Articles 15, 19, and 23 of the Constitution. Furthermore, the clause is not contrary to the principle of equality enunciated by Article 7 of the Constitution in specifying a different standard of verification for overseas commission paid in the Taiwan area in New Taiwan dollars from the payment of overseas commissions otherwise specified in the same article by taking into account the differences in factual circumstances, as the portion above the three percent limit may still be verified if additional documents are produced by the business entity.

J. Y. Interpretation No.439（October 30, 1997）*

ISSUE: Does Article 49 of the Customs Smuggling Control Act restrict the people's rights of lodging complaints and instituting legal proceedings, thus violating Article 16 of the Constitution and being void?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; Articles 49 and 49-1 of the Customs Smuggling Control Act（海關緝私條例第四十九條、第四十九條之一）.

KEYWORDS:

motion of objection（聲明異議）, fine（罰鍰）, tax payment（稅款）, security（擔保）, rights of lodging complaints and instituting legal proceedings（訴願及訴訟之權利）, administrative remedy（行政救濟）.**

HOLDING: Article 49 of the Customs Smuggling Control Act (hereinafter the "Act") provides: "For a motion of objection, if nothing is attached or if the attached article is insufficient to offset the fine or leviable tax, the Customs may

解釋文：海關緝私條例第四十九條：「聲明異議案件，如無扣押物或扣押物不足抵付罰鍰或追徵稅款者，海關得限期於十四日內繳納原處分或不足金額二分之一保證金或提供同額擔保，逾期不為繳納或提供擔保者，其異議不

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

require that a cash bond in the amount equal to one half of the originally levied amount or the underpaid amount be paid, or security in the equivalent amount be furnished, within 14 days. Failure to make payment or furnish security within the said time limit shall subject the objection to rejection." Such provision causes the person who raises the objection but fails to pay the cash bond or furnish security in the equivalent amount within the statutory time limit to lose the chance of administrative remedy, which unnecessarily limits the people's right of lodging complaints and instituting legal proceedings and conflicts with the intent of Article 16 of the Constitution to protect the people's rights. Such provision shall no longer apply and the relevant part of J.Y. Interpretation No. 211 should be changed.

予受理」之規定，使未能於法定期限內繳納保證金或提供同額擔保之聲明異議人喪失行政救濟之機會，係對人民訴願及訴訟權利所為不必要之限制，與憲法第十六條所保障之人民權利意旨牴觸，應不再適用。本院釋字第二一一號解釋相關部分應予變更。

REASONING: Article 16 of the Constitution provides that the people shall have the right of lodging complaints and instituting legal proceedings. By lodging complaints, people may seek remedies according to the procedures legally set by the nation when their rights and interests

解釋理由書：憲法第十六條規定人民有訴願及訴訟之權利。就訴願而言，係在人民之權益遭受公權力侵害時可循國家依法所設之程序尋求救濟，使作成行政處分之機關或其上級機關經由此一程序自行矯正其違法或不當處分，以維持法規之正確適用，並保障人民之

are injured by the public authority, and the agency which makes the administrative decision or its superior agency can correct the illegal or improper decision through such procedures to ensure that the laws and regulations are correctly applied and that the people's rights and interests are protected. In accordance with Article 23 of the Constitution, such basic right shall not be restricted by law except when it is necessary to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain the social order, or to advance the public welfare. The provision that the administrative remedy against a decision of tax levy or imposition of a fine is conditioned on the payment of the whole or a certain percentage of the tax amount, or a fine or the furnishing of security causes the person who fails to make tax payment or furnish security to lose the remedy available under the law, which unnecessarily restricts the people's right to institute an action and administrative appeal and is inconsistent with the Constitution. This Yuan has consistently held such opinion since J.Y. Interpretation No. 224 was made (See J.Y.

權益。對此項基本權利，依憲法第二十三條規定，須為防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益所必要者，始得以法律限制之。有關課稅或罰鍰之處分，對之提起行政救濟時，以繳納全部或一定比例之稅款、罰鍰或提供擔保為條件之規定，使未能繳納或提供者喪失法律之救濟，係對人民訴訟及訴願權所為不必要之限制，與憲法有所不符，乃本院自釋字第二二四號解釋以來一貫之見解（參照本院釋字第二八八號、第三二一號解釋）。海關緝私條例第四十九條：「聲明異議案件，如無扣押物或扣押物不足抵付罰鍰或追徵稅款者，海關得限期於十四日內繳納原處分或不足金額二分之一保證金或提供同額擔保，逾期不為繳納或提供擔保者，其異議不予受理」之規定，固授權海關審酌具體案件，為適當之處分，以防止受處分人藉故聲明異議，以達拖延或逃避執行之目的。惟依同條例第四十九條之一規定，海關既得於處分書送達後，免提擔保逕行聲請法院假扣押或假處分，於原處分之執行，已屬可得確保，復無受處分人得聲請暫免繳納或暫免提供擔保之救助規定，將使無力繳納或提供擔保之受處分人喪失行政救濟之機會，是該條例第四十九條規定對

Interpretations Nos. 288 and 321). Article 49 of the Act provides: "For a motion of objection, if nothing is attached or if the attached article is not sufficient to offset the fine or leviable tax, the Customs may require that a cash bond in the amount equal to one half of the originally imposed amount or the insufficient amount be paid, or security in the equivalent amount be furnished, within 14 days. Failure to make payment or furnish security within the said time limit shall subject the objection to rejection." This provision authorizes the Customs to examine specific cases and take proper measures to prevent the person subject to the sanction from making a motion of objection expressly for the purpose of procrastinating or avoiding the enforcement. However, according to Article 49-1 of the Act, after the decision is served, the Customs may directly petition to the court for provisional attachment or preliminary injunction without furnishing security. Thus, the execution of the decision is secured. In addition, in the absence of a provision which allows the person subject to sanction to petition for temporary exemption from tax payment or fur-

人民訴願及訴訟之權利顯為不必要之限制，與憲法第十六條保障人民權利之意旨牴觸，應不適用。本院釋字第二一一號解釋相關部分，應予變更。

nishing security, those who are unable to pay the tax or furnish security would lose the administrative remedy. Therefore, the provision of Article 49 of the Act unnecessarily restricts the people's right of lodging complaints and instituting actions and contradicts the intent of Article 16 of the Constitution to protect the people's rights. Such provision shall no longer apply, and the relevant part of J. Y. Interpretation No. 211 should be revised

J. Y. Interpretation No.440（November 14, 1997）*

ISSUE: Does the construction by the government, without expropriation or purchase, of underground public facilities beneath preexisting roads or land reserved for urban planning use encroach upon the people's property rights guaranteed by Article 15 of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 30 and 48 of the Urban Planning Act（都市計畫法第三十條、第四十八條）; Article 15 of the Regulation Governing the Supervision of Taipei City Roads（台北市市區道路管理規則第十五條）; Ordinance T.86 N. No.38181 (Executive Yuan, October 6, 1997)（行政院八十六年十月六日台八十六內字第三八一八一號函）.

KEYWORDS:

principle of proportionality （比例原則）, preexisting roads（既成道路）, planned roads in city planning（都市計畫用地）, special sacrifice（特別犧牲）, underground facilities（地下設施物）.**

HOLDING: Article 15 of the Constitution provides that the people's

解釋文：人民之財產權應予保障，憲法第十五條設有明文。國家機關

* Translated by Dr. Tze-Shiou Chien.

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

rights of property shall be protected. When state organizations legally exercise their public power and incidentally cause harm to people's property, and this harm goes beyond the normal degree of tolerance the victim as a socially responsible person should display and becomes a special sacrifice to him/her, the state shall compensate him/her fairly. Those land-right holders of preexisting roads and of land reserved for urban planning use, whose powers to exercise those rights have been encroached upon by the burial of underground facilities by competent organizations prior to making purchase or expropriation according to law, and to the extent that the harm suffered has become a special sacrifice, obviously have the right to ask for fair compensation. Article 15 of the Regulation Governing the Supervision of Taipei City Roads, promulgated by the Taipei City Government on August 22, 1975, provides that "When not interfering with the original uses of and not causing danger to preexisting roads and land reserved for urban planning use, competent organizations may bury facilities underground without expropriating

依法行使公權力致人民之財產遭受損失，若逾其社會責任所應忍受之範圍，形成個人之特別犧牲者，國家應予合理補償。主管機關對於既成道路或都市計畫道路用地，在依法徵收或價購以前埋設地下設施物妨礙土地權利人對其權利之行使，致生損失，形成其個人特別之犧牲，自應享有受相當補償之權利。台北市政府於中華民國六十四年八月二十二日發布之台北市市區道路管理規則第十五條規定：「既成道路或都市計畫道路用地，在不妨礙其原有使用及安全之原則下，主管機關埋設地下設施物時，得不徵購其用地，但損壞地上物應予補償。」其中對使用該地下部分，既不徵購又未設補償規定，與上開意旨不符者，應不再援用。至既成道路或都市計畫道路用地之徵收或購買，應依本院釋字第四〇〇號解釋及都市計畫法第四十八條之規定辦理，併此指明。

for them. But harm to facilities above ground has to be compensated." The part of this regulation concerning the burial of underground facilities without expropriation and compensation, being not consistent with the above reasoning, shall no longer apply. In other words, expropriations and purchases of preexisting roads and land reserved for urban planning use should be conducted in accordance with the requirements of J.Y. Interpretation No.400 and Article 48 of the Urban Planning Act.

REASONING: It has been provided in Article 15 of the Constitution that the people's rights of property shall be protected. When state organizations legally exercise their public power and incidentally cause harm to people's property, and this harm goes beyond the normal degree of tolerance the victim as a socially responsible person should display and becomes a special sacrifice to him/her, the state shall compensate him/her fairly. J.Y. Interpretation No. 400 declared: "To be consistent with this constitutional protection of property right,

解釋理由書：人民之財產權應予保障，憲法第十五條設有明文。國家機關依法行使公權力致人民之財產遭受損失，若逾其社會責任所應忍受之範圍，形成個人之特別犧牲者，國家應予合理補償。既成道路符合一定要件而成立公用地役關係者，其所有權人對土地既已無從自由使用收益，形成因公益而特別犧牲其財產上之利益，國家自應依法律之規定辦理徵收給予補償，各級政府如因經費困難，不能對上述道路全面徵收補償，有關機關亦應訂定期限籌措財源逐年辦理或以他法補償，業經本院釋字第四〇〇號解釋釋示在案。又關於

state organizations, for public necessity or other public interests, may expropriate a person's property according to law, but should give him/her fair compensation. Where a public easement has been established according to specific criteria on a preexisting road, the owners of those roads have been deprived of their freedom to use and make profit from the land in question, and their interest in the property has been specifically sacrificed for the general interest. The state has a legal obligation to expropriate the land according to law and give them compensation. If central or local governments, due to financial difficulties, are unable to completely expropriate and pay compensation for the land in question, concerned organizations should set a deadline for compensation to be paid by annual installment or by other means." With regard to the expropriation or purchase of reserve land in city planning, Article 48 of the Urban Planning Act provides that those competent organizations, which according to the Act designate reserve land for facilities by public utilities, should expropriate or purchase the designated privately owned land. The

都市計畫保留地之徵收或購買，都市計畫法第四十八條規定，依同法指定之公共設施保留地供公用事業設施之用者，由各該事業機構依法予以徵收或購買。其餘由該管政府或鄉、鎮、縣轄市公所依(一)徵收、(二)區段徵收、(三)市地重劃之方式取得之。為儘量保全土地權利人使用收益之權能，都市計畫法第三十條及行政院八十六年十月六日台八十六內字第三八一八一號函修正之都市計畫公共設施用地多目標使用方案第四點、第十一點附表甲規定，土地權利人在其土地被徵收前得申請於地下建造停車場或商場。是關於都市計畫保留地得予徵收或購買已有相關法律可資適用，主管機關基於增進公共利益之必要，依法使用計畫道路用地時，應否予以徵購，須考量其侵害之嚴重性，是否妨礙其原來之使用及安全等因素而為決定。對既成道路或都市計畫用地，主管機關在依據法律辦理徵購前，固得依法加以使用，如埋設電力、自來水管線及下水道等地下設施物，惟應依比例原則擇其損失最少之處所及方法為之；對土地權利人因此所受損失，並應給與相當之補償，以保護其財產上之利益。台北市政府於六十四年八月二十二日發布之台北市市區道路管理規則第十五條規定：「既成道

concerned government, village, town, or city government should take measures of (1) expropriation, (2) blocking of expropriation, or (3) redistribution of city land to acquire the other reserve land. To protect land-right holders' powers to use and profit from their land as much as possible, Article 30 of the Urban Planning Act and Ordinance T.86 N. No.38181 (Executive Yuan, October 6, 1997), which modifies Appendix A of the 4th item and 11th item of the Multiple Purpose Plans for Reserved Public Land under Urban Planning, have allowed the land-right holders to apply for the construction of parking lots or marts under their land. Therefore, it is obvious that there exist relevant laws and ordinances conferring on competent organizations powers to expropriate or purchase those reserve lands in city planning. Indeed, for the necessity of improving the public interest, competent organizations may legally expropriate the land which has been designated for road use in city planning. However, such decisions to expropriate or purchase have to be made after taking into account the severity of the harm caused thereby, such as whether

路或都市計畫道路用地，在不妨礙其原有使用及安全之原則下，主管機關埋設地下設施物時，得不徵購其用地，但損壞地上物應予補償。」其中對使用該地下部分，既不徵購又未設補償規定，與上開意旨不符者，應不再援用。至既成道路或都市計畫道路用地之徵收或購買，應依本院釋字第四〇〇號解釋及都市計畫法第四十八條之規定辦理，併此指明。

it has interfered with the original uses or created dangers. Accordingly, prior to exercising their powers to expropriate or purchase, competent organizations may legally use those preexisting roads or reserve lands in city planning to bury underground facilities for electricity distribution, water supply or sewage systems. However, under the principle of proportionality *(Verhältnismäßigkeitsprinzip)*, this can only be done in the least harmful places and with the least harmful methods. Furthermore, the land-right holders in question have to be reasonably compensated as a means to protect their benefits from property. Article 15 of the Regulation Governing the Supervision of Taipei City Roads, promulgated by the Taipei City Government on August 22, 1975, provides that "When not interfering with the original uses of and not causing danger to preexisting roads and land reserved for urban planning use, competent organizations may bury facilities under those lands without expropriating them. But harm to facilities above ground has to be compensated." The part of this regulation concerning the burial of underground fa-

cilities without expropriation and compensation, being not consistent with the above reasoning, shall no longer apply. In other words, expropriations and purchases of preexisting roads and land reserved for urban planning use should be conducted in accordance with the requirements of J.Y. Interpretation No.400 and Article 48 of the Urban Planning Act.

J. Y. Interpretation No.441（November 28, 1997）*

ISSUE: Where the Rules established by the Executive Yuan under the Act of Encouragement of Investment allow income tax credit for expenses paid by productive enterprises for research work performed by research institutions, is the Ministry of Finance directive contradictory to such Rules and as a result unconstitutional in requiring that such research institutions be limited to those controlled by government-approved foundations?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 34-1, Paragraphs 1 and 2 of the Act of Encouragement of Investment（獎勵投資條例第三十四條之一第一項、第二項）; Act for Upgrading Industries（促進產業升級條例）; Article 2, Subparagraphs 1, 8 and 10 of the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment（生產事業研究發展費用適用投資抵減辦法第二條第一款、第八款、第十款）; Tai-Tsai-Shui No. 7549464 Directive of Ministry of Finance dated August 16, 1986（財政部七十五年八月十六日台財稅字第七五四九四六四號函）; Regulation Governing the Reduction of Expenditures for Corporate Research and Development, Talent Training and Establishing International Brand as

* Translated by Raymond T. Chu.

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

Investment（公司研究與發展人才培訓及建立國際品牌形象支出適用投資抵減辦法）.

KEYWORDS:

productive enterprise（生產事業）, business income tax（營利事業所得稅）, research and development expenses（研究發展費用）, foundation（財團法人）, private corporate bodies（私法人）, freedom of choice（選擇自由）, tax credit；credit against tax（抵減稅額）.**

HOLDING: To encourage productive enterprises to engage in research and development, upgrade their technological standards and increase their productivity, the Executive Yuan established on September 18, 1985, the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment under authorization of Article 34-1 of the Act of Encouragement of Investment. Under Article 2, Paragraph 8, of the Regulation, "research and development expenses" are defined as the expenses paid by a productive enterprise for the purpose of research leading to the creation or design of any new product under a concontract with a university, college, or re-

解釋文：為獎勵生產事業從事研究發展，提昇技術水準，增進生產能力，行政院於中華民國七十四年九月十八日，依獎勵投資條例第三十四條之一授權訂定之生產事業研究發展費用適用投資抵減辦法，其第二條第八款規定，生產事業為研究新產品，委託大專校院、研究機構辦理研究工作所支出之費用，為研究發展費用，得抵減當年度應納營利事業所得稅額。所稱研究機構，依財政部七十五年八月十六日台財稅字第七五四九四六四號函釋，係指經政府核准登記有案之財團法人所屬之研究機構而言，僅就私法人而為說明，固欠周延。惟上開辦法第二條抵減事由共有十款，經政府核准登記有案之財團法人所屬研究機構以外之研究機構，仍得依該辦法同條第十款規定申請專案認定獲致

search institution for doing such research work, and may be credited against the business income tax payable for that taxable year. Although the Ministry of Finance Directive Tai-Tsai-Shui No. 7549464 issued on August 16, 1986, is, in our opinion, far from being sufficiently comprehensive in defining "research institution" to include those research institutions under the control of foundations approved by and registered with the government, meaning private corporate bodies only, Article 2 of said Regulation, which includes altogether 10 paragraphs enumerating circumstances in which income tax may be credited, makes it possible for productive enterprises to apply under Paragraph 10 of said Article for special case-by-case approval for tax reduction or exemption if the research work is performed by a research institution other than those controlled by foundations approved by and registered with the government. Thus, the Directive of the Ministry of Finance does not affect the interest of productive enterprises in the tax benefits available and is not in conflict with aforementioned Regulation, nor does it

減免，未影響生產事業租稅優惠之權益，是財政部該號函釋與上開辦法並未牴觸，於憲法第十九條亦無違背。至生產事業委託研究之選擇自由因而受限及不在抵減範圍之研究機構可能遭受不利影響，仍應隨時檢討改進。

contradict Article 19 of the Constitution. Nonetheless, the situation that the freedom of choice of productive enterprises to appoint institutes to do research is thus constrained and the likelihood of adverse effect that may be caused by the Directive to those institutions precluded from the application of the law of tax credit must be reviewed from time to time so that the situation may be improved.

REASONING: To encourage productive enterprises to engage in research and development, upgrade their technological standards and increase their productivity, the Act of Encouragement of Investment (now replaced by the Act for Upgrading Industries upon expiration of its period of implementation on December 31, 1990) was amended on December 31, 1984, to add Article 34-1, Paragraph 1, of which the first sentence provides that, "where the research and development expenses paid by a productive enterprise in the year for which income tax return is filed exceeds the greatest amount spent during any of the five preceding years, anamount equal to twenty percent of the

解釋理由書：為獎勵生產事業從事研究發展，提昇技術水準，增進生產能力，七十三年十二月三十日增訂獎勵投資條例（施行期間至七十九年十二月三十一日屆滿，另經制定促進產業升級條例）第三十四條之一第一項前段規定，生產事業申報年度之研究發展費用超過以往五年度最高支出之金額者，其超出部分百分之二十得抵減當年度應納營利事業所得稅額。同條第二項又規定前項研究發展費用抵減之適用範圍，由行政院定之。行政院依此授權於七十四年九月十八日訂定生產事業研究發展費用適用投資抵減辦法（現依促進產業升級條例另訂定公司研究與發展人才培訓及建立國際品牌形象支出適用投資抵減辦法），其第二條第八款規定生產事業

portion of the expenses over such greatest amount may be credited against the business income tax payable for that year." Paragraph 2 of the same Article provides further that "the scope to which such tax credit for research and development expenses may be applied shall be established by the Executive Yuan." Pursuant to this authorization, the Executive Yuan issued on September 18, 1985, the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment (now replaced by the Regulation Governing the Reduction of Expenditures for Corporate Research and Development, Talent Training and Establishing International Brand as Investment formulated under the Act for Upgrading Industries). Under Article 2, Paragraph 8, of the Regulation, "research and development expenses" are defined as the expenses spent by a productive enterprise for the purpose of research leading to the creation or design of any new product under a contract with a university, college, or research institution for carrying out such research work, and may be credited against the

為研究新產品，委託大專校院、研究機構辦理研究工作所支出之費用為研究發展費用，得抵減當年度應納營利事業所得稅額。所稱研究機構，依財政部七十五年八月十六日台財稅字第七五四九四六四號函釋，係指經政府核准登記有案之財團法人所屬之研究機構而言，僅就私法人而為說明，固欠周延。惟生產事業為研究新產品、改進生產管理技術、改善製程、節約能源、防治污染之研究及產品市場調查所支出之費用符合同條所列各款情形之一者，均屬研究發展費用，得用以抵減當年度應納營利事業所得稅額。個人在生產事業研究發展單位兼職，從事研究者，其費用得適用同條第一款規定；經政府核准登記有案之財團法人所屬研究機構以外之研究機構，經受委託辦理研究工作者，其費用如確屬必要，亦得適用同條第十款規定，申請專案認定獲致減免，未影響生產事業租稅優惠之權益，是財政部該號函釋與上開辦法並未牴觸，於憲法第十九條規定租稅法律主義之本旨亦無違背。至生產事業委託研究之選擇自由因而受限及不在抵減範圍之研究機構可能遭受不利影響，仍應隨時檢討改進。

business income tax payable for that year. Although the Ministry of Finance Directive Tai-Tsai-Shui No. 7549464 issued on August 16, 1986, is, in our opinion, far from being sufficiently comprehensive in defining "research institution" to include those research institutions under the control of foundations approved by and registered with the government, meaning private corporate bodies only, expenses spent by any productive enterprise for research in developing new products, improving production management and technologies, perfecting manufacturing processes, saving energy, controlling pollution and for marketing surveys for its products are considered research and development expenses so long as the expenses are paid for any of the purposes enumerated in one of the subparagraphs of said Article and may be applied for credit against the business income tax payable for that particular year. In case of expenses paid by a productive enterprise for research work performed by an individual working part-time at its research and development unit, Paragraph 1 of the same Article may be applicable. Even if the research work is

undertaken by a research institution other than one controlled by a foundation approved by and registered with the government, it is still possible for the productive enterprise to apply under Paragraph 10 of said Article for special case-by-case approval for tax reduction or exemption if the expenses spent are truly necessary. Thus, the Directive of the Ministry of Finance does not affect the interest of productive enterprises in the tax benefits available and is not in conflict with the aforementioned Regulation, nor does it contradict Article 19 of the Constitution. Nonetheless, the situation that the freedom of choice of productive enterprises to appoint institutes to do research is thus constrained and the likelihood of adverse effect that may be caused by the Directive to those institutions precluded from the application of the law of tax allowance must be reviewed from time to time so that the situation may be improved.

Justice Jyun-Hsiung Su filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋蘇大法官俊雄、劉大法官鐵錚分別提出不同意見書。

J. Y. Interpretation No.442（December 12, 1997）*

ISSUE: Does the law violate the constitutional protection of the people's right of instituting legal proceedings in providing that matters of election or recall of elected public officials shall be finalized on appeal to the high court only and under no circumstances may retrial be applied for?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; Article 109 of the Public Officials Election and Recall Act（公職人員選舉罷免法第一百零九條）.

KEYWORDS:

election（選舉）, recall（罷免）, appeal（上訴）, review of judgment（審查原裁判）, right to sue（訴訟權）, retrial（再審）.**

HOLDING: The purpose of Article 16 of the Constitution, providing that the people have the right of instituting legal proceedings, is to ensure that people may file a lawsuit in accordance with legal procedures and receive a fair judgment. In regards to the system of different

解釋文：憲法第十六條規定人民有訴訟之權，旨在確保人民得依法定程序提起訴訟及受公平之審判。至於訴訟救濟應循之審級制度及相關程序，立法機關自得衡量訴訟性質以法律為合理之規定。中華民國八十三年七月二十三日修正公布之公職人員選舉罷免法第一

* Translated by BAKER & McKENZIE.

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

adjudication levels and the relevant procedures for pursuing legal remedies, the legislative agency may on its own consider the nature of the lawsuit to regulate it appropriately by law. Article 109 of the Public Officials Election and Recall Act, as amended and promulgated on July 23, 1994, providing that decisions from election lawsuits must be finalized on the first appeal and may not be appealed again, is within the scope of the legislative agency's discretion and meets the special needs of election-related lawsuits. It does not infringe upon the constitutional protection of the people's right of instituting legal proceedings, is necessary to advance public interests and benefits, and is not in conflict with Article 23 of the Constitution.

百零九條規定，選舉訴訟採二審終結不得提起再審之訴，係立法機關自由形成之範圍，符合選舉訴訟事件之特性，於憲法保障之人民訴訟權尚無侵害，且為增進公共利益所必要，與憲法第二十三條亦無牴觸。

REASONING: The purpose of Article 16 of the Constitution, providing that the people have the right of instituting legal proceedings, is to ensure that people may file a lawsuit in accordance with legal procedures and receive a fair judgment. In regards to the system of different adjudication levels and the relevant pro-

解釋理由書：憲法第十六條規定人民有訴訟之權，旨在確保人民得依法定程序提起訴訟及受公平之審判。至於訴訟救濟應循之審級制度及相關程序，立法機關自得衡量訴訟性質以法律為合理之規定。選舉、罷免為公法上之權利，其爭議之處理，雖非可完全置私人權益於不顧；然其究係重在公益之維

cedures for pursuing legal remedies, the legislative agency may on its own consider the nature of the lawsuit to regulate it appropriately by law. Election and recall is a public legal right. The resolution of the relevant disputes, though it cannot completely ignore private rights, should place emphasis on preserving public interests, which is not entirely the same as civil litigations protecting private rights. Also, there is a specific term limit to the office of public officials. If there are many adjudication levels in lawsuits relating to election and recall, then the situation may arise where the office term ends before the lawsuit is finalized. It may also affect the elected official's ability to concentrate on his/her official duties. Therefore, for the purpose of ensuring the order of law, there is the need to adjudicate lawsuits promptly relating to election and recall. Appeal in legal procedures is an abnormal procedure. It is in essence a system to remedy the wrong determination of facts in the original judgment and is different from the usual legal procedures. Because it is an abnormal procedure, it contradicts the principle of finality of judgment.

護，而與保障私權之民事訴訟不盡相同；且公職人員任期有一定之年限，選舉、罷免之訴訟倘審級過多，當難免於時間之拖延，不僅將有任期屆滿而訴訟猶未終結之情形，更有使當選人不能安於職位致影響公務推行之結果。是為謀法秩序之安定，選舉、罷免訴訟自有速予審結之必要。茲訴訟法上之再審，乃屬非常程序，本質上係為救濟原確定判決之認定事實錯誤而設之制度，與通常訴訟程序有別，亦因其為非常程序，要不免與確定判決安定性之要求相違。因之，對於確定判決應否設有再審此一程序，當不能一概而論，而應視各種權利之具體內涵暨訴訟案件本身之性質予以決定，此則屬於立法機關自由形成之範疇；倘其所為之限制合乎該權利維護之目的，並具備必要性者，即不得謂其係侵害憲法所保障之訴訟權。現行選舉、罷免訴訟既採當事人進行主義，復採合議制之審判，其於第一審程序即已慎重進行，以達訴訟之目的，縱使第一審偶有疏未注意之處，致影響當事人權益，亦可因上訴而獲得維護，亦即其經兩次之辯論（一、二審），在健全之司法組織與成員運作下，即應予以信賴，認事用法亦可期待其已臻於理想。因此，基於目的性之要求暨選舉、罷免訴訟之特

Therefore, there is no single solution to the question of whether there should be an appeal to final judgment, which question should be determined on a case-by-case basis depending on the rights involved and the nature of the lawsuit. Thus, this is within the discretion of the legislative agency. If the restriction satisfies the goal of protecting the rights of the people and is a necessary measure, then it does not infringe upon the constitutionally protected right of instituting legal proceedings. The current election/recall lawsuit is an inter-parte action and is adjudicated by a panel of judges. The proceeding at the trial level is already very scrupulous so that it may satisfy the object of the lawsuit. Even if there is a neglected issue at the trial level affecting the rights of the parties, their rights can be protected on appeal. After going through two arguments (at the trial and appeal levels), under the operation of a competent judicial structure with professional personnel, the judgment should be trusted, and the determination of facts and application of law should be close to ideal. Therefore, based on certain needs and the special nature of

性，其予排除再審此一非常程序，本為增進公共利益所必要，難認其有逾越憲法第二十三條之規定。

election and recall lawsuits, it is necessary to eliminate the procedure for reviewing the judgment on appeal for the public interest. Thus, it cannot be said to violate Article 23 of the Constitution.

Justice Sen-Yen Sun filed concurring opinion.

Justice Young-Mou Lin filed concurring opinion.

本號解釋孫大法官森焱、林大法官永謀分別提出協同意見書。

J. Y. Interpretation No.443（December 26, 1997）*

ISSUE: Is the Regulation for Exit of Draftees promulgated by the Executive Yuan under no proper authorization to restrict a draftee from applying for an exit permit to take a trip abroad unconstitutional due to its lack of the said requirements?

RELEVANT LAWS:

Articles 7, 9-18, 20-22 and 23 of the Constitution（憲法第七條、第九條至第十八條、第二十條至二十二條、第二十三條）; Conscription Act（兵役法）; Article 45 of the Enforcement Act of Conscription Act（兵役法施行法第四十五條）; Article 8 of the Regulation for Exit of Draftees（役男出境處理辦法第八條）; Article 18 of the Conscription Regulation（徵兵規則第十八條）.

KEYWORDS:

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

HOLDING: It stipulates in Article 10 of the Constitution that people are free to choose their residences and to move freely. This is to protect the right of the people to move or travel freely. Any

解釋文：憲法第十條規定人民有居住及遷徙之自由，旨在保障人民有任意移居或旅行各地之權利。若欲對人民之自由權利加以限制，必須符合憲法第二十三條所定必要之程度，並以法律

* Translated by Chi-chang Yu.

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

limitation on the people's freedoms or rights shall meet the "necessity" standard stipulated in Article 23 of the Constitution and be regulated by laws or rules made by administrative institutions authorized by legislative authority. The limitation on draftees on departure from the country is a major limitation on the people's freedom to choose their residences and to move freely. Nevertheless, such limitation is not regulated in the Conscription Act and the Enforcement Act of Conscription Act, nor is it authorized to be made in administrative rules. The Conscription Regulation promulgated by the Administrative Yuan authorizing the Ministry of Interior to establish the Regulation for Exit of Draftees lack the authorization of law. The concerned matters listed in Article 8 of the Regulation limiting the departure from the country of eligible males are in violation of the Constitution and shall become void within 6 months from the date of this Interpretation.

定之或經立法機關明確授權由行政機關以命令訂定。限制役男出境係對人民居住遷徙自由之重大限制，兵役法及兵役法施行法均未設規定，亦未明確授權以命令定之。行政院發布之徵兵規則，委由內政部訂定役男出境處理辦法，欠缺法律授權之依據，該辦法第八條規定限制事由，與前開憲法意旨不符，應自本解釋公布日起至遲於屆滿六個月時，失其效力。

REASONING: The range of freedom and rights of the people stipulated in the Constitution is very broad.

解釋理由書：憲法所定人民之自由及權利範圍甚廣，凡不妨害社會秩序公共利益者，均受保障。惟並非一切

Any freedom and right, which is not in contravention of the order of the society and the public interest, is protected by the Constitution. Nevertheless, not every freedom and right is protected in the same way in the Constitution. The physical freedom of the people is stipulated in detail in Article 8 of the Constitution, in which those rights reserved in the Constitution shall not be limited even by the legislative authority (See J. Y. Interpretation No. 392), whereas freedoms and rights under Articles 7, 9-18, 21 and 22 may be limited by the law upon meeting the conditions stipulated in Article 23 of the Constitution. The determination of which freedom or right shall be regulated by law or by rules authorized by the law shall depend on regulated intensity. Reasonable deviation is allowed considering the party to be regulated, the content of the regulation, or the limitations to be made on the interests or freedom. For instance, depriving people's lives or limiting their physical freedom shall be in compliance with the principle of definitiveness of crime and punishment and stipulated by law; limitations concerning people's other free-

自由及權利均無分軒輊受憲法毫無差別之保障：關於人民身體之自由，憲法第八條規定即較為詳盡，其中內容屬於憲法保留之事項者，縱令立法機關，亦不得制定法律加以限制（參照本院釋字第三九二號解釋理由書），而憲法第七條、第九條至第十八條、第二十一條及第二十二條之各種自由及權利，則於符合憲法第二十三條之條件下，得以法律限制之。至何種事項應以法律直接規範或得委由命令予以規定，與所謂規範密度有關，應視規範對象、內容或法益本身及其所受限制之輕重而容許合理之差異：諸如剝奪人民生命或限制人民身體自由者，必須遵守罪刑法定主義，以制定法律之方式為之；涉及人民其他自由權利之限制者，亦應由法律加以規定，如以法律授權主管機關發布命令為補充規定時，其授權應符合具體明確之原則；若僅屬與執行法律之細節性、技術性次要事項，則得由主管機關發布命令為必要之規範，雖因而對人民產生不便或輕微影響，尚非憲法所不許。又關於給付行政措施，其受法律規範之密度，自較限制人民權益者寬鬆，倘涉及公共利益之重大事項者，應有法律或法律授權之命令為依據之必要，乃屬當然。

doms shall also be stipulated by law, in the case where there is authorization by the law to the administrative institutions to make supplemental rules, the authorization shall be specific and precise. The competent authority, on the ground that such limitations shall not be inconvenient for the people, may make only those limitations concerning details and technical matters of law enforcement. For policies concerning benefit to the people, the law governing such policies may be constructed more loosely compared to laws governing limitations on people's rights. Nevertheless, in the case where such policies are related to major public interests, they shall be made by law or rules authorized by law.

It stipulates in Article 10 of the Constitution that people are free to choose their residences and to move freely. This is to give people the freedom to choose their residences, to enjoy their lives without intrusion, and to move or travel based on their free will. According to Article 23 of the Constitution, limitations on such freedom shall be made by law and in such

憲法第十條規定人民有居住及遷徙之自由，係指人民有選擇其居住處所，營私人生活不受干預之自由，且有得依個人意願自由遷徙或旅居各地之權利。對此人民自由權利之限制，憲法第二十三條規定應以法律定之且不得逾越必要之程度。又憲法第二十條規定，人民有依法律服兵役之義務，係指有關人民服兵役之重要事項均應以法律或法律

case shall be necessary. In addition, the stipulation of Article 20 of the Constitution that draftees have the obligation to serve in the military in accordance with law shall have the implication that major matters concerning their military service shall be made by law or rules specifically authorized by law. There are no clauses in the Conscription Act and the Enforcement Act of Conscription Act limiting draftees from leaving the country. In addition, Article 45 of the Enforcement Act of Conscription Act only authorizes the Administrative Yuan to promulgate the Conscription Regulation and does not have any clause authorizing the administrative institutions to promulgate regulations concerning matters by their nature limiting the freedom of people's movement, e.g., prohibiting draftees from leaving the country. Further, there is no stipulation permitting the Administrative Yuan to authorize the Ministry of Interior to establish the regulation. As a result, though the purpose of Article 8 of the Regulation for Exit of Draftees, which is authorized by Article 18 of the Conscription Regulation, is to prevent draftees from evading their

明確授權之命令予以規定。查兵役法及兵役法施行法並無任何限制役男出境之條款，且兵役法施行法第四十五條僅授權行政院訂定徵兵規則，對性質上屬於限制人民遷徙自由之役男出境限制事項，並未設有任何具體明確授權行政機關訂定之明文，更無行政院得委由內政部訂定辦法之規定，是上開徵兵規則第十八條授權內政部所定之「役男出境處理辦法」第八條限制役男出境之規定，雖基於防範役男藉故出境，逃避其應盡之服兵役義務，惟已構成對人民自由權利之重大限制，與前開憲法意旨不符，應自本解釋公布日起至遲於屆滿六個月時，失其效力。

military service obligation, it constitutes a major limitation on the people's freedom and is in contravention of the Constitution and shall become void within 6 months from the date of this Interpretation.

J. Y. Interpretation No.444（January 9, 1998）*

ISSUE: Does Article 25 of the Enforcement Guidelines for the Use Permission of Non-Urban Land of Taiwan Province stipulating that within ambit of the area any application for the set-up of pasturing facilities shall be denied and the use of such area as a pasturing ground forbidden contradict the Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 1, 2 and 15 of the Zoning Act（區域計畫法第一條、第二條及第十五條）; Article 11 of the Water Supply Act（自來水法第十一條）; Article 28, Subparagraph 4 of the Water Pollution Control Act（水污染防治法第二十八條第四款）; Articles 13 and 15 of the Enforcement Rules of the Zoning Act（區域計畫法施行細則第十三條、第十五條）; Article 6, Paragraph 1, of the Regulation Governing the Utilization Control of Non-Urban Land（非都市土地使用管制規則第六條第一項）; Article 25 of the Enforcement Guidelines for the Use Permission of Non-Urban Land of Taiwan Province（臺灣省非都市土地容許使用執行要點第二十五點）.

KEYWORDS:

principle of legal reservation（法律保留原則）.**

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* Translated by Jer-Shenq Shieh.

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

HOLDING: The Zoning Act is enacted to promote conservation and the use of land and natural resources, improve the living environment, and enhance the public interest. The second sentence of Article 2 provides: "What is not stipulated in this Act applies to other laws." Whatever law accords with the purpose of this Act will be among the laws to be applied. Article 6, Paragraph 1, of the Regulation Governing the Utilization Control of Non-Urban Land, promulgated by the Ministry of the Interior, based on the above provides: "Land designated for certain use should be used according to permitted use items, but other laws which prohibit or restrain certain use will be applied preemptively." Article 25 of the Enforcement Guidelines for the Use Permission of Non-Urban Land of Taiwan Province, amended and promulgated on June 7, 1995, provides: "No new pasture ground can be set aside and no permit for building pasturing facilities can be set up in a water quality and quantity protection area." Based on the intent of Paragraph 1, this exemplifies that land set aside for certain use should (or not) be used according to

解釋文：區域計畫法係為促進土地及天然資源之保育利用、改善生活環境、增進公共利益而制定，其第二條後段謂：「本法未規定者，適用其他法律」，凡符合本法立法目的之其他法律，均在適用之列。內政部訂定之非都市土地使用管制規則即本此於第六條第一項規定：「經編定為某種使用之土地，應依容許使用之項目使用。但其他法律有禁止或限制使用之規定者，依其規定。」中華民國八十四年六月七日修正發布之臺灣省非都市土地容許使用執行要點第二十五點規定：「在水質、水量保護區規定範圍內，不得新設立畜牧場者，不得同意畜牧設施使用」，係為執行自來水法及水污染防治法，乃按本項但書之意旨，就某種使用土地應否依容許使用之項目使用或應否禁止或限制其使用為具體明確之例示規定，此亦為實現前揭之立法目的所必要，並未對人民權利增加法律所無之限制，與憲法第十五條保障人民財產權之意旨及第二十三條法律保留原則尚無牴觸。

permitted use items or certain uses should (or not) be prohibited or be restrained in order to enforce the Water Supply Act and Water Pollution Control Act. This is necessary to fulfill the legislative purpose of the aforementioned Act, and does not add any limitation on the people's property right that is not provided by statutes. Therefore, it does not violate the intent of protection of private property of Article 15 of the Constitution and the principle of legal reservation *(Gesetzesvorbehaltprinzip)* of Article 23 of the Constitution.

REASONING: Land is necessary for the people's livelihood. The nation, based on the mutual reliance and mutual interest of geography, population, resources, economic activities, etc., and according with national economic development and environmental protection policy, shall enact land use and conservation plans to accord with social need. The Zoning Act is a law enacted to coordinate the various needs of land use and balance them with the interests of the people in a reasonable manner. The legislative purpose of Article 1 is: "to promote

解釋理由書：按土地為人民生存所不可或缺，國家基於地理、人口、資源、經濟活動等相互依賴及共同利益關係，並配合國家經濟發展及環境保護之政策，應訂定符合社會需要之土地使用保育計畫，區域計畫法即係為合理調整土地上各種不同的使用需求與人民整體利益之均衡考量所制定之法律，於第一條揭示其立法目的為：「促進土地及天然資源之保育利用，人口及產業活動之合理分布，以加速並健全經濟發展，改善生活環境、增進公共福利。」為貫定，非都市土地，按照非都市土地分區使用計畫，製定非都市土地使用分區徵

conservation and the use of land and natural resources, reasonable allocation of population and industrial activities, and to accelerate healthy economic development, improve the living environment, and enhance the public welfare." To implement the public policy of non-urban land use control and ecological and environmental conservation, Paragraph 1 of Article 15 of the same Act provides that land use control on non-urban land, being zoned according to a non-urban zoning plan and designated as land for various uses, should be enforced, and the control rules should be enacted by the central authority concerned. In addition, the second sentence of Article 2 provides: "What is not stipulated in this Act applies to other laws." Whatever laws accord with the purpose of this Act, i.e., the Water Supply Act and the Water Pollution Control Act, will be among the laws applied. Based on the above stipulation, the Ministry of the Interior enacted the Regulation Governing the Utilization Control of Non-Urban Land. According to Article 13 of the Enforcement Rules of the Zoning Act, it divides non-urban land into various use dis-

非都市土地之使用管制與生態環境保育之公共政策，同法第十五條第一項規圖，並編定各種使用地，實施管制，其管制規則，由中央主管機關定之；並於第二條後段規定：「本法未規定者，適用其他法律」，凡符合本法立法目的之其他法律，諸如自來水法及水污染防治法，均應在適用之列。內政部乃本此訂定非都市土地使用管制規則，將非都市土地依照區域計畫法施行細則第十三條之規定，劃分為各種使用區域，並依第十五條之規定在各使用區域內編成十八種用地，依照土地使用種類與使用性質進行管制；該規則第六條第一項規定：「經編訂為某種使用之土地，應依容許使用之項目使用，但其他法律有禁止或限制使用之規定者，依其規定。」中華民國八十四年六月七日修正發布之臺灣省非都市土地容許使用執行要點第二十五點規定：「在水質、水量保護區規定範圍內，不得新設立畜牧場者，不得同意畜牧設施使用」，係為執行自來水法第十一條及水污染防治法第二十八條第四款，而按本項但書意旨，就某種使用土地應否依容許使用之項目使用，或禁止或限制其使用為具體明確之例示規定（本例示規定已於八十六年八月六日經內政部（八六）內地字第八六八四八三

tricts, designates 18 categories of land use in every use district according to Article 15 and controls land use based on the varieties and nature of land use. Paragraph 1 of Article 6 of the Regulation provides: "Land designated for certain use should be used according to permitted use items, but other laws which prohibit or restrain certain use will be applied preemptively." Article 25 of the Enforcement Guidelines for the Use Permission of Non-Urban Land of Taiwan Province, amended and promulgated on June 7, 1995, provides: "No new pasture ground can be set aside and no permit for building pasturing facilities can be set up in a water quality and quantity protection area." Based on the intent of Paragraph 1, it exemplifies that land of certain use should (or not) be used according to permitted use items or certain uses should (or not) be prohibited or be restrained in order to enforce Article 11 of Water Supply Act and Subparagraph 4 of Article 28 of the Water Pollution Control Act. (This exemplification was deleted by (86) N. T. T. Directive No. 8684833 of the Ministry of the Interior on August 6, 1997). This is necessary to

三號函核定刪除），此亦為實現前揭立法目的所必要，並未對人民權利增加法律所無之限制，與憲法第十五條保障人民財產權之意旨及第二十三條法律保留原則尚無牴觸。至具體個案中之土地，是否屬於水質、水量保護區規定範圍，屬法院認事用法之問題，併此指明。

fulfill the legislative purpose of the aforementioned Act, and does not add any limitation on the people's property right that is not provided by statutes. Therefore, it does not violate the intent of protection of private property of Article 15 of the Constitution and the principle of legal reservation (Gesetzesvorbehaltprinzip) of Article 23 of the Constitution. Whether a piece of land in an actual case is within a water quality and quantity protection area is a matter of fact to be decided by judges.

J. Y. Interpretation No.445（January 23, 1998）*

ISSUE: Are the relevant provisions of the Assembly and Parade Act unconstitutional?

RELEVANT LAWS:

Articles 11, 14 and 23 of the Constitution（憲法第十一條、第十四條、第二十三條）; Articles 4, 6, 8, 9, 10,11 and 29 of the Assembly and Parade Act (July 27, 1992)（集會遊行法第四條、第六條、第八條、第九條、第十條、第十一條、第二十九條(81.07.27)）.

KEYWORDS:

Freedom of assembly（集會自由）, freedom of expression（表現自由）, extrinsic freedom in form（形式上外在自由）, intrinsic freedom in essence（實質上內在自由）, principle of clarity and definiteness of law（法律明確性原則）, principle of legal reservation（法律保留原則）, principle of proportionality（比例原則）, outdoor assembly and parade（室外集會遊行）, prior application for approval（事前申請許可）, system of guided approval（準則主義許可制）, advocacy of communism or secession of territory（主張共產主義或分裂國土）, political speech censorship（政治上言論審查）, clear and present danger（明顯而立即之危險）, restricted area for assembly and parade（集會遊行禁制區）,

* Translated by Vincent C. Kuan.

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social order（社會秩序）, public interests（公共利益）, generalized provision（概括條款）, power of discretion（裁量權）, scope of legislative discretion（立法形成之範圍）, incidental assembly or parade（偶發性集會遊行）, penalty for offense against an administrative order（行政秩序罰）, dispersal and restraining order（解散及制止命令）, scope of constitutional interpretation（大法官解釋憲法之範圍）, provisions of law relevant and necessary to a specific case（具體事件相關聯且必要之法條內容）.**

HOLDING: Article 14 of the Constitution provides that the people have the freedom of assembly. Like Article 11 of the Constitution, which provides for the freedom of speech, teaching, writing and publication, it is also a kind of freedom of expression that is the most important fundamental human right in practicing democracy. In order to guarantee the people's freedom of assembly, the nation shall provide appropriate places for, and ensure the safety and regular process of, assemblies and parades. In restricting the rights of assembly and parade by law, the principle of clarity and definiteness of law and the provisions of Article 23 of the

解釋文：憲法第十四條規定人民有集會之自由，此與憲法第十一條規定之言論、講學、著作及出版之自由，同屬表現自由之範疇，為實施民主政治最重要的基本人權。國家為保障人民之集會自由，應提供適當集會場所，並保護集會、遊行之安全，使其得以順利進行。以法律限制集會、遊行之權利，必須符合明確性原則與憲法第二十三條之規定。集會遊行法第八條第一項規定室外集會、遊行除同條項但書所定各款情形外，應向主管機關申請許可。同法第十一條則規定申請室外集會、遊行除有同條所列情形之一者外，應予許可。其中有關時間、地點及方式等未涉及集會、遊行之目的或內容之事項，為維持

Constitution must be complied with. Article 8-I of the Assembly and Parade Act provides that, unless any of the situations otherwise provided in the proviso of the same paragraph exists, anyone who wants to hold an outdoor assembly or a parade shall apply for permission from the competent authority. Article 11 of said Act provides that, unless any of the situations listed in the same article exists, the application for an outdoor assembly or a parade shall be approved. To the extent that those items in regard to time, place, and manner are irrelevant to the purposes or contents of the assembly or parade, and that they are necessary to the maintenance of social order and the advancement of public welfare, they should fall within the scope of legislative discretion and will not result in any infringement of the purpose of freedom of expression. Therefore, the constitutional intent of protecting the freedom of assembly is not violated.

社會秩序及增進公共利益所必要，屬立法自由形成之範圍，於表現自由之訴求不致有所侵害，與憲法保障集會自由之意旨尚無牴觸。

Article 11 (i) of the Assembly and Parade Act, which provides that any violation of Article 4 of the said Act is one of the essential conditions for which the

集會遊行法第十一條第一款規定違反同法第四條規定者，為不予許可之要件，乃對「主張共產主義或分裂國土」之言論，使主管機關於許可集會、

competent authority may deny the application for an outdoor assembly, prohibits any speech that "advocates communism or secession of territory." The said provision, which allows the competent authority to censor the contents of a political speech prior to the approval of an assembly or a parade, is inconsistent with the intention of protecting the freedom of expression under the Constitution. Subparagraph 2 of said article, providing that "There are facts showing the likelihood that national security, social order or public welfare will be jeopardized," and Subparagraph 3 thereof, providing that "There is the likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property," are neither specific nor clear enough. The mere basis on which the competent authority may either approve or deny an application for an assembly or a parade is the future possibility of occurrence instead of a factual showing of clear and present danger. As such, the said provisions are inconsistent with the constitutional intention of protecting the freedom of assembly, and thus shall become null and void from the date

遊行以前，得就人民政治上之言論而為審查，與憲法保障表現自由之意旨有違；同條第二款規定：「有事實足認為有危害國家安全、社會秩序或公共利益之虞者」，第三款規定：「有危害生命、身體、自由或對財物造成重大損壞之虞者」，有欠具體明確，對於在舉行集會、遊行以前，尚無明顯而立即危險之事實狀態，僅憑將來有發生之可能，即由主管機關以此作為集會、遊行准否之依據部分，與憲法保障集會自由之意旨不符，均應自本解釋公布之日起失其效力。

of this Interpretation.

Article 6 of the Assembly and Parade Act, which stipulates a restricted area for assembly and parade, is intended to protect the security of government leaders and military facilities, and to maintain the unobstructed flow of traffic and communications. Article 10 of said Act stipulates the qualifications for the person in charge of the assembly or parade, his or her agent or picket. Article 11(iv) thereof provides that an application for an assembly or a parade shall be denied if the same time, place, and route have been applied for by another and been approved. Article 11(v) thereof provides that the application for an assembly or a parade by a group may be denied if such group is not established according to the law, or permission for its establishment has been withdrawn, or it has been ordered to dissolve. Article 11(vi) thereof provides that the application may not be approved if the application does not conform to Article 9, which, among other things, requires the applicant to submit a completely filled-out application form. All of the foregoing provisions

集會遊行法第六條規定集會遊行之禁制區，係為保護國家重要機關與軍事設施之安全、維持對外交通之暢通；同法第十條規定限制集會、遊行之負責人、其代理人或糾察員之資格；第十一條第四款規定同一時間、處所、路線已有他人申請並經許可者，為不許可集會、遊行之要件；第五款規定未經依法設立或經撤銷許可或命令解散之團體，以該團體名義申請者得不許可集會、遊行；第六款規定申請不合第九條有關責令申請人提出申請書填具之各事項者為不許可之要件，係為確保集會、遊行活動之和平進行，避免影響民眾之生活安寧，均屬防止妨礙他人自由、維持社會秩序或增進公共利益所必要，與憲法第二十三條規定並無牴觸。惟集會遊行法第九條第一項但書規定：「因天然災變或其他不可預見之重大事故而有正當理由者，得於二日前提出申請。」對此偶發性集會、遊行，不及於二日前申請者不予許可，與憲法保障人民集會自由之意旨有違，亟待檢討改進。

are meant to ensure a peaceful assembly or parade and to prevent any disturbance of the public quiet, which are necessary to either prevent infringement upon the freedom of other people, to maintain social order or to advance public welfare, and thus are not in conflict with Article 23 of the Constitution. Nonetheless, the proviso of Article 9-I of the said Act reads, "An application may be submitted two days (prior to an assembly or parade) where there is any justifiable reason because of any natural disaster or any other unforeseeable major accident." Denying an application for an incidental assembly or parade that is not filed two days prior to such assembly or parade is in violation of the constitutional intention of protecting the people's freedom of assembly and thus requires prompt and speedy review and revision.

Article 29 of the Assembly and Parade Act, which imposes criminal liability on a chief violator who disobeys a dispersal and restraining order, is within the scope of legislative discretion and, as such, is not in conflict with Article 23 of

集會遊行法第二十九條對於不遵從解散及制止命令之首謀者科以刑責，為立法自由形成範圍，與憲法第二十三條之規定尚無牴觸。

the Constitution.

REASONING: The Petitioners, Kao Cheng-Yien, Chen Mao-Nang, and Chang Cheng-Shiu, alleging that the Assembly and Parade Act invoked in Judgment S.Y.T. No. 5278 (H. Ct., 1994) is unconstitutional, duly initiated a petition for interpretation and the petition is admitted by the Justices for that purpose. In accordance with Article 13-I of the Constitutional Interpretation Procedure Act, the Justices ordered the petitioners and the authorities concerned, i.e., the Executive Yuan, Ministry of the Interior, Ministry of Justice, Ministry of Transportation and Communications, and National Police Agency, Ministry of the Interior, to appoint their respective agents to attend the oral argument held in the Constitutional Court on December 5, 1997.

解釋理由書：本件係因高成炎、陳茂男、張正修為台灣高等法院八十三年度上易字第五二七八號判決所適用之集會遊行法有違憲之疑義，聲請解釋，經大法官議決應予受理，並依司法院大法官審理案件法第十三條第一項規定通知聲請人及關係機關行政院、內政部、法務部、交通部及內政部警政署指派代表，於中華民國八十六年十二月五日在憲法法庭行言詞辯論，合先說明。

The Petitioners have alleged summarily that: Article 14 of the Constitution provides, “The people shall have freedom of assembly and association.” In addition, Article 11 thereof provides, “The people shall have freedom of speech, teaching,

次查聲請人主張略稱：憲法第十四條規定：「人民有集會及結社之自由。」第十一條並規定：「人民有言論、講學、著作及出版之自由。」均係表示憲法保障人民之表現自由。因為人民有參與政治意思決定之權利，表現自

writing and publication." Both articles are designed to guarantee the people's freedom of expression under the Constitution. Since the people have the right to participate in the political decision-making process, the freedom of expression enables an individual to fully and completely express his or her will during the formative process of the public will. As such, it is an important fundamental human right in practicing democracy. Of those rights, the freedoms of teaching, writing, and publication are mainly exercised by intellectuals. As to the freedom of association, which is a kind of freedom of expression exercised mainly by action, it is a direct means for the general public, who do not have easy access to the media, to express their opinions openly. And, as the participants of collective will use an assembly or a parade as a way "to actively participate in the formation of the national will," it is also, in nature, a right of utility. Surprisingly, Article 8-I of the Assembly and Parade Act provides that, unless any of the situations otherwise provided in the proviso of the same paragraph exists, anyone who wants to hold an outdoor assembly or parade shall apply

由使個人之意思，於公意形成之過程中，得充分表達，是為實施民主政治重要之基本人權。其中講學、著作及出版之自由，大多由知識分子行使，至於集會自由是以行動為主的表現自由，對於不易利用媒體言論管道之眾人，為公開表達意見之直接途徑，集體意見之參與者使集會、遊行發展成「積極參與國家意思形成之參與權」，故兼有受益權之性質。詎集會遊行法第八條第一項規定，室外集會、遊行，除有同條項但書所列各款情形外，應向主管機關申請許可，對於人民集會、遊行之權利為概括性之限制，賦予主管機關事前抑制、禁止人民集會、遊行之權限。再依同法第十一條規定，申請室外集會、遊行，除有(一)違反第四條、第六條、第十條之規定，(二)有事實足認為有危害國家安全、社會秩序或公共利益之虞，(三)有危害生命、身體、自由或對財物造成重大損壞之虞，(四)同一時間、處所、路線已有他人申請並經許可，(五)未經依法設立或經撤銷許可或命令解散之團體，以該團體名義申請，(六)申請不合第九條規定等情形外，應予許可。其中第一款所指同法第四條「集會遊行不得主張共產主義或分裂國土」，乃具有高度政治性之議題，其概念有欠明確。蓋

for permission from the competent authority, thus broadly restricting the people's right to assemble and parade and empowering the competent authorities to restrain and forbid people from holding an assembly or a parade in advance. According to Article 11 of said Act, the application for an outdoor assembly or parade shall be approved unless there is any violation of Articles 4, 6, or 10, that is: there are facts showing the likelihood that national security, social order or public welfare will be jeopardized; there is likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property; the same time, place, and route have been applied for by another and been approved; a group applicant is not established according to the law, or permission for its establishment has been withdrawn, or it has been ordered to dissolve; or the application does not conform to Article 9 thereof. Article 4 of the said Act, as referred to in Subparagraph 1 thereof, addresses a highly political issue, that "there shall be no advocacy of communism or secession of territory during an assembly or a parade," whose concept is unclear.

以集會、遊行之方式主張共產主義或分裂國土，若未妨礙或侵犯他人之權利或自由，應為表現自由所保障之範圍。如果主張馬列氏之共產主義，並欲以暴力推翻體制，以達到共產主義之目的而積極進行組織者，顯然已超越集會、遊行權利之內在限制，當可另立特別法予以規範。於集會遊行法為不明確之禁止規定，任由警察機關予以認定，使警察機關捲入政治漩渦中，違背警察政治中立之要求，且無異對意見之表達為事前之檢查，復未經法院依嚴謹之訴訟程序決定之，欠缺必要之防護措施，對言論自由之保障，實有未足。又第六條所列禁制區之範圍係授權內政部及國防部劃定公告，於採報備制之國家，集會不須得警察機關之許可，故於禁制區為集會、遊行，須得禁制區保護機關之同意，集會遊行法第六條規定禁制區範圍過於浮濫，且同條第一項但書規定在禁制區集會之例外許可，與集會之許可均由同一主管機關核准，亦屬重複。至第十條關於負責人、其代理人或糾察員之消極資格規定，僅具形式意義。其次，第十一條第一項第二款及第三款規定，均屬不確定法律概念，因為室外集會、遊行難免對他人之自由、社會秩序或公共利益產生影響，其認定之標準，如缺乏明確

Advocacy of communism or secession of territory, to the extent that no right or freedom of another person is interfered with or infringed upon, should be protected under the right of freedom of expression. While advocating Marxist or Leninist communism, if a person actively organizes in order to overthrow the governmental system by violence for the purpose of establishing a communist state, such behavior is obviously beyond the internal limitations of the rights of assembly and parade, which should be regulated by enacting a special law. In drawing up an ambiguously prohibitive provision in the Assembly and Parade Act and thus empowering the police agency with the discretion to make determinations, the legislature has placed the police in a political quandary that violates the requirement that the police must be politically neutral. Furthermore, it is no different from prior censorship of the expression of opinions, which, is also not determined by a court of law through a carefully formulated litigation procedure. As such, it is lacking in necessary protective measures, and does not adequately protect the free-

之準則，人民之集會自由即遭干預。第四款規定同一時間、處所、路線已有他人申請並經許可者，惟於例外情形構成「警察緊急狀態」下，始得對後申請之室外集會或反制之示威加以禁止或不許可。倘不論原因一律不許可，亦有違憲法第十四條規定保障集會自由之趣旨，且不符比例原則之要求。第五款規定涉及集會自由之主體問題，實則未經依法設立或經撤銷許可或命令解散之團體，仍得由其構成員以自然人或其他依法設立之團體名義申請，是本款規定並無意義。第六款係謂申請不合第九條規定者不予許可，惟第九條規定申請許可之方式及其期間之遵守，不符比例原則且排除自發性集會之合法性，尤屬可議。綜上可知集會遊行法第十一條規定所列不予許可之事由，或過於抽象而無實質意義，或牴觸憲法第十四條規定保障集會自由之旨意，與憲法第二十三條規定之要求亦有未符。依集會遊行法之規定，集會、遊行之申請應向警察機關為之，而警察機關又是維持集會、遊行秩序並依法得將違反集會遊行法規定者移送司法機關偵辦之機關。在目前的警察體制下，極易為經由選舉而執政之政黨所利用，以干預人民集會之自由。自人民之立場言，集會之申請經拒絕以後，雖可

dom of speech. In addition, the power to demarcate and announce the restricted areas referred to in Article 6 thereof is entrusted to the Ministry of the Interior and the Ministry of National Defense. In those nations that adopt a system of reporting, it is not necessary to obtain approval from the police agency before holding an assembly or a parade. Therefore, the consent from a protected agency in a restricted area must be obtained before an assembly or a parade may be held in such area. Article 6 of the Assembly and Parade Act is too broad in providing for the range of restricted areas. Furthermore, it is unnecessarily redundant that the proviso of Paragraph 1 of the same Article stipulates that the exceptive approval for assembly in the restricted area, as well as the approval for assembly, will be given by the same authority. As for Article 10, which provides for the negative qualifications of the person in charge, the agent, or the picket, has no material meaning. Besides, the provisions of Article 11-I (ii) and (iii) are indefinite concepts of law because an outdoor assembly or parade will inevitably affect the free-

申復，然申復之審查仍由警察機關單方面為之，即欠缺正當法律程序為之救濟。為使國民能機會均等參與公共事務，國家必須積極制定相關制度，保障人民之表現自由，公意政治方能實現。集會遊行法採取事前許可制，限制人民之基本權利，自屬牴觸憲法保障人民集會自由之權利。又集會遊行法第二十九條規定：「集會、遊行經該管主管機關命令解散而不解散，仍繼續舉行經制止而不遵從，首謀者處二年以下有期徒刑或拘役。」此項規定與刑法第一百四十九條規定公然聚眾不遵令解散罪之構成要件比較，寬嚴之間有失均衡。由於集會自由有無可替代之民主功能，和平進行之集會應受法律之充分保障，集會遊行法第二十九條規定之情形，僅課以較高額之行政罰即可，應無必要處以刑罰。依集會遊行法第二十五條規定，未經許可或許可經撤銷而擅自舉行者，或違反許可事項、許可限制事項者，該管主管機關得予警告、制止或命令解散。基本上係以事前許可為前提，惟有主管機關許可時，方得免受刑事追訴，顯然為箝制表現自由重大的規定。為調節集會、遊行與一般民眾因此感受之不便，採用報備制，使警察機關得預為綢繆，避免參與集會者之利益與第三人之安全

dom of other people, the social order, or public interests. And, if clear determining standards are lacking, the people's freedom of assembly will be infringed. Subparagraph 4 thereof provides that a later application for an assembly or a parade may be prohibited or denied only if the same time, place, and route have been previously applied for by another and been approved, and if such later application for an outdoor assembly or a counter-demonstration may constitute "police emergency circumstances." If an application is denied for any reason, such denial will violate the intention of protecting freedom of assembly according to Article 14 of the Constitution and will be inconsistent with what is guaranteed under the principle of proportionality. Subparagraph 5 concerns the subject of freedom of assembly. Since a group which is not legally established, whose permission has been withdrawn, or which is ordered to dissolve, can still apply under the name of any of its individual members or that of another legally established group, this subparagraph is meaningless. Subparagraph 6 provides that an application shall

利益發生不必要之衝突，並視情況採取維持秩序之措施，以資兼顧。集會、遊行為人民表達思想的重要手段，為憲法所保障，集會遊行法採許可制，依上說明，自屬牴觸憲法，侵犯人民之基本權等語。

not be approved if it is inconsistent with Article 9. However, the manner of application for approval and the period allowed for filing an application as provided by Article 9 are inconsistent with the principle of proportionality, and the legality of its exclusion of spontaneous assembly is especially questionable. In conclusion, the reasons for disapproval listed in Article 11 of the Assembly and Parade Act are either too abstract and without material meaning or in conflict with the intention of protecting the freedom of assembly provided in Article 14 of the Constitution, and they are also inconsistent with what is required under Article 23 of the Constitution. Under the Assembly and Parade Act, an application for an assembly or a parade shall be filed with the police agency, which, however, is also the agency in charge of maintaining the order of an assembly or a parade and of removing the violators of the Assembly and Parade Act and escorting them to the judicial authorities. Under the current police system, the police agency may be used as a tool of the elected ruling party to interfere with the people's freedom of assembly. From the

people's point of view, although an application for assembly may be re-filed, the review of the re-application will still be conducted by the police agency itself and, therefore, adequate remedy is lacking under due process of law. In order to provide the citizens with an equal opportunity to participate in public affairs, the state must vigorously establish related systems to protect the people's freedom of expression and only then can the public's political will be realized. The Assembly and Parade Act, in adopting the system of prior approval, restricts people's fundamental rights and thus is in conflict with the constitutional guarantee of the people's rights and freedom of assembly. Furthermore, Article 29 of the Assembly and Parade Act provides, "Where those engaging in an assembly or parade do not disperse after an order to disperse is given by the competent authority, and continue the assembly or parade in disobedience of an order to stop, the chief violator shall be subject to punishment of imprisonment for a term of not more than two years or for detention." When compared with the offense of gathering in public and dis-

obeying the order to disperse as provided by Article 149 of the Criminal Code, the punishment stipulated in the aforesaid Article is unbalanced as far as the requisite elements are concerned. Due to the irrevocable democratic function of freedom of assembly, a peaceful assembly should be adequately protected by law. The situations referred to in Article 29 should be merely punishable by a higher amount of fine and no criminal punishment should be necessary. In accordance with Article 25 of the Assembly and Parade Act, where an assembly or a parade is held without approval, with approval having been withdrawn, or in violation of the conditions or restrictive requirements for approval, the competent authority may warn, restrain, or issue an order to disperse. Basically, prior approval is a prerequisite and criminal prosecution can be avoided only if and when approval is given by the competent authority; therefore, it is obviously a regulation that severely restricts the freedom of expression. In order to balance the freedom of assembly and parade and the inconvenience to others caused by an assembly or a parade, the government

should adopt the system of reporting to prepare the police agency in advance to prevent any unnecessary conflict between the interests of the participants in the assembly and the interests of the safety of third parties. They should also take any measures necessary to maintain order as the circumstances dictate so as to give due consideration to both sides. Assemblies and parades are important ways for the people to express their will, and are guaranteed by the Constitution. The system of approval as adopted for the Assembly and Parade Act, as stated above, is in conflict with the Constitution and thus infringes upon the people's fundamental rights.

The Executive Yuan, as the relevant authority, has alleged that: In a democratic society, the people usually display the public will in respect to the administrative measures of the government by expressing their opinions through an assembly or a parade. However, unpredictability and uncontrollability are characteristics of assemblies and parades, which may pose potential threats to social order. In order to protect the people's legal rights of assem-

相關機關行政院則主張：民主社會中，人民對於政府施政措施，常藉集會、遊行之方式表達意見，形成公意。惟集會、遊行亦具有容易感染及不可控制的特質，對於社會治安可能產生潛在威脅。為維護人民集會、遊行的合法權益，並確保社會秩序安寧，自有制定法律，將之限定於和平表達意見範疇之必要。集會遊行法係解嚴後為因應社會變遷，於七十七年一月二十日所制定，八十一年七月二十七日復因終止戡亂而修

bly and parade and to ensure social order and safety, it is necessary to enact laws that limit an assembly or a parade to a peaceful expression of will. The Assembly and Parade Act was enacted on January 20, 1988, in response to changes in society after the martial law was lifted and said Act was amended and promulgated on July 27, 1992, after the termination of the Act for the Suppression of the Communist Rebellion. Obviously, as the circumstances of the society have changed, so has the Act, as a product of democratization, evolved. With respect to the legislations regulating assemblies and parades, some nations have adopted the system of reporting, whereas others have adopted the system of approval. Although the system of approval was adopted by the Legislative Yuan when it designed the Assembly and Parade Act, it is, in nature, closer to a system of guided approval than to charters, and, as such, it does not transgress the boundary delineated by Article 23 of the Constitution, which requires that abridgement of freedoms is necessary to prevent infringement of the freedom of other persons, to avert an imminent crisis,

正公布，顯係隨社會之變動而演進，為民主化的產物。顧各國立法例對於集會、遊行之管理方式有採報備制者，有採許可制者，集會遊行法所採，雖為許可制，惟其性質非屬特許而近準則主義，尚未逾憲法第二十三條所定防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益所必要之程度，以近五年來警察機關受理集會、遊行申請案資料統計分析，共受理申請三一、七二五件，不准許者僅一〇八件，約佔千分之三點四，所佔比例甚低，即可明瞭。又集會遊行法第四條規定集會遊行不得主張共產主義或分裂國土，乃因共產主義本質上與三民主義背道而馳，且現階段大陸政權仍屬敵對團體，對我國仍具武力威脅，集會、遊行活動主張共產主義不但違反立國精神，且參照憲法增修條文第五條第五項規定，尚有危害中華民國之存在或自由民主憲政秩序之虞。因此，集會、遊行不得主張共產主義。其次，主張分裂國土，乃違背憲法第四條規定，集會遊行法第四條規定不得主張分裂國土，亦無不合。再查國家安全法第二條雖針對集會、結社為上開二原則之規定，惟違反者，同法並未規定其法律效果。若違反集會遊行法第四條規定，則不許可或撤銷許可集會、遊

to maintain the social order, or to advance the public welfare. It This should be clear by taking note of the low percentage of applications for assemblies or parades denied by the police agency in the past five years: only 108 out of a total of 31,725 applications filed were denied, resulting in a rate of about 0.34%. Article 4 of the Assembly and Parade Act provides that an assembly or a parade in advocacy of communism or secession of territory shall not be approved because communism, in nature, runs counter to the Three Principles of the People. Besides, the government of mainland China is still hostile to the interests of Taiwan, and has threatened our nation with military force. Advocating communism during an assembly or a parade not only violates the founding spirit of the nation but, by referring to Article 5-V of the Amendments to the Constitution, also raises concerns about putting the very existence of the Republic of China or the nation's constitutional order of freedom and democracy in danger. Therefore, advocacy of communism or secession of territory is not allowed during an assembly or a parade.

行之申請，同時可達成國家安全法所揭示二原則之立法目的。至於集會遊行法第二十九條對於首謀者處以刑事罰，乃因首謀者業經警察機關警告、制止、命令解散，仍繼續進行，不遵制止等四階段程序，其主觀惡性已表露無遺，非處行政罰所能奏效，較之德國集會法第二十六條第一款規定採二階段程序者更為嚴謹，自無違反憲法可言云云。

Secondly, advocacy of secession of territory violates Article 4 of the Constitution, so Article 4 of the Assembly and Parade Act rightfully and legitimately disallows secession of territory. Additionally, Article 2 of the National Security Act provides for the foregoing two principles about assemblies and associations but is silent as to the legal consequences of violations of said principles. In the case of any violation of Article 4 of the Assembly and Parade Act, the application for an assembly or a parade shall be denied, and, as such, the legislative purpose of the said principles of the National Security Act shall be achieved at once. As to Article 29 of the Assembly and Parade Act, which imposes a criminal penalty on the chief violator who has been warned, stopped, or ordered to disperse but still proceeds without obeying the order, the reason for the criminal punishment is that an administrative punishment will not obtain the desired results since a four-stage procedure has proven futile in deterring the chief violator whose subjective maliciousness has been manifested in the case at hand. When compared with Article 26 (i) of the

Assembly Act of Germany, which adopts a two-phase procedure, such criminal penalty is even more exact and thus is not inconsistent with the Constitution.

The Ministry of Justice (concurrently representing the Executive Yuan) has alleged that: Promulgated by the President on January 20, 1988, and named the Assembly and Parade Act during the Period of National Mobilization for Suppression of the Communist Rebellion, the law governing assemblies and parades in our nation was enacted for the purpose of protecting legally held assemblies and parades in response to the political environment following the lifting of martial law Because of the subsequent termination of the period of mobilization for suppression of the communist rebellion, the law was renamed the Assembly and Parade Act on July 27, 1992, and relevant provisions thereof were amended to be in accord with the changes in society. The Assembly and Parade Act, therefore, is not a product of martial law. The reason for enacting the law is that the activities of assemblies and parades may incidentally breach the pub-

法務部（兼代行政院）主張：我國集會、遊行之法律係解嚴後，為保障合法舉行之集會、遊行及順應當時環境之需要所制定，由總統於七十七年一月二十日公布施行，名稱為動員戡亂時期集會遊行法。其後因動員戡亂時期之終止，於八十一年七月二十七日將名稱修正為集會遊行法，並修正相關規定，以應社會之新發展趨勢，故集會遊行法非戒嚴制度之產物。其制定之原因係本於集會、遊行活動可能有侵害公共秩序之虞，基於維護公益及保障社會大眾人權之衡平，對集會、遊行之場所、時間、方式等，酌予合理限制，要非賦予公權力對表現自由予以壓制或剝奪為目的，符合憲法第十一條保障表現自由所追求探究真理、健全民主程序、自我實現等基本價值。為避免集會、遊行活動侵害公益而對民眾之生活安寧與安全，交通秩序、居家品質或環境衛生產生影響或發生侵害情事，依憲法第二十三條規定，以法律為必要之限制，而採準則主義之許可制，亦符合比例原則。至於集

lic order. In order to balance the preservation of public interests and the protection of human rights, the place, time, manner, etc., of assemblies and parades are reasonably restricted. The restrictions are not intended to confer on the government the power to suppress or withhold the freedom of expression and are thus consistent with the basic values of pursuit of the truth, integration of democratic procedures, and self-realization that are embodied in the protection of freedom of expression under Article 11 of the Constitution. To prevent the infringement of public interests and thus any influence on, or breach of, the public quiet and safety, the traffic order, quality of residence, or environmental sanitation, certain necessary restrictions, adopting the system of guided approval, are prescribed by law in accordance with Article 23 of the Constitution, which are consistent with the principle of proportionality. As to Article 29 of the Assembly and Parade Act, which imposes criminal penalties on violators, the legislators enacted it after evaluating its deterrence and punitive levels, which are not inappropriate from the viewpoint of legis-

會遊行法第二十九條規定對於觸犯者處以刑事罰，係立法上衡量其反社會性之強弱、可非難性之高低而制定，自立法政策言，並無不妥。又我國自七十六年七月十五日解嚴、八十年五月一日終止動員戡亂，回復平時憲政。惟衡諸兩岸關係，中共對我之敵對狀態並未消除，其以武力威脅、飛彈恫嚇之危險仍然存在，為維護國家安全及社會秩序，對於集會、遊行所涉及有關國家安全之言論因可能產生內部不安，自有限制必要。主張共產主義與分裂國土之集會、遊行，危害中華民國之存在或自由民主之憲政秩序，參照憲法增修條文第五條第五項之規定意旨，應不受憲法保障云云。

lative policy. Our nation abolished the martial law on July 15, 1987, terminated the mobilization for suppression of the communist rebellion on May 1, 1991, and returned to a peacetime constitutional government. However, considering the cross-strait relationship, mainland China's hostility toward Taiwan has not been eliminated, with ever-present dangers of military threat and missile intimidation. Therefore, in order to maintain national security and the social order, it is necessary to restrict national security-related speech made during an assembly or a parade that may give rise to internal insecurity. An assembly or a parade that advocates communism and secession of territory endangers the existence of the Republic of China or the constitutional order of freedom and democracy, which, in reference to the intention of Article 5-V of the Amendments to the Constitution, should not be protected by the Constitution.

Citing the foregoing arguments of the Executive Yuan, the Ministry of the Interior and the Police Agency of the Min-

內政部及內政部警政署之主張除與前述行政院之主張相同者予以引用外，並稱：集會遊行法對於集會、遊行

istry of the Interior, have additionally alleged that: The Assembly and Parade Act has adopted the system of approval to review the applications for assemblies and parades due to concerns about the public interests of society and fundamental rights and interests of third parties when an assembly or a parade, as a constitutionally protected fundamental human right, is in progress. In order to guarantee the people's legitimate rights of assembly and parade and to ensure the stability of social order, it is not inconsistent with Article 23 of the Constitution that the Assembly and Parade Act imposes an obligation of prior application for approval. Besides, the Act adopts the principle of guidelines and, when making a decision as to an application for an assembly or a parade, the police agency must approve or deny according to the law and cannot legally deny a duly filed application. The system of prior approval is designed to allow an applicant enough time to prepare so that the competent authority will also be prepared in time and be able to respond properly. Sociological studies on the dangerous nature of crowds also reinforce the necessity of

之申請採用許可制，乃因集會、遊行固為憲法所保障之基本人權，惟其享有及行使，應顧及社會公益及他人之基本權益，集會遊行法為維護人民集會、遊行之合法權益，並確保社會秩序之安寧，課以事前申請許可之義務，於憲法第二十三條規定，並無不合。況同法係採準則主義，警察機關對於集會、遊行，唯有依法為准駁之處分，不得違法不予許可。採行事前許可制，既可使申請人有充裕時間準備，亦可使主管機關即時瞭解事態，妥為因應。社會學家對群眾危險性格之實證研究，亦認為有強化許可制之必要。在經驗法則上，對之實施事前許可規制，應屬必要，經民意調查結果，並為多數人所認同。再就本件事實以言，聲請人係因遊行前五日向警察機關申請，因不符集會遊行法第九條第一項規定而未獲許可，於集會、遊行中，經警察主管機關依同法第二十五條第一項規定警告、制止及命令解散仍不遵從，因而受刑事處罰。其涉及之法律僅同法第九條第一項、第二十五條第一項第一款及第二十九條規定而已。至於同法第四條規定則與聲請解釋之原因事實無關，違反其規定而主張共產主義或分裂國土，同法未設行政或刑事責任，可知其性質並非許可管制的主要目的。司

strengthening the system of approval. Empirically, it is necessary to implement the system of prior approval, which has also been endorsed by the majority of people based on their response to a public survey on the issue. Furthermore, as far as the facts of this case are concerned, the petitioner filed the application with the police agency five days before the parade. It is because of non-compliance with Article 9-I of the Assembly and Parade Act that the application was denied. Due to the refusal to obey the competent police authority's warning, a stop and dispersal order was issued during the assembly and parade and, based on Article 25-I of said Act, criminal penalties were imposed. The only provisions at issue are Articles 9-I, 25-I (i) and 29 of said Act. Article 4 of said Act is irrelevant to the facts on which this petition is based. Neither administrative nor criminal liability is prescribed as to any violation of said provision by advocating communism or secession of territory. It may thus be reasoned that the nature of this provision is not the main purpose of the control of approval. Therefore, the Judicial Yuan cannot make any

法院即不得為訴外解釋，就與確定終局裁判無關聯部分為合憲性審查。集會、遊行涉及集體意見的表達與溝通，影響公共政策的形成，終致參政權及請願權之行使，為社會少數族群藉以表達訴求之重要管道。惟因群眾活動易引起衝動、脫軌而影響安寧、交通及衛生等問題，自有必要以法律為相當之限制。其限制之寬嚴原有多樣，集會遊行法第八條、第十一條所採實係準則許可制，其與報備制之差別僅在行政程序有異，兩者在本質上並無不同。涉及公意形成之集會、遊行，若非有極重要之公共利益考量，事前管制集會、遊行之言論內容亦非憲法所能容許。集會遊行法第九條規定申請書應記載集會、遊行之目的，固可認為一種言論檢查，其用意僅在考量其造成公共危險之可能性，非對言論為抽象之價值判斷，雖然目的的檢驗可能涉及同法第十一條第一款所定違反第四條問題，因而是一種審查言論本身的標準。惟此規定實與憲法增修條文第五條第五項規定：「政黨之目的或其行為，危害中華民國之存在或自由民主之憲政秩序者為違憲」相呼應，此際警察機關仍得依同法第二十六條規定為准否之判斷。由於集會、遊行可能對公共秩序發生影響，集會遊行法對於室外集

interpretation beyond the scope of the petition by reviewing the constitutionality of any part irrelevant to the final and conclusive judgment. Assemblies and parades concern the expression and communication of collective will, affect the formation of public policies, and eventually relate to the exercise of the right to suffrage and to petition, which are significant means for the society's minority groups to express their views. Nevertheless, as activities of the masses tend to trigger reactions that will impact on peace, traffic and sanitation, it is necessary to impose reasonable restrictions by law. Nevertheless, the strictness of such restrictions varies. It is the system of guided approval that is adopted by Articles 8 and 11 of the Assembly and Parade Act, which differs from the system of reporting only in the administrative procedures, not in nature. With respect to an assembly or a parade involving the formation of the public will, prior control of the contents of the speech to be made during the assembly or parade is not allowed by the Constitution unless there are any compelling public interest considerations. Although the provisions of

會、遊行所採許可管制，符合比例原則。關此，同法第十一條規定除列舉情事外，主管機關應予許可，全無裁量餘地。即使具有上開除外情事，仍須依比例原則加以裁量。如不予許可，應附理由於三日內以書面通知負責人，並記載不服之救濟程序。其依第九條第一項但書之規定提出申請者，不許可之通知應於二十四小時內為之。集會、遊行之申請於六日前提出；如因天然災害或其他不可預見之重大事故而有正當理由者，則於二日前提出即可。此項期間之規定與其他民主國家之管制規定比較並不為過。至於偶發性遊行，雖因無發起人而無從申請，主管機關亦得斟酌第二十六條規定之比例原則而為處理。從而對於集會、遊行，即不得謂已為過度之限制。又集會遊行法僅對負責人、代理人或首謀者課以法律責任，對於參加者則未加限制；第十四條對於許可集會、遊行者，亦得課以六項必要之限制；第十五條復規定撤銷或變更許可之要件，無非因人、事、時、地、物之不同而避免過度管制。事後報備制對已造成之公益損害僅能追懲而不能預防，對於社會趨於多元化、利益與觀念衝突不斷滋生、寬容的政治文化尚未形成而又地狹人稠的台灣，可能造成難以估計的不利影

Article 9 of the Assembly and Parade Act, in requiring that the purpose of the assembly or parade be specified, may be regarded as a form of speech censorship, the mere intention thereof is to assess the likelihood of public danger that may be caused by the assembly or parade, but not to pass any judgment on the abstract value of the speech. Although the review of the purpose may imply the violation of Article 4 of said Act as provided by Article 11 (i) thereof, thus qualifying as a criterion by which the speech itself is censored, the said provision actually echoes Article 5-V of the Amendments to the Constitution, which provides, "A political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the nation's constitutional order of freedom and democracy." At that point, the police agency may still decide whether or not an application should be approved in accordance with Article 26 of said Act. Since an assembly or parade may impact on public order, the control of approval as adopted by the Assembly and Parade Act is in line with the principle of proportionality. In that regard, the mere fact that Article 11 (ii) thereof requires that the purpose of the assembly or parade be specified does not violate the Constitution. Article 11 (iii) thereof provides that the assembly or parade shall be prohibited if there is sufficient evidence to establish that it will endanger national security, social order or public interest. This provision does not violate the principle of clarity of law. Article 28 thereof provides that any person who violates Article 11 (iii) thereof shall be punished with imprisonment for not more than two years, detention or a fine of not more than NT$ 60,000. Article 29 thereof provides that any person who violates Article 4 thereof shall be punished with imprisonment for not more than three years, detention or a fine of not more than NT$ 60,000. Article 30 thereof provides that any person who violates Article 9 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 31 thereof provides that any person who violates Article 10 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 32 thereof provides that any person who violates Article 11 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 33 thereof provides that any person who violates Article 12 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 34 thereof provides that any person who violates Article 13 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 35 thereof provides that any person who violates Article 14 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 36 thereof provides that any person who violates Article 15 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 37 thereof provides that any person who violates Article 16 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 38 thereof provides that any person who violates Article 17 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 39 thereof provides that any person who violates Article 18 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 40 thereof provides that any person who violates Article 19 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 41 thereof provides that any person who violates Article 20 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 42 thereof provides that any person who violates Article 21 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 43 thereof provides that any person who violates Article 22 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 44 thereof provides that any person who violates Article 23 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 45 thereof provides that any person who violates Article 24 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 46 thereof provides that any person who violates Article 25 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 47 thereof provides that any person who violates Article 26 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 48 thereof provides that any person who violates Article 27 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 49 thereof provides that any person who violates Article 28 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 50 thereof provides that any person who violates Article 29 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 51 thereof provides that any person who violates Article 30 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 52 thereof provides that any person who violates Article 31 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 53 thereof provides that any person who violates Article 32 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 54 thereof provides that any person who violates Article 33 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 55 thereof provides that any person who violates Article 34 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 56 thereof provides that any person who violates Article 35 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 57 thereof provides that any person who violates Article 36 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 58 thereof provides that any person who violates Article 37 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 59 thereof provides that any person who violates Article 38 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 60 thereof provides that any person who violates Article 39 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 61 thereof provides that any person who violates Article 40 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 62 thereof provides that any person who violates Article 41 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 63 thereof provides that any person who violates Article 42 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 64 thereof provides that any person who violates Article 43 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 65 thereof provides that any person who violates Article 44 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 66 thereof provides that any person who violates Article 45 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 67 thereof provides that any person who violates Article 46 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 68 thereof provides that any person who violates Article 47 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 69 thereof provides that any person who violates Article 48 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 70 thereof provides that any person who violates Article 49 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 71 thereof provides that any person who violates Article 50 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 72 thereof provides that any person who violates Article 51 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 73 thereof provides that any person who violates Article 52 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 74 thereof provides that any person who violates Article 53 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 75 thereof provides that any person who violates Article 54 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 76 thereof provides that any person who violates Article 55 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 77 thereof provides that any person who violates Article 56 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 78 thereof provides that any person who violates Article 57 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 79 thereof provides that any person who violates Article 58 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 80 thereof provides that any person who violates Article 59 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 81 thereof provides that any person who violates Article 60 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 82 thereof provides that any person who violates Article 61 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 83 thereof provides that any person who violates Article 62 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 84 thereof provides that any person who violates Article 63 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 85 thereof provides that any person who violates Article 64 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 86 thereof provides that any person who violates Article 65 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 87 thereof provides that any person who violates Article 66 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 88 thereof provides that any person who violates Article 67 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 89 thereof provides that any person who violates Article 68 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 90 thereof provides that any person who violates Article 69 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 91 thereof provides that any person who violates Article 70 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 92 thereof provides that any person who violates Article 71 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 93 thereof provides that any person who violates Article 72 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 94 thereof provides that any person who violates Article 73 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 95 thereof provides that any person who violates Article 74 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 96 thereof provides that any person who violates Article 75 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 97 thereof provides that any person who violates Article 76 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 98 thereof provides that any person who violates Article 77 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 99 thereof provides that any person who violates Article 78 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 100 thereof provides that any person who violates Article 79 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 101 thereof provides that any person who violates Article 80 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 102 thereof provides that any person who violates Article 81 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 103 thereof provides that any person who violates Article 82 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 104 thereof provides that any person who violates Article 83 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 105 thereof provides that any person who violates Article 84 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 106 thereof provides that any person who violates Article 85 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 107 thereof provides that any person who violates Article 86 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 108 thereof provides that any person who violates Article 87 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 109 thereof provides that any person who violates Article 88 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 110 thereof provides that any person who violates Article 89 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 111 thereof provides that any person who violates Article 90 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 112 thereof provides that any person who violates Article 91 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 113 thereof provides that any person who violates Article 92 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 114 thereof provides that any person who violates Article 93 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 115 thereof provides that any person who violates Article 94 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 116 thereof provides that any person who violates Article 95 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 117 thereof provides that any person who violates Article 96 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 118 thereof provides that any person who violates Article 97 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 119 thereof provides that any person who violates Article 98 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 120 thereof provides that any person who violates Article 99 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 121 thereof provides that any person who violates Article 100 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 122 thereof provides that any person who violates Article 101 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 123 thereof provides that any person who violates Article 102 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 124 thereof provides that any person who violates Article 103 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 125 thereof provides that any person who violates Article 104 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 126 thereof provides that any person who violates Article 105 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 127 thereof provides that any person who violates Article 106 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 128 thereof provides that any person who violates Article 107 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 129 thereof provides that any person who violates Article 108 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 130 thereof provides that any person who violates Article 109 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 131 thereof provides that any person who violates Article 110 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 132 thereof provides that any person who violates Article 111 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 133 thereof provides that any person who violates Article 112 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 134 thereof provides that any person who violates Article 113 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 135 thereof provides that any person who violates Article 114 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 136 thereof provides that any person who violates Article 115 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 137 thereof provides that any person who violates Article 116 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 138 thereof provides that any person who violates Article 117 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 139 thereof provides that any person who violates Article 118 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 140 thereof provides that any person who violates Article 119 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 141 thereof provides that any person who violates Article 120 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 142 thereof provides that any person who violates Article 121 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 143 thereof provides that any person who violates Article 122 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 144 thereof provides that any person who violates Article 123 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 145 thereof provides that any person who violates Article 124 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 146 thereof provides that any person who violates Article 125 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 147 thereof provides that any person who violates Article 126 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 148 thereof provides that any person who violates Article 127 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 149 thereof provides that any person who violates Article 128 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 150 thereof provides that any person who violates Article 129 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 151 thereof provides that any person who violates Article 130 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 152 thereof provides that any person who violates Article 131 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 153 thereof provides that any person who violates Article 132 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 154 thereof provides that any person who violates Article 133 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 155 thereof provides that any person who violates Article 134 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 156 thereof provides that any person who violates Article 135 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 157 thereof provides that any person who violates Article 136 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 158 thereof provides that any person who violates Article 137 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 159 thereof provides that any person who violates Article 138 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 160 thereof provides that any person who violates Article 139 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 161 thereof provides that any person who violates Article 140 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 162 thereof provides that any person who violates Article 141 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 163 thereof provides that any person who violates Article 142 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 164 thereof provides that any person who violates Article 143 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 165 thereof provides that any person who violates Article 144 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 166 thereof provides that any person who violates Article 145 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 167 thereof provides that any person who violates Article 146 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 168 thereof provides that any person who violates Article 147 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 169 thereof provides that any person who violates Article 148 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 170 thereof provides that any person who violates Article 149 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 171 thereof provides that any person who violates Article 150 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 172 thereof provides that any person who violates Article 151 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 173 thereof provides that any person who violates Article 152 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 174 thereof provides that any person who violates Article 153 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 175 thereof provides that any person who violates Article 154 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 176 thereof provides that any person who violates Article 155 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 177 thereof provides that any person who violates Article 156 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 178 thereof provides that any person who violates Article 157 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 179 thereof provides that any person who violates Article 158 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 180 thereof provides that any person who violates Article 159 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 181 thereof provides that any person who violates Article 160 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 182 thereof provides that any person who violates Article 161 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 183 thereof provides that any person who violates Article 162 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 184 thereof provides that any person who violates Article 163 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 185 thereof provides that any person who violates Article 164 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 186 thereof provides that any person who violates Article 165 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 187 thereof provides that any person who violates Article 166 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 188 thereof provides that any person who violates Article 167 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 189 thereof provides that any person who violates Article 168 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 190 thereof provides that any person who violates Article 169 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 191 thereof provides that any person who violates Article 170 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 192 thereof provides that any person who violates Article 171 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 193 thereof provides that any person who violates Article 172 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 194 thereof provides that any person who violates Article 173 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 195 thereof provides that any person who violates Article 174 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 196 thereof provides that any person who violates Article 175 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 197 thereof provides that any person who violates Article 176 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 198 thereof provides that any person who violates Article 177 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 199 thereof provides that any person who violates Article 178 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 200 thereof provides that any person who violates Article 179 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 201 thereof provides that any person who violates Article 180 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 202 thereof provides that any person who violates Article 181 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 203 thereof provides that any person who violates Article 182 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 204 thereof provides that any person who violates Article 183 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 205 thereof provides that any person who violates Article 184 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 206 thereof provides that any person who violates Article 185 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 207 thereof provides that any person who violates Article 186 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 208 thereof provides that any person who violates Article 187 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 209 thereof provides that any person who violates Article 188 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 210 thereof provides that any person who violates Article 189 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 211 thereof provides that any person who violates Article 190 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 212 thereof provides that any person who violates Article 191 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 213 thereof provides that any person who violates Article 192 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 214 thereof provides that any person who violates Article 193 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 215 thereof provides that any person who violates Article 194 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 216 thereof provides that any person who violates Article 195 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 217 thereof provides that any person who violates Article 196 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 218 thereof provides that any person who violates Article 197 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 219 thereof provides that any person who violates Article 198 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 220 thereof provides that any person who violates Article 199 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 221 thereof provides that any person who violates Article 200 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 222 thereof provides that any person who violates Article 201 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 223 thereof provides that any person who violates Article 202 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 224 thereof provides that any person who violates Article 203 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 225 thereof provides that any person who violates Article 204 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 226 thereof provides that any person who violates Article 205 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 227 thereof provides that any person who violates Article 206 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 228 thereof provides that any person who violates Article 207 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 229 thereof provides that any person who violates Article 208 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 230 thereof provides that any person who violates Article 209 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 231 thereof provides that any person who violates Article 210 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 232 thereof provides that any person who violates Article 211 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 233 thereof provides that any person who violates Article 212 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 234 thereof provides that any person who violates Article 213 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 235 thereof provides that any person who violates Article 214 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 236 thereof provides that any person who violates Article 215 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 237 thereof provides that any person who violates Article 216 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 238 thereof provides that any person who violates Article 217 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 239 thereof provides that any person who violates Article 218 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 240 thereof provides that any person who violates Article 219 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 241 thereof provides that any person who violates Article 220 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 242 thereof provides that any person who violates Article 221 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 243 thereof provides that any person who violates Article 222 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 244 thereof provides that any person who violates Article 223 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 245 thereof provides that any person who violates Article 224 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 246 thereof provides that any person who violates Article 225 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 247 thereof provides that any person who violates Article 226 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 248 thereof provides that any person who violates Article 227 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 249 thereof provides that any person who violates Article 228 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 250 thereof provides that any person who violates Article 229 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 251 thereof provides that any person who violates Article 230 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 252 thereof provides that any person who violates Article 231 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 253 thereof provides that any person who violates Article 232 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 254 thereof provides that any person who violates Article 233 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 255 thereof provides that any person who violates Article 234 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 256 thereof provides that any person who violates Article 235 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 257 thereof provides that any person who violates Article 236 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 258 thereof provides that any person who violates Article 237 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 259 thereof provides that any person who violates Article 238 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 260 thereof provides that any person who violates Article 239 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 261 thereof provides that any person who violates Article 240 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 262 thereof provides that any person who violates Article 241 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 263 thereof provides that any person who violates Article 242 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 264 thereof provides that any person who violates Article 243 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 265 thereof provides that any person who violates Article 244 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 266 thereof provides that any person who violates Article 245 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 267 thereof provides that any person who violates Article 246 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 268 thereof provides that any person who violates Article 247 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 269 thereof provides that any person who violates Article 248 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 270 thereof provides that any person who violates Article 249 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 271 thereof provides that any person who violates Article 250 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 272 thereof provides that any person who violates Article 251 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 273 thereof provides that any person who violates Article 252 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 274 thereof provides that any person who violates Article 253 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 275 thereof provides that any person who violates Article 254 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 276 thereof provides that any person who violates Article 255 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 277 thereof provides that any person who violates Article 256 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 278 thereof provides that any person who violates Article 257 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 279 thereof provides that any person who violates Article 258 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 280 thereof provides that any person who violates Article 259 thereof shall be punished with imprisonment for not more than one year, detention or a fine of not more than NT$ 30,000. Article 281 thereof provides that any person who violates Article 260 thereof shall be punished with imprisonment for not more than one

gard, the competent authority has no discretionary power to deny any application unless any of the situations enumerated in Article 11 of said Act exist. Even if any of the enumerated situations exist, discretion should still be used to such extent as is consistent with the principle of proportionality. If an application is denied, the reasons thereof, along with any remedial procedure, shall be given in writing to the responsible person within three days. A notice of denial shall be provided within twenty-four hours if an application is submitted in accordance with the proviso of Article 9 of said Act. An application shall be submitted six days prior to an assembly or a parade unless there is any justifiable reason, because of a natural disaster or any other unforeseeable major accident, in which case an application may be submitted two days prior to an assembly or parade. As for an incidental parade, the competent authority may approve it after giving due consideration to the principle of proportionality as provided by Article 26 thereof even though no application can be submitted in the absence of an originator. As a result, it

集會遊行法採事前許可制，揆諸群眾之危險特性並影響交通、警力之分配及群眾相互間之對立、同法第二十六條有關比例原則之規定等情形，尚未違反憲法第二十三條所定必要之程度。至於因情況危迫，有正當理由，不及依現行集會遊行法之規定提出申請者，可從立法技術上予以解決，要與違憲與否無涉云云。

should not be reasoned that excessive restrictions have been imposed on assemblies and parades. In addition, the Assembly and Parade Act merely imposes legal liability on a responsible person, agent or chief violator, but imposes no restrictions on the participants. Article 14 thereof also imposes six restrictions on an approved assembly or parade. In addition, Article 15 thereof provides the requirements for withdrawal or modification of an approval. All of the foregoing provisions are meant to prevent excessive control due to the differences in persons, matters, times, places and objects. A system of subsequent reporting can not prevent damage to public interests, but can merely punish unlawful behavior. As such, it may cause inestimable negative influence on the densely populated nation of Taiwan, which is moving towards a pluralistic society, with ever-increasing conflicts of interests and ideas and yet without a political culture of tolerance. Furthermore, since Article 11 (ii) thereof provides that there are facts showing the likelihood that national security, social order or public welfare will be jeopardized, it should not

be regarded as being overly ambiguous. Moreover, the competent authority has never taken any abusive action due to the ambiguity of said provision. As to the issue regarding the imposition of criminal penalties on the leader of an assembly or a parade which has not been approved, the Assembly and Parade Act does not impose any undue restrictions insofar as the two-phase punitive measures for a leader who breaches prior and on-the-spot administrative control are concerned. A question that is likely to raise constitutional concerns, if any, may be whether administrative abuse of power has not been prevented from a systemic perspective. In other words, a criminal court should simultaneously consider the legality of an order to disperse and the subsequent action to stop so as to ensure that abuse of administrative power does not occur. In respect of Article 29 of the Assembly and Parade Act, an outdoor assembly or parade may infringe upon other legally recognized and protected interests, rather than pose mere inconveniences for the administration, and, as such, imposition of criminal penalties on violators

does not transgress the scope of legislative discretion. The said provision and Article 28 of said Act vary in that their respective requisite elements, as far as both subjective and objective conditions are concerned, differ to some extent. Should Article 29 of said Act be deleted, any refusal to obey an order to disperse and any noncompliance with an order to stop during an assembly or a parade would not be subject to any criminal liability if and when the requisite elements of Article 149 of the Criminal Code are not satisfied. It would not be rational to do so unless such maliciousness as manifested by the repeated violations prescribed in Article 29 of the Assembly and Parade Act is subject to criminal punishment. Under the principle of constitutional interpretation, a law enacted by the legislature should be so interpreted as to regard it as constitutional unless there is any clear basis on which a declaration of its unconstitutionality and voidance is warranted. Having considered such circumstances as the potentially dangerous nature of a crowd, distribution of the police force, confrontation between opposing groups, and the principle of pro-

portionality as provided in Article 26 of said Act, the system of prior approval as adopted by the Assembly and Parade Act does not go beyond the extent of necessity as provided in Article 23 of the Constitution. As for the emergency situations that justify approval of an application not meeting the deadline required by the existing Assembly and Parade Act, the problem may be solved by means of legislative provisions, which should not involve any issue of unconstitutionality.

The Ministry of Transportation and Communications has alleged that: Since an assembly or a parade may escalate into something unforeseen as the number of the people involved increases, thus affecting traffic order and safety, the adoption of the system of guided approval may enable the competent authority to take timely precautions by making adequate traffic control plans, thus avoiding traffic tie-ups or chaos that will infringe upon the rights and interests of other road users. According to earlier cases, the social costs have indeed been incalculable when an assembly or parade led to the blocking of

交通部提出書狀主張：因集會、遊行可能因量增而產生質變，易影響交通秩序，妨礙交通安全，採用準則許可制，可使主管機關對集會、遊行及早未雨綢繆，妥善規劃交通管制，避免交通陷於停滯或混亂，造成妨礙他人使用道路之權益。依過去發生之實例，因集會、遊行而霸佔高速公路、率眾夜宿車站前廣場、臥軌妨礙鐵路交通，對於社會秩序及公共利益之危害，均屬顯著而首當其衝，所付出之社會成本實難以估計。集會遊行法現行規定應符合憲法第十四條保障人民集會自由之意旨及第二十三條法律保留之原則等語。

superhighways, the overnight stay of a large crowd at a plaza in front of a railroad station, or people lying on the tracks to stop rail traffic, noticeably threatening the social order and public interests. The current provisions of the Assembly and Parade Act should be consistent with the constitutional intent of Article 14 of the Constitution, which protects the people's freedom of assembly, and in line with the principle of legal reservation as embodied in Article 23 thereof.

Having examined the substance of all the arguments, this Court hereby issues this Interpretation based on the following reasons:

本院斟酌全辯論意旨，作成本解釋，其理由如左：

It is unambiguously provided by Article 78 of the Constitution that the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders. Naturally, an interpretation made by said Yuan shall be binding on various state organs, as well as the people. As such, it differs distinctly from an ordinary court, which accepts and hears civil and criminal cases, from an

司法院解釋憲法，並有統一解釋法律及命令之權，為憲法第七十八條所明定。其所為之解釋，自有拘束全國各機關及人民之效力。此與普通法院受理民、刑事訴訟事件；行政法院審理行政訴訟案件；公務員懲戒委會審議公務員之懲戒案件，其所為裁判或議決，僅於該具體事件有拘束力者迥然有異。人民、法人或政黨於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起

administrative court, which hears administrative litigation cases, and from the Commission on the Discipline of Public Functionaries, which deliberates on cases regarding the discipline of public functionaries, in that the judgments or resolutions rendered or made by the aforesaid bodies merely have binding force on the specific cases heard by them. When an individual, a legal entity, or a political party, whose constitutional right was infringed upon and remedies provided by law for such infringement had been exhausted, has questions about the constitutionality of the statute or regulation relied thereupon by the court of last resort in its final judgment, petitions for interpretation may be made in accordance with Article 5-I (ii) of the Constitutional Interpretation Procedure Act. Undoubtedly, in making an interpretation pursuant to said provision, the Justices will focus upon the statute or regulation relied thereupon by the court of last resort in its final judgment and determine whether or not a constitutional right of an individual, a legal entity or a political party was infringed upon. However, in respect of the system under

訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得依司法院大法官審理案件法第五條第一項第二款規定聲請解釋。大法官依此規定所為解釋，固以該確定終局裁判所適用之法律或命令為標的，就人民、法人或政黨於其憲法上所保障之權利有無遭受不法侵害為審理對象。惟人民聲請憲法解釋之制度，除為保障當事人之基本權利外，亦有闡明憲法真義以維護憲政秩序之目的，故其解釋範圍自得及於該具體事件相關聯且必要之法條內容有無牴觸憲法情事而為審理。揆諸本院釋字第二一六號解釋，聲請意旨係就前司法行政部發布關於強制執行事件之兩項函示，發生牴觸關稅法疑義，聲請解釋，該號解釋則對法官在審判上不受司法行政機關所發命令拘束，作成明確之釋示。釋字第二八九號解釋，其聲請意旨僅係主張財務案件處理辦法第六條有牴觸憲法之疑義，本院大法官則解釋同辦法之訂定係法制未備前之措施，爰定期間宣告辦法之全部失其效力。釋字第三二四號解釋，其聲請意旨係謂海關管理貨櫃辦法第二十六條規定有牴觸憲法之疑義，上開解釋則附加「該辦法尚涉及公法契約之問題，關於公法契約之基本規範，亦宜由有關機關儘速立法，妥為

which the people petition for a constitutional interpretation, the purposes thereof are not only to protect the fundamental rights of the parties concerned, but also to elaborate on the genuine intent of the Constitution so as to safeguard the constitutional order. Therefore, the scope of interpretation may, of course, so extend as to review the constitutionality of the provisions of law relevant and necessary to a specific case. For instance, in respect of J. Y. Interpretation No. 216, the purport of the petition for interpretation was that there had been questions about two directives issued by the erstwhile Ministry of Judicial Administration in regard to compulsory enforcement matters, which were thought to be in conflict with the Customs Act. The said interpretation gave a clear explanation that judges are not bound by directives issued by a judicial administration body. As for J. Y. Interpretation No. 289, the purport of the petition for interpretation was merely that Article 6 of the Regulation on the Handling of Financial Matters might have violated the Constitution. Nonetheless, the Justices opined that said Regulation had been a temporary

訂定。」釋字第三三九號解釋，其聲請人謂財政部六十六年十二月二十日台財稅字第三八五七二號函釋意旨牴觸憲法第十九條及貨物稅條例第十八條規定，並違反「從新從輕」之原則，本院大法官則併將六十年一月九日修正公布之貨物稅條例第十八條第一項第十二款規定宣告應不予援用。釋字第三九六號解釋，其聲請人係以公務員懲戒法未規定審級救濟，牴觸憲法第十六條關於保障人民訴訟權之意旨，聲請解釋。本院大法官則引申其義，謂懲戒機關應採法院之體制，懲戒案件之審議亦應本正當法律程序之原則，對被付懲戒人予以充分之程序保障，為合憲性之立法建制之宣示。此外，本院大法官對於立法委員依司法院大法官審理案件法第五條第一項第三款規定提出之聲請所為釋字第四三六號解釋，亦就聲請意旨涉及軍事審判制度之全盤，宣示「為貫徹審判獨立原則，關於軍事審判之審檢分立、參與審判軍官之選任標準及軍法官之身分保障等事項，亦應一併檢討改進。」以上僅就本院解釋中擇其數則而為例示，足以說明大法官解釋憲法之範圍，不全以聲請意旨所述者為限。本件聲請人因違反集會遊行法案件，經台灣高等法院八十三年度上易字第五二七八號刑事判決以

measure adopted before a full-fledged statute was in place, and thus declared a deadline for said Regulation to completely cease to be effective. As to J. Y. Interpretation No. 324, the purport of the petition for interpretation was that Article 26 of the Regulation Governing the Customs Supervision of Containers might have been in conflict with the Constitution. The said interpretation added, *inter alia*, that "said Regulation also concerns the issues of contracts under public law, and, as such, the authorities concerned should enact appropriate laws as soon as possible in regard to the basic norms of contracts under public law." As to J. Y. Interpretation No. 339, the petitioner at issue alleged that Directive TTS-38572 issued by the Ministry of Finance on December 20, 1977, was not only inconsistent with Article 19 of the Constitution and Article 18 of the Commodity Tax Act, but also in violation of the principle of "preference of later in time and slighter in degree." The Justices, however, also declared that Article 18-I (xii) of the Commodity Tax Act as amended and promulgated on January 9, 1971, should no longer apply. In respect

犯集會遊行法第二十九條之罪處以刑罰，因認其於憲法第十四條規定所保障之集會自由遭受不法侵害，對於確定判決所適用集會遊行法以不確定法律概念賦予警察機關事前抑制與禁止集會、遊行，發生有牴觸憲法之疑義，聲請解釋。查聲請人所以受刑事法院判以罪刑，雖係因舉行室外集會、遊行未依集會遊行法第九條第一項規定於六日前向主管機關申請，致未獲許可，竟引導車隊及群眾遊行，經主管機關命令解散而不解散，仍繼續舉行，經制止而不遵從，為其原因事實，其牽涉之問題實係集會遊行法第八條第一項前段規定室外集會、遊行應向主管機關申請許可及相關規定是否牴觸憲法所發生之疑義，殊難僅就同法第九條第一項所定申請期限是否違憲一事為論斷。從而本件解釋應就集會遊行法所採室外集會、遊行應經事前申請許可之制度是否有牴觸憲法之疑義而為審理。

of J. Y. Interpretation No. 396, the petitioner filed a petition for interpretation on the ground that the Public Functionaries Disciplinary Act was in violation of Article 16 of the Constitution, which is intended to protect the people's right to institute legal proceedings, for failure to provide for any remedial hierarchy. Nonetheless, the Justices went beyond the purport of said petition to pronounce that the disciplinary authority should follow the court system and that, in deliberating on disciplinary matters, adequate procedural protection should be provided to a person subject to discipline based on the principle of due process of law, which is a pronouncement on the constitutionality of an organizational system. Additionally, in respect of J. Y. Interpretation No. 436, rendered in response to the petition filed by the legislators in accordance with Article 5-I (iii) of the Constitutional Interpretation Procedure Act, the justices declared that "such matters as the separation of the bench and the prosecution in a court-martial trial, the criteria for the selection of military officers participating in such a trial and the guarantee of court-martial

judgeship, should be reviewed and improved at once so as to maintain the principle of judicial independence." The foregoing are merely some examples of the interpretations made by this Court, which should be sufficient to explain that the scope of constitutional interpretation is not always limited to the purport of a petition. Criminal penalty was imposed on the petitioners at issue by the Taiwan High Court as per its Judgment S.Y.T No. 5278 (H. Ct., 1994) for violation of the Assembly and Parade Act. A petition for interpretation was duly filed by the petitioners on the ground that their constitutionally protected freedom of assembly as provided in Article 14 of the Constitution was wrongfully infringed upon, and that they had questions about the constitutionality of the Assembly and Parade Act relied upon by the court of last resort in its final judgment as said Act, by means of indefinite concepts of law, had empowered the police agency to restrain and prohibit an assembly or a parade prior to the occurrence thereof. The facts relevant to the criminal penalty imposed by a criminal court on the petitioners are that they failed

to submit an application to the competent authority six days prior to the outdoor assembly or parade in accordance with Article 9-I of the Assembly and Parade Act, that they nonetheless led the motorcade and the crowd marching in procession without approval, that they continued the march disregarding the order to disperse given by the competent authority, and that they disobeyed the order to stop given by same. Actually, the genuine issues involved should be the questions about the constitutionality of the first part of Article 8-I of the Assembly and Parade Act, which provides that an application for approval should be submitted to the competent authority in respect of an outdoor assembly or parade, as well as the relevant provisions. It is hard to merely pass any judgment on the constitutionality of the deadline for application as set forth in Article 9-I of said Act. Therefore, this Interpretation should rightfully examine the questions about the constitutionality of the Assembly and Parade Act in adopting the system of prior approval in respect of an outdoor assembly or parade.

Furthermore, Article 14 of the Constitution provides that the people have freedom of assembly. Like Article 11 of the Constitution, which provides for the freedom of speech, teaching, writing and publication, it is also a kind of freedom of expression. Based on the idea that sovereignty lies with the people, the people shall enjoy the right to freely discuss and fully express their opinions so that facts will be sought after and the truth will be discovered, and that the public will shall be formed by means of the democratic process to propose policies and enact laws. Therefore, the freedom of expression is the most important fundamental human right in practicing democracy. The purposes of the State, in protecting said right of the people, are to respect the dignity of an individual's independent existence and his or her autonomy to freely engage in activities. Of those rights, the freedom of assembly is mainly a form of freedom of speech exercised by the people through action, whereas the freedoms of teaching, writing, and publication are expression of opinions in spoken or written form. For the general public who do not have easy ac-

次查憲法第十四條規定人民有集會之自由，此與憲法第十一條規定之言論、講學、著作及出版之自由，同屬表現自由之範疇。本於主權在民之理念，人民享有自由討論、充分表達意見之權利，方能探究事實，發見真理，並經由民主程序形成公意，制定政策或法律。因此，表現自由為實施民主政治最重要的基本人權。國家所以保障人民之此項權利，乃以尊重個人獨立存在之尊嚴及自由活動之自主權為目的。其中集會自由主要係人民以行動表現言論自由；至於講學、著作、出版自由係以言論或文字表達其意見，對於一般不易接近或使用媒體言論管道之人，集會自由係保障其公開表達意見之重要途徑。依集會遊行法第二條規定，所謂集會係指於公共場所或公眾得出入之場所舉行會議、演說或其他聚眾活動。遊行則指於市街、道路、巷弄或其他公共場所或公眾得出入之場所之集體行進。集會自由以集體方式表達意見，為人民與政府間溝通之一種方式。人民經由此方式，主動提供意見於政府，參與國家意思之形成或影響政策之制定。從而國家在消極方面應保障人民有此自由而不予干預；積極方面應提供適當集會場所，並保護集會、遊行之安全，使其得以順利進行。又集

cess to the media, the freedom of assembly is an important means to express their opinions openly. According to Article 2 of the Assembly and Parade Act, an assembly is a meeting, speech or any other crowd-gathering activity held on the streets, roads, lanes or alleys, or at any other public places or areas accessible to the general public. A parade is a march by a crowd on the streets, roads, lanes or alleys or at any other public places or areas accessible to the general public. The freedom of assembly is a collective expression of opinions, which is a means of communication between the people and the government. By such means, the people may take the initiative in offering their opinions to the government, thus participating in the formation of the State's will or influencing the policy-making process. Accordingly, the State should not only passively protect said right of the people and not interfere with it, but also actively provide appropriate places for assembly and protect the safety of assemblies and parades so as to facilitate their smooth proceeding. Moreover, the protection of the freedom of assembly should not only

會自由之保障，不僅及於形式上外在自由，亦應及於實質上內在自由，俾使參與集會、遊行者在毫無恐懼的情況下進行。是以法律限制集會、遊行之權利，除應遵守憲法第二十三條必要性原則外，尚須符合明確性原則，使主管機關於決定是否限制人民之此項權利時，有明確規定其要件之法律為依據，人民亦得據此，依正當法律程序陳述己見，以維護憲法所保障之權利。

extend to the extrinsic freedom in form, but also to the intrinsic freedom in essence, thus enabling the participants in an assembly or a parade to proceed without fear. Therefore, in restricting the rights of assembly and parade by law, the principle of necessity as provided in Article 23 of the Constitution, as well as the principle of clarity and definiteness of law, must be complied with. Thus, the competent authority, in deciding if said right of the people should be restricted, will have a clearly defined legal basis to act upon, whereas the people, on the same basis, may also express their opinions under due process of law so as to preserve their constitutional right.

An assembly or a parade may be held either indoors or outdoors. An outdoor assembly or parade inevitably will affect public peace and safety, traffic order, quality of residence, or environmental sanitation. In order to prevent infringement upon other people's freedom, to maintain social order or public interests, the State may certainly make laws to impose necessary restrictions. Having con-

按集會、遊行有室內、室外之分，其中室外集會、遊行對於他人之生活安寧與安全、交通秩序、居家品質或環境衛生難免有不良影響。國家為防止妨礙他人自由、維持社會秩序或公共利益，自得制定法律為必要之限制。其規範之內容仍應衡量表現自由與其所影響社會法益之價值，決定限制之幅度，以適當之方法，擇其干預最小者為之。對於集會、遊行之限制，大別之，有追懲

sidered the value of the freedom of expression and that of other legally recognized and protected interests of the society affected by said freedom, in formulating relevant regulations, the extent of restrictions should then be determined, using proper methods and selecting the least intrusive means. In respect of the restrictions on an assembly or a parade, there are roughly three systems in place, i.e., the punitive, reporting and approval systems. Article 8-II of the Assembly and Parade Act provides that no application for approval is required for an indoor assembly. Although the first part of Paragraph I of said Article provides that an application for approval shall be submitted to the competent authority in the case of an outdoor assembly or parade, the proviso thereof excludes its application to the following: (i) (an assembly or a parade) held in accordance with law or regulation; (ii) academic, artistic, literary, travel, or sports contests or other activities of similar nature; and (iii) religious, folk, wedding, funeral, festive, or celebratory activities. Apparently, the system of approval is the one adopted by the Assembly and Parade

制、報備制及許可制之分。集會遊行法第八條第二項規定室內集會無須申請許可，同條第一項前段雖規定室外集會、遊行，應向主管機關申請許可，惟其但書則規定：一、依法令規定舉行者。二、學術、藝文、旅遊、體育競賽或其他性質相類之活動。三、宗教、民俗、婚、喪、喜、慶活動，則均在除外之列，可見集會遊行法係採許可制。對此事前行政管制之規定，判斷是否符合憲法第二十三條之比例原則，仍應就相關聯且必要之規定逐一審查，並非採用追懲制或報備制始得謂為符合憲政原則，採用事前管制則係侵害集會自由之基本人權。聲請意旨執此指摘，自非有理由。於事前審查集會、遊行之申請時，苟著重於時間、地點及方式等形式要件，以法律為明確之規定，不涉及集會、遊行之目的或內容者，則於表現自由之訴求不致有所侵害。主管機關為維護交通安全或社會安寧等重要公益，亦得於事前採行必要措施，妥為因應。

Act. In deciding whether the relevant provisions regarding prior administrative control are in line with the principle of proportionality set forth in Article 23 of the Constitution, the provisions of law relevant and necessary to a specific case must be examined one by one. It ought not to be reasoned that the system will be unconstitutional unless either the punitive system or reporting system is adopted, or that the system will be in violation of the freedom of assembly as a fundamental human right if the system of approval is used. Having so framed its argument, the purport of the petition at issue is considered groundless. In conducting a prior review of an application for an assembly or a parade, if the focus is on such formal requirements as time, place and methods, which are clearly prescribed by law, but not on the purposes or contents of the assembly or parade, there should be no infringement upon the freedom of expression. In order to maintain important public interests such as traffic safety or social peace, the competent authority may also take necessary precautions in advance and respond properly.

Article 11 of the Assembly and Parade Act provides that an application for an outdoor assembly or parade shall be approved unless any of the situations described in said Article exists. Hence, excepting any of the various situations described in said article, the competent authority is not allowed to deny any application for an assembly or a parade. As such, it is a system of guided approval. The constitutionality of the various situations enumerated in Article 11 of the Assembly and Parade Act will be explained as follows:

集會遊行法第十一條規定申請室外集會、遊行，除有同條所列情形之一者外，應予許可。從而申請集會、遊行，苟無同條所列各款情形，主管機關不得不予許可，是為準則主義之許可制。茲就集會遊行法第十一條所列各款情形，是否符合憲法意旨，分述之。

Subparagraph I: "Any violation of Articles 4, 6 or 10." Article 4 thereof provides, "There shall be no advocacy of communism or secession of territory during an assembly or a parade." "Advocacy of communism or secession of territory" is a political position. By making it a requirement for approval or denial of an assembly or parade, the competent authority is empowered to review the speech itself, thus abridging the freedom of expression as a fundamental right. Despite the provision of Article 5-V of the

第一款：「違反第四條、第六條、第十條之規定者。」按第四條規定「集會遊行不得主張共產主義或分裂國土。」所謂「主張共產主義或分裂國土」原係政治主張之一種，以之為不許可集會、遊行之要件，即係賦予主管機關審查言論本身的職權，直接限制表現自由之基本權。雖然憲法增修條文第五條第五項規定：「政黨之目的或其行為，危害中華民國之存在或自由民主之憲政秩序者為違憲。」惟政黨之組成為結社自由之保障範圍，且組織政黨既無須事前許可，須俟政黨成立後發生其目

Amendments to the Constitution, which reads, “A political party shall be considered unconstitutional if its goals or active ties endanger the existence of the Republic of China or the nation's constitutional order of freedom and democracy,” the organization of a political party is protected under the freedom of association. Besides, the organization of a political party does not require prior approval, and cannot be prohibited unless and until, subsequent to the establishment of the party, its goals or activities endanger the existence of the Republic of China or the nation's constitutional order of freedom and democracy, and a judgment is rendered by the Constitutional Court ordering its dissolution. There is no point in any existing law that forbids organizing a political party in advance. The Ministry of the Interior’s contention that Article 4 of the Assembly and Parade Act echoes the aforesaid provisions of Article 5 of the Amendments to the Constitution is simply not well reasoned. By making violation of Article 4 of the Assembly and Parade Act a requirement for denial of an assembly or a parade, the competent authority is em-

的或行為危害中華民國之存在或自由民主之憲政秩序者，經憲法法庭作成解散之判決後，始得禁止，現行法律亦未有事前禁止組成政黨之規定。相關機關內政部以集會遊行法第四條與憲法增修條文第五條上開規定相呼應云云，自非可採。以違反集會遊行法第四條規定為不許可之要件，係授權主管機關於許可集會、遊行以前，先就言論之內容為實質之審查。關此，若申請人於申請書未依集會遊行法第九條第一項第二款規定，於集會、遊行之目的為明確之記載，則主管機關固無從審查及此，至若室外集會、遊行經許可後發見有此主張，依當時之事實狀態為維護社會秩序、公共利益或集會、遊行安全之緊急必要，自得依同法第十五條第一項撤銷許可，而達禁止之目的；倘於申請集會、遊行之始，僅有此主張而於社會秩序、公共利益並無明顯而立即危害之事實，即不予許可或逕行撤銷許可，則無異僅因主張共產主義或分裂國土，即禁止集會、遊行，不僅干預集會、遊行參與者之政治上意見表達之自由，且逾越憲法第二十三條所定之必要性。又集會遊行法第六條係規定集會、遊行禁制區，禁止集會、遊行之地區為：一、總統府、行政院、司法院、考試院、各級法院。二、

powered to conduct a substantive review of the contents of the speech prior to the assembly or parade. In that regard, if an applicant does not specify in the application the purposes of an assembly or a parade in accordance with Article 9-I (ii) of the Assembly and Parade Act, then the competent authority will not be able to review such purposes. If such advocacy is later found during a previously approved outdoor assembly or parade, the permission may certainly be withdrawn in accordance with Article 15-I of said Act to achieve the objective of prohibiting the assembly or parade based on the facts and circumstances and as dictated by the urgency and necessity of maintaining social order, public interests or the safety of the assembly or parade. If, at the beginning of the application for an assembly or parade, the mere existence of such advocacy does not pose any clear and present danger to social order or public interests, but the application is nonetheless denied or an approval thereof is withdrawn, it is tantamount to prohibiting the assembly or parade merely for its advocacy of communism or secession of territory. As such, it

國際機場、港口。三、重要軍事設施地區。其範圍包括各該地區之週邊，同條第二項授權內政部及國防部劃定之。上開地區經主管機關核准者，仍得舉行。禁制區之劃定在維護國家元首、憲法機關及審判機關之功能、對外交通之順暢及重要軍事設施之安全，故除經主管機關核准者外，不得在此範圍舉行集會、遊行，乃為維持社會秩序或增進公共利益所必要，同條就禁制地區及其週邊範圍之規定亦甚明確，自屬符合法律明確性原則，並無牴觸憲法情事。至集會遊行法第十條規定不得為應經許可之室外集會、遊行之負責人、其代理人或糾察員資格係：一、未滿二十歲者。二、無中華民國國籍者。三、經判處有期徒刑以上之刑確定，尚未執行或執行未畢者。但受緩刑之宣告者，不在此限。四、受保安處分或感訓處分之裁判確定，尚未執行或執行未畢者。五、受禁治產宣告尚未撤銷者。以上規定限制集會、遊行之負責人、其代理人或糾察員應具中華民國國籍、具有完全行為能力之人、經法院判處有期徒刑以上之刑確定、或受保安處分、感訓處分之裁判確定，已執行完畢或受緩刑之宣告者，係限制此等人員主導公意之形成，要屬立法機關之職權行使範圍，與憲法第二十

not only interferes with the participants' freedom to express their political opinions, but also goes beyond the necessity as set forth in Article 23 of the Constitution. Furthermore, Article 6 of the Assembly and Parade Act provides for a restricted area for an assembly or a parade, which include the following: (i) Office of the President, Executive Yuan, Judicial Yuan, Examination Yuan, and various levels of courts; (ii) international airports and seaports; and (iii) important military facilities. The scope thereof includes the areas adjacent to the respective areas, which should be demarcated by the Ministry of the Interior and the Ministry of National Defense, as authorized by Paragraph II of said Article. Upon approval by the competent authority, an assembly or a parade may still be held in the aforesaid areas. The demarcation of the restricted areas is intended to preserve the functions of the head of state, constitutional organs and adjudicative body, unhindered flow of traffic and communications, and security of important military facilities. Therefore, no assembly or parade shall be held in said areas except as otherwise approved

三條規定亦無違背。

by the competent authority, which is necessary to maintain social order or to advance public interests. As the provisions of said Article are quite clear as to the restricted areas and adjacent areas, there is no breach of the principle of clarity and definiteness of law, and thus no violation of the Constitution. Article 10 of the Assembly and Parade Act provides for the negative qualifications for the person in charge of the assembly or parade that requires approval, as well as his or her agent or picket. Such qualifications are as follows: (i) any person under the age of twenty; (ii) any person who is not an R.O.C. citizen; (iii) any person who has been conclusively sentenced to imprisonment for a definite term, with such imprisonment not yet having been completed, except one who is on probation; (iv) any person who is subject to rehabilitative or reformative measures that have not been completed; or (v) any person who is subject to interdiction, which has not been revoked. The foregoing provisions, which limit the responsible person, his or her agent or picket to one who is an R.O.C. citizen, with full and complete

legal capacity, and, if conclusively sentenced to a fixed-term imprisonment or subject to rehabilitative or reformative measures, has fully served such term or punishment or is on probation, are meant to restrain such person from playing a leading role in the formation of the public will. As such, it is in the legislature's power and authority to do so, which does not contradict Article 23 of the Constitution.

Subparagraph II: "There are facts showing the likelihood that national security, social order or public welfare will be jeopardized." An assembly or a parade is a group activity engaged in by numerous persons to achieve a particular common goal, which, in a democratic society, is a means through which the people express their opinions in respect of the administrative measures of the government so as to form the public will. In order to ensure social order and safety, the constitutionally protected assemblies and parades must be conducted in a peaceful manner. Furthermore, the law shall not impose any restrictions thereupon unless an assembly

第二款：「有事實足認為有危害國家安全、社會秩序或公共利益之虞者。」按集會、遊行乃多數人為達到特定共同目的而從事的群體活動，在民主社會中，人民對於政府施政措施，常藉此方式表達意見，形成公意。為確保社會安寧秩序，憲法所保障之集會、遊行，必須以和平方式為之，若逾此限度，法律始得加以限制，惟法律限制之要件，應明確而具體。本款規定所稱「危害國家安全、社會秩序或公共利益」均為概括條款，有欠具體明確，委諸主管之警察機關，於短期間內判斷有此事實足認有妨害上開法益之虞，由於室外集會、遊行難免對他人之自由、社會秩序或公共利益有不利影響，主管機

or a parade is in violation of the law, provided that such law shall still be clear and definite in formulating its restrictive conditions. The phrase "national security, social order or public welfare will be jeopardized" as contained in said subparagraph is a generalized provision lacking specificity and definiteness, which empowers the competent police agency to pass judgment on the existence or nonexistence of said facts within a short period. As such, it is likely to infringe upon the aforesaid legally recognized and protected interest. Since an outdoor assembly or parade inevitably will affect the freedom of other people, social order or public interests, it is more likely than not that the people's freedom of assembly will be interfered with and thus such provision is not in line with the legislative intent of Article 11 of the Assembly and Parade Act in limiting the competent authority's power of discretion, if the mere basis on which the competent authority, after conducting a substantive review of the facts short of a clear and present danger, may either approve or deny an application is the possibility of future occurrence.

關對此尚未達到明顯而立即危險之事實若為實質審查，僅憑將來有發生之可能，即以之為准否之依據，易生干預人民集會自由之情事，與集會遊行法第十一條限制主管機關裁量權之立法意旨亦有未符。是本款規定列為事前審查之許可要件，即係侵害憲法所保障集會自由之權利。至若應經許可之集會、遊行未經許可者；或經許可以後有明顯而立即危險之事實者，主管機關為維護集會、遊行安全之緊急必要，得分別依集會遊行法第二十五條第一項第一款及第十五條第一項為適當之處置；又已有明顯而立即危險之事實發生，猶申請集會、遊行助長其危害之情事者，仍得不予許可，要屬當然。

Therefore, the requirements subject to prior censorship as listed in said subparagraph have infringed upon the constitutional right and freedom to assemble. As for an assembly or a parade subject to approval, if no approval is obtained or if, subsequent to approval, there are any facts showing a clear and present danger, the competent authority, as dictated by the urgency and necessity of maintaining the safety of the assembly or parade, may take appropriate action in accordance with Articles 25-I (i) and 15-I of the Assembly and Parade Act, respectively. Additionally, in the event that an application for an assembly or a parade is submitted despite a factual showing of clear and present danger, which will intensify the danger, the approval may be denied as a matter of course.

Subparagraph III: "There is likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property." The provision of said subparagraph is inconsistent with the constitutional intent partly due to the reasons described in the preceding paragraph. Ad-

第三款：「有危害生命、身體、自由或對財物造成重大損壞之虞者。」此款規定與憲法意旨不符，其理由除前段所述外，所稱「有危害生命、身體、自由或對財物造成重大損壞之虞者」，如僅一二參與者有此情形，是否即得不許可其他參與人舉辦集會、遊行；又既

ditionally, in respect of the "likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property," is it appropriate to deny other participants the right to hold an assembly or a parade if merely a couple of participants have acted to that effect? Besides, even though there is the abovementioned "likelihood", it has not gone so far as to give rise to criminal liability. In case any behavior breaches peace or order, resort to the penal provisions of the Social Order Maintenance Act should suffice. If an assembly or a parade is prohibited simply due to such situation, the principle of proportionality will be violated. Since the criteria for determining "likelihood" is neither specific nor clear, a substantive review thereof conducted by the competent authority prior to the assembly or parade will be in violation of the constitutional intent to protect such right. As with the preceding subparagraph, if any major event occurs subsequent to the approval of an outdoor assembly or parade, the competent authority, as dictated by the urgency and necessity of maintaining the safety of the assembly or parade, may still

有危害生命、身體、自由或對財物造成重大損壞之虞，即尚未至構成刑事責任之程度；倘有妨害安寧秩序之行為，則有社會秩序維護法之規定可資處罰。以有此情形，即禁止為集會、遊行，亦違反比例原則。所謂「之虞」認定之標準如何，既欠具體明確，則在舉辦集會、遊行以前，由主管機關就此為實質上之審查，與憲法保障之旨意，不無違背。室外集會、遊行於許可以後，若發生重大事故，主管機關為維護集會、遊行安全之緊急必要，仍有同法第十五條第一項前段規定之適用，與前款所述同。

act in accordance with the first part of Article 15-I of said Act.

Subparagraph IV: "The same time, place, and route have been applied for by another and been approved." If the same time, place, and route have been applied for by another and been approved, any additional assembly or parade, if approved, will give rise to confusion over the objectives of the assemblies or parades. And if the assemblies or parades are held in different ways, the possibility of breaching the social order will be even higher. If any people oppose the assembly or parade, the chance of crowd-agitating conflicts will increase proportionally. According to Article 26 of the Assembly and Parade Act, if the competent authority denies an application in accordance with said provision, it shall still do so in an equitable manner within the necessary scope of achieving the objectives after taking into consideration the balance and preservation of the people's right to assemble and parade and other legally recognized and protected interests. Thus, the provision of said subparagraph is consis-

第四款：「同一時間、處所、路線已有他人申請並經許可者。」同一時間、處所、路線已有他人申請集會、遊行，並經許可者，如再許可舉辦集會、遊行，將發生集會、遊行目的之混淆；倘舉辦之方式不同，其妨礙社會秩序之可能性亦更擴大，遇有反制集會、遊行者，激起群眾衝突之機會即相對增加。主管機關依此規定不予許可時，依集會遊行法第二十六條規定，固應公平合理考量人民集會、遊行權利與其他法益間之均衡維護，於不逾越所欲達成目的之必要限度，以適當之方式為之。此款規定符合憲法意旨。

tent with the constitutional intent.

Subparagraph V: "An application is submitted by a group that is not established according to the law, or permission for its establishment has been withdrawn, or it has been ordered to dissolve." The provision of said subparagraph limits an applicant for an assembly or a parade to a natural or juristic person, or any other group duly established pursuant to law due to the provisions of Article 7-I of the Assembly and Parade Act, which provides, "There shall be a person in charge of an assembly or parade," and Article 7-II thereof, which further provides, "In respect of an assembly or a parade held by a group duly established according to the law, the responsible person thereof shall be the representative of the group or anyone designated by him or her." A complete background check may be conducted on the representative of a group duly established according to the law, and an objective basis also exists, on which the identity of the responsible person will be determined. As such, it falls within the scope of legislative discretion and, therefore, is not inconsistent with the constitutional intent.

第五款：「未經依法設立或經撤銷許可或命令解散之團體，以該團體名義申請者。」本款規定所以限制集會、遊行之申請人為自然人、法人或其他經依法設立之團體，乃因集會遊行法第七條第一項規定：「集會、遊行應有負責人。」第二項又規定：「依法設立之團體舉行之集會、遊行，其負責人為該團體之代表人或其指定之人。」對於依法設立團體之代表人得為確實之審查，負責人之身分亦有客觀的認定依據，屬於立法自由形成範圍，尚未牴觸憲法意旨。

fore, is not in violation of the constitutional intent.

Subparagraph VI: "The application does not conform to the provisions of Article 9." Article 9-I of the Assembly and Parade Act provides that the person in charge of an outdoor assembly or parade shall fill out an application form, which shall be submitted to the competent authority for approval six days prior to the assembly or parade, specifying the following: (i) the personal information of the responsible person or his or her agent or picket, such as his or her name, residence, etc.; (ii) the purpose, methods, and the beginning and ending time of the assembly or parade; (iii) the place of the assembly or the route of the parade and the roundup and breakup points; (iv) the expected number of participants; and (v) the total number of vehicles and each vehicle's license number and/or types and numbers of articles. However, an application may be submitted two days prior to an assembly or a parade where there is any justifiable reason because of any natural disaster or any other unforeseeable

第六款：「申請不合第九條規定者。」集會遊行法第九條第一項係規定室外集會、遊行，應由負責人填具申請書，載明：一、負責人或其代理人、糾察員之姓名、住所等人別事項。二、集會、遊行之目的、方式及起訖期間。三、集會處所或遊行之路線及集合、解散地點。四、預定參加人數。五、車輛、物品之名稱、數量。於六日前向主管機關申請許可。但因天然災變或其他不可預見之重大事故而有正當理由者，得於二日前提出申請。同條第二項則規定代理人應提出代理同意書，集會處所之表明應檢具該處所之所有人或管理人之同意文件，遊行應檢具詳細路線圖。按室外集會、遊行對於他人之自由、社會秩序或公共利益難免產生影響。為避免集會、遊行活動侵害公益而對民眾之生活安寧與安全、交通秩序、居家品質或環境衛生產生影響或發生侵害情事，責令負責人於舉行集會、遊行前六日，向主管機關申請許可，列舉參與集會、遊行之負責人、集會、遊行之目的、方式及起訖時間、集會處所、遊行之路線及集合、解散地點、預定參加人數及車

major accident. Paragraph II of said article further provides that an agent shall present a letter of consent on behalf of his or her agency, that a document showing consent from the owner or manager of the place of the assembly shall be made available, and that a detailed route map shall be made available in the case of a parade. An outdoor assembly or parade will inevitably affect the freedoms of other people, social order or public interests. In order to prevent the infringement upon public interests and thus any influence on or breach of public peace and safety, traffic order, quality of residence, or environmental sanitation, the responsible person is directed to file an application with the competent authority for approval six days prior to the assembly or parade, specifying the person in charge of the assembly or parade, the purpose, methods, and the beginning and ending time of the assembly or parade, the place of the assembly, the route of the parade and the roundup and breakup points, the expected number of participants, the total number of vehicles and each vehicle's license number, and/or the number and types of articles,

輛、物品之數量等，不惟使申請人有充裕時間準備，亦可使主管機關瞭解事態，預為綢繆，妥善規劃交通管制，避免交通陷於停滯或混亂，造成過度妨礙他人使用道路之權益。從而本款規定關此部分，尚未逾越憲法第二十三條規定之必要程度。惟集會遊行法第九條第一項但書規定：「因天然災變或其他不可預見之重大事故而有正當理由者，得於二日前提出申請。」既云集會、遊行係因天然災變或其他不可預見之重大事故而舉行，豈有餘裕於二日前提出申請？所謂偶發性集會、遊行，既係群眾對不可預見之重大事故所為之立即反應而引起，即不可能期待負責人於二日前提出申請，亦不可能期待於重大事故發生後二日始舉辦集會、遊行。是許可制於偶發性集會、遊行殊無適用之餘地。憲法第十四條規定保障人民之集會自由，並未排除偶發性集會、遊行，若依集會遊行法第九條第一項規定之要件以觀，則凡事起倉卒者，因不及於法定期間內提出申請，其集會、遊行概屬違反第九條規定而應不予許可，依此規定而抑制人民之集會、遊行，於憲法保障之基本人權，未盡相符，亟待檢討改進。

etc., so that an applicant may have enough time to prepare and the competent authority will be ready for the situation and take timely precautions by making adequate traffic control plans, thus avoiding traffic standstills or chaos that will result in excessive interference with the rights and interests of other road users. Therefore, in that respect, the provision of this subparagraph does not go beyond the extent of necessity as provided in Article 23 of the Constitution. Nonetheless, the proviso of Article 9-I of the said Act reads, "An application may be submitted two days (prior to an assembly or a parade) where there is any justifiable reason because of any natural disaster or any other unforeseeable major accident." Since it is exactly because of a natural disaster or other unforeseeable major accident that an assembly or a parade will be held, how can one be expected to have time enough to submit an application two days earlier since the decision to hold an incidental assembly or parade is triggered by the instantaneous response of the crowd to an unforeseeable major accident, it is not likely that any responsible person will

submit the application two days earlier, nor is it likely that an assembly or a parade will be held two days after the occurrence of the major accident. As such, the system of approval simply should not apply in the case of an incidental assembly or parade. Article 14 of the Constitution guarantees the people's freedom of assembly, which does not prohibit an incidental assembly or parade. In view of the requirements listed in Article 9-I of the Assembly and Parade Act, any and all applications for assemblies or parades not filed within the statutorily prescribed period due to the suddenness of the events will be denied for violation of the provisions of said Article 9. Restraining the people's constitutionally guaranteed fundamental right to assemble and parade in accordance with said provisions is not consistent with the Constitution and thus requires prompt and speedy review and revision.

Article 29 of the Assembly and Parade Act provides, "Where an assembly or a parade is not dispersed after an order to disperse by the competent authority is

集會遊行法第二十九條規定：「集會、遊行經該管主管機關命令解散而不解散，仍繼續舉行經制止而不遵從，首謀者處二年以下有期徒刑或拘

given, and is still in progress in disobedience of an order to stop, the chief violator shall be subject to imprisonment for a term of not more than two years or for detention." In respect of an assembly or a parade, if any of the situations described in Article 25-I of said Act exist, the competent authority may warn, restrain, or issue an order to disperse. The said situations are as follows: (i) In the case of an assembly or a parade requiring approval, it is held without approval, or with approval having been withdrawn; (ii) There is any violation of the conditions or restrictive items for approval in the case of an approved assembly or parade; (iii) Taking advantage of the right to hold any of the types of assemblies or parades described in Article 8-I thereof, there is any violation of laws and/or regulations; and (iv) There is any other behavior in violation of laws and/or regulations. Article 11 of said Act provides that, unless any of the situations listed in the same article exist, the application for an outdoor assembly or parade shall be approved. To the extent that those items in regard to time, place, and manner are irrelevant to

役。」按集會、遊行而有同法第二十五條所定情事之一者，該管主管機關得予警告、制止或命令解散。其所定情事為：一、應經許可之集會、遊行未經許可或其許可經撤銷而擅自舉行者。二、經許可之集會、遊行，而有違反許可事項、許可限制事項者。三、利用第八條第一項各款集會、遊行，而有違反法令之行為者。四、有其他違反法令之行為者。同法第十一條規定申請室外集會、遊行，除有同條所列情形之一者外，應予許可。其中有關時間、地點及方式等未涉及集會、遊行之目的或內容之事項，與憲法保障集會自由之意旨尚無牴觸，則集會、遊行而有同法第二十五條所定情事者，該管主管機關為警告、制止或命令解散，與憲法第二十三條之規定亦無違背。倘集會、遊行經該管主管機關命令解散而不解散者，依同法第二十八條規定，處集會、遊行負責人或其代理人或主持人新台幣三萬元以上十五萬元以下罰鍰。此係規範集會、遊行不遵從主管機關所為解散命令，對於負責人、代理人或主持人所為之行政秩序罰。相互參酌，「經該管主管機關命令解散而不解散，仍繼續舉行經制止而不遵從」，第二十九條始對首謀者科以刑罰。因此，後者為前者之後續行為，應

the purposes or contents of the assembly or parade, the constitutional intent of protecting the freedom of assembly is not violated. And if any of the situations enumerated in Article 25 of said Act exist in respect of an assembly or a parade, the competent authority, in warning, restraining, or issuing an order to disperse, does not violate Article 23 of the Constitution, either. If an assembly or parade is not dispersed in compliance with the competent authority's order to disperse, the person in charge of the assembly or parade, or his or her agent or host shall be subject to an administrative fine of not less than NT$30,000 but not more than NT$150,000 in accordance with Article 28 of said Act. The foregoing is a penalty for offense against the order of administration, which is imposed on the person in charge of an assembly or a parade, or his or her agent or host for disobeying the competent authority's order to disperse. By cross-referencing, no criminal penalty will be inflicted upon the chief violator in accordance with Article 29 thereof unless and until "(an assembly or a parade) is not dispersed after an order to disperse by the

受處罰之人，亦未必相同。後者對於首謀者科以二年以下有期徒刑或拘役，乃處罰其一再不遵從解散及制止之命令。如再放任而不予取締，對於他人或公共秩序若發生不可預見之危險，主管機關亦無從適用刑事訴訟法之規定為必要之處分。至於社會秩序維護法第六十四條第一款規定之妨害安寧秩序須「意圖滋事，於公園、車站、輪埠、航空站或其他公共場所，任意聚眾，有妨礙公共秩序之虞，已受該管公務員解散命令，而不解散」為要件，刑法第一百四十九條規定之公然聚眾不遵令解散罪則須「公然聚眾，意圖為強暴脅迫，已受該管公務員解散命令三次以上，而不解散者」為處刑之對象。不論主觀要件與客觀要件，均與集會遊行法第二十九條規定之內容，有輕重之分，即不得指其違反憲法第二十三條規定之必要原則。又主管機關如何命令解散集會、遊行，以及用何種方式制止其繼續進行，涉及此項解散命令之當否，為事實認定問題。刑事法院於論罪科刑時，就犯罪行為之構成要件是否符合，應為確切之認定，尤其對於行為須出於故意為處罰之要件，亦應注意及之，乃屬當然。

competent authority is given, and is still in progress in disobedience of an order to stop." Therefore, the latter is an act subsequent to the former, and different persons may be subject to punishment for the respective acts. In respect of the latter act, the reason to subject the chief violator to a punishment of imprisonment for a term of not more than two years or for detention is to punish his or her repeated refusal to obey the disbursal and restraining order. If the competent authority does not enforce it, not only will it pose unforeseeable danger to other people or public order, but the competent authority will not be in a position to take necessary action pursuant to the applicable provisions of the Code of Criminal Procedure. The requisite elements for breach of peace and order as provided in Article 64-I of the Social Order Maintenance Act are to "assemble a crowd haphazardly at a park, station, seaport, airport or any other public place with the intent to cause trouble, which is likely to interfere with the public order, and to not disperse after an order to disperse is given by the public functionary in charge." And, as to the offense of a fla-

grant assembly of a crowd without regard to an order to disperse provided by Article 149 of the Criminal Code, the criminal penalty will be inflicted upon a person who "flagrantly assembles a crowd with the intent to engage in violence or coercion, and does not disperse it after three or more orders to disperse are given by the public functionary in charge." The aforesaid provisions and Article 29 of the Assembly and Parade Act vary in their levels of severity as far as both subjective and objective elements are concerned, and thus there is no violation of the principle of necessity as provided in Article 23 of the Constitution. Additionally, the issues as to how the competent authority orders the dispersal of an assembly or parade, and in what manner it stops the assembly or parade from continuing, touch upon the appropriateness of the orders at issue and thus are questions of the facts. A criminal court, in weighing the offense and imposing a penalty, should make a precise determination as to whether the requisite elements of the criminal act are met. Needless to say, attention should also be paid to the existence of intent, especially,

as a requisite element for the punishment of the act at issue.

Justice Hsiang-Fei Tung filed dissenting opinion in part.

Justice Chi-Nan Chen filed dissenting opinion in part.

Justice Young-Mou Lin filed dissenting opinion in part.

本號解釋董大法官翔飛、陳大法官計男與林大法官永謀分別提出部分不同意見書。

J. Y. Interpretation No.446（February 13, 1998）*

ISSUE: Is the relevant provision of the Act on the Discipline of Public Functionaries, prescribing that the period for filing a review starts from the date of a final criminal judgment, unconstitutional?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; J. Y. Interpretation No. 396（司法院釋字第三九六號解釋）; Articles 33, 34, Subparagraph 2, and 35 of the Public Functionaries Discipline Act（公務員懲戒法第三十三條、第三十四條第二款、第三十五條）; Resolution Ref. No. TS-431 of the Committee on the Discipline of Public Functionaries（公務員懲戒委員會再審字第四三一號議決案例）.

KEYWORDS:

right to sue（訴訟權）, judicial beneficiary right（司法受益權）, due process of law（正當法律程序）, discipline of public functionaries（公務員懲戒）, starting point of the period during which application or petition for review may be filed（移請、聲請再審議期間起算點）, date of final judgment（裁判確定日）, date of service of judgment （裁判書送達日）.**

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* Translated by Vincent C. Kuan.

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

HOLDING: It is provided in Article 34, Subparagraph 2, of the Public Functionaries Discipline Act that the application or petition for review shall be completed no later than thirty days from the date on which the relevant criminal judgment becomes final and conclusive. In the case of any trial of the first and second instance where any judgment rendered thereby may be appealed, the starting point of such period should fall on the date when the judgment becomes final and conclusive. On the other hand, however, in the case of any trial of the first or second instance where judgment rendered thereby is not appealable or any trial of the third instance, the party subjected to the disciplinary measure cannot possibly file a petition in accordance with the aforesaid provision because such judgment becomes final and conclusive without the necessity of service of process thereof once it has been announced or published after the decision of the deliberation, as the case may be. Consequently, the constitutional intent to protect the people's right to sue under Article 16 thereof will not be served unless the start-

解釋文：公務員懲戒法第三十四條第二款規定移請或聲請再審議，應自相關之刑事裁判確定之日起三十日內為之。其期間之起算點，就得聲明不服之第一審及第二審裁判言，固應自裁判確定之日起算；惟對於第一審、第二審不得聲明不服之裁判或第三審之裁判，因一經宣示或經評決而為公告，不待裁判書之送達，即告確定，受懲戒處分人即難依首開規定為聲請。是其聲請再審議之期間，應自裁判書送達之日起算，方符憲法第十六條保障人民訴訟權之意旨。公務員懲戒委員會再審字第四三一號議決案例及其他類似案例與此意旨不合部分，應不再援用。

ing point of the period for filing such review falls on the date of service of such judgment. Resolution Ref. No. TS-431 of the Committee on the Discipline of Public Functionaries and other similar cases, to the extent that they are in contradiction to the intent hereof, should no longer be applied.

REASONING: The people shall have the rights to petition, to file administrative appeal and to sue, as clearly stated in Article 16 of the Constitution. The right to sue is the kind of judicial beneficiary right of the people that not only entitles the people to take judicial action to protect their rights when infringed upon, but, in particular, guarantees the right of the people to a fair and speedy trial and, ultimately, to adequate remedies so that the people are free from any inappropriate restrictions imposed by any written or unwritten practice beyond the law and thus are guaranteed with the status as the primary participant in the judicial process. The discipline of public functionaries, which falls within the judicial power, is handled and heard by the Committee on

解釋理由書：人民有請願、訴願及訴訟之權，為憲法第十六條所明定。所稱訴訟權，乃人民在司法上之受益權，不僅指人民於其權利受侵害時得提起訴訟請求權利保護，尤應保障人民於訴訟上有受公正、迅速審判，獲得救濟之權利，俾使人民不受法律以外之成文或不成文例規之不當限制，以確保其訴訟主體地位。公務員之懲戒事項，屬司法權之範圍，由公務員懲戒委員會審理，而懲戒處分影響人民服公職之權利至鉅，懲戒案件之審議，自應本正當法律程序之原則，對被付懲戒人予以充分之程序保障，乃憲法第十六條保障人民訴訟權之本旨，本院釋字第三九六號解釋已有闡示。

the Discipline of Public Functionaries in the form of trial. And, since disciplinary measures have significant impact on the right of the people to hold public offices, the party subject to such discipline should be guaranteed with adequate procedural protection based on the principle of due process of law, which, as has been elaborated by this Yuan in Interpretation No. 396, is in line with the constitutional intent to protect the people's right to sue under Article 16 of the Constitution.

According to Article 33, Paragraph 1, Subparagraph 3, of the Public Functionaries Discipline Act, the original transferring authority or the party subjected to the disciplinary measure shall have the right to apply or petition, as the case may be, for the review of the original resolution, which has been reached based on a criminal judgment that is later changed by a final and conclusive judgment. The legislative purpose thereof is to deal with the unreasonable situation where no alternative remedy is available to a public functionary in the event of any mistake found in the resolution regarding the discipline,

公務員懲戒法第三十三條第一項第三款規定「原議決所憑之刑事裁判，已經確定裁判變更者，原移送機關或受懲戒處分人得移請或聲請再審議」，其立法目的係在補救對於公務員之懲戒一經議決即行確定，如有錯誤，並無其他救濟途徑之不合理現象。同法第三十四條第二款規定，移請或聲請再審議，「依前條第一項第二款至第四款為原因者，自相關之刑事裁判確定之日起三十日內」為之，亦係為維繫法安定性而設。對於公務員懲戒案件之決議，聲請再審議，應以書面敘述理由，附具繕本，連同原議決書影本及證據為之，同法第三十五條定有明文，則上開第三十

which becomes final as soon as it is reached. Article 34, Paragraph 2, of the same Act provides that the application or petition for review shall be completed no later than thirty days from the date on which the relevant criminal judgment becomes final and conclusive if the application or petition for review is based on one of the reasons prescribed in Subparagraphs 2 through 4 of the preceding Article, and the rationale behind such provision is to maintain the stability of the law. It is clearly prescribed under Article 35 thereof that the petition for review of the resolution regarding the discipline of any public functionary shall be made in writing, with reasons shown, along with a transcript thereof and a copy of the original resolution and the relevant evidence. Therefore, it is appropriate for the period prescribed in the aforesaid Article 34, Subparagraph 2, thereof to start from the date when the judgment becomes final and conclusive in the case of any trial of the first and second instance where any judgment rendered thereby may be appealed. On the other hand, however, in the case of any trial of the first or second in-

四條第二款之規定，其期間之起算點，就得聲明不服之第一審及第二審裁判言，固應自裁判確定之日起算；惟對於第一審、第二審不得聲明不服之裁判或第三審之裁判，因一經宣示或經評決而為公告，不待裁判書之送達，即告確定，受懲戒處分人即難依前開第三十四條第二款及第三十五條規定為聲請，對人民行使訴訟救濟期間之權益保障，顯有不足。是受懲戒處分人聲請再審議之期間，應自裁判書送達之日起算，方符憲法第十六條維護人民訴訟權之意旨。公務員懲戒委員會再審字第四三一號議決案例及其他類似案例，未就案件之裁判區分得否聲明不服分別計算其聲請再審議期間，概以應「自相關之刑事裁判確定之日起算」云云，與上開意旨不合部分，應不再援用。

stance where judgment rendered thereby is not appealable or any trial of the third instance, the party subjected to the disciplinary measure cannot possibly file a petition in accordance with the provisions of Article 34, Subparagraph 2, and Article 35 thereof because such judgment becomes final and conclusive without the necessity of service of process thereof once it has been announced or published after the decision of the deliberation, as the case may be. The protection with regard to the time limit available to the people to petition for remedy through litigation is obviously inadequate in this respect. Consequently, the constitutional intent to protect the people's right to sue under Article 16 thereof will not be served unless the starting point of the period for filing such review falls on the date of service of such judgment. Resolution Ref. No. TS-431 of the Committee on the Discipline of Public Functionaries and other similar cases, failing to determine the starting points of the period for filing a review by distinguishing whether the judgment of a particular case is appealable, should no longer be applied insofar

as they are in contradiction to the intent as illustrated above.

J. Y. Interpretation No.447（February 27, 1998）*

ISSUE: Does the "monthly salary" referred to in Article 4, Paragraph 2, of the Act Governing the Pension of the Special Political Officials include "other cash payment"?

RELEVANT LAWS:

Article 4, Paragraph 2 of the Act Governing the Pension of the Special Political Officials（政務官退職酬勞金給與條例第四條第二項）; Provisional Act Governing the Salary and Allowance for the President, Vice-President and Special Political Appointees（總統副總統及特任人員月俸公費支給暫行條例）; Article 6, Paragraph 2, and Article 8, Paragraph 1 of the Public Functionaries Retirement Act (before January 20, 1993 Amendment)（八十二年一月二十日修正前公務人員退休法第六條第二項、第八條第一項）; Article 17 of the Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries (before the implementation of the new retirement regulations on July 1, 1995)（八十四年七月一日公務人員退撫新制實施前之公務人員撫卹法第十七條）.

KEYWORDS:

Political Appointees（政務官）, monthly salary（月俸）, other cash payment（其他現金給與）.**

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* Translated by Professor S. M. Yu.

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

HOLDING: According to Article 4, Paragraph 2, of the Act Governing the Pension of the Special Political Officials, the calculation of pensions for political officials is based on a monthly salary, whereas the monthly payment received by political officials according to the Provisional Act Governing the Salary and Allowance for the President, Vice-President and Special Political Appointees, includes a monthly salary and allowance. Article 8, Paragraph 1, of the Public Functionaries Retirement Act, provided, before the January 20, 1993 amendment, that monthly salary includes basic pay and other cash payment. It may be seen from the abovementioned retirement laws for public functionaries that monthly salary differs from basic pay. Monthly salary includes not only basic pay or monthly pay, but also other cash payment. It follows that the "monthly salary" used in calculating the pension of political officials should include not only monthly pay, but also "other cash payment."

解釋文：現行法上政務官退職酬勞金之計算，依政務官退職酬勞金給與條例第四條第二項規定，以月俸額為計算基準，而政務官每月所支領之俸額，依總統副總統及特任人員月俸公費支給暫行條例規定，包括月俸及公費。參照中華民國八十二年一月二十日修正前之公務人員退休法第八條第一項：「本法所稱月俸額，包括實領本俸及其他現金給與」，可知公務人員退休法規上所稱之月俸額與本俸有別，月俸額除本俸或月俸外，尚包括其他現金給與在內。是以計算政務官退職酬勞金基準之「月俸額」，除月俸外亦應包括「其他現金給與」部分。

REASONING: Those political officials who participate in the govern-

解釋理由書：政務官為參與政策之決定，應隨政黨更替或政策變更而

ment policy decision-making process and change with political parties or policies and those with defined terms of office under the Constitution or law to maintain independence in the exercise of their function are distinguishable. The fact that our prevailing law does not distinguish these two types of officials, though not uncontroversial in a constitutional sense, is not within the scope of this interpretation. Insofar as the relevant laws are not amended, they should be construed accordingly.

進退之人員，與依憲法或法律之規定有任期保障，俾能超然獨立行使職權而無所瞻顧之人員，本有不同。我國現行法所謂政務官未就上述兩種人員加以區別，有無牴觸憲法雖非無爭議，但不在本解釋範圍，是在相關法律未修正以前，仍應依現行法律予以解釋，合先說明。

The calculation of pensions for political officials under prevailing law is provided under Article 4, Paragraph 2, of the Act Governing the Pension of the Special Political Officials, as amended and promulgated on December 11, 1985, "Lump sum pension for political officials is based on their last monthly salary and their own "cash payment in lieu of basic necessities" as one unit; every half-year service earns one unit; service lasting less than three years earns one extra unit; service less than one-half year counts as a half year; and the maximum credit is

現行法上政務官退職酬勞金之計算，依七十四年十二月十一日修正公布之政務官退職酬勞金給與條例第四條第二項規定：「一次退職酬勞金以政務官最後在職之月俸額及本人實物代金為基數，每服務滿半年給與一個基數；未滿三年給與一個基數；未滿半年以半年計，最高以六十一個基數為限。」係以月俸額為計算基準，而政務官每月所支領之俸額，依三十八年一月十七日制定公布之總統副總統及特任人員月俸公費支給暫行條例規定，包括月俸及公費。至政務官退職金之月俸額給與是否即以月俸及公費為計算標準，現行法雖無明

sixty-one units." Thus the base is the monthly salary, and the salary received by political officials each month according to the Provisional Act Governing the Salary and Allowance for the President, Vice President and Special Political Appointees enacted and promulgated January 17, 1949, includes a monthly salary and allowance, although the prevailing law is not clear about whether the monthly salary, for the purpose of calculating pensions of political officials, includes a monthly salary and allowance. We took into account the legislative purpose of the relevant laws on the retirement and payment of recompense to surviving dependents of public functionaries when the abovementioned Act Governing Pensions of the Special Political Officials was enacted and promulgated and arrived at an overall construction. Insofar as the retirement of ordinary public functionaries is concerned, according to Article 6, Paragraph 2, of the Public Functionaries Retirement Act before its January 20, 1993 amendment, lump sum retirement payment is based on their last monthly salary and their own "cash payment in lieu of

確規定，惟應參酌上開政務官退職酬勞金給與條例修正公布時公務人員退休、撫卹相關法令之立法目的而為整體之解釋。按一般公務人員之退休，依八十二年一月二十日修正前之公務人員退休法第六條第二項規定，一次退休金，係以退休人員最後在職之月俸額及本人實物代金為基數；又八十四年七月一日公務人員退撫新制實施前之公務人員撫卹法第十七條規定，政務官之撫卹亦係準用公務人員撫卹法之規定。顯見政務官退職酬勞金及撫卹金計算之標準，與舊制之公務人員退休法、公務人員撫卹法規定之退休金、撫卹金計算標準自應相稱。參照前開公務人員退休法第八條第一項規定：「本法所稱月俸額，包括實領本俸及其他現金給與」，可知公務人員退休法規上所稱之月俸額與本俸有別，月俸額除本俸或月俸外，尚包括其他現金給與在內。是以計算政務官退職酬勞金基準之「月俸額」，除月俸外亦應包括「其他現金給與」部分。惟其他現金給與之退職酬勞金應發給數額，應依退職時法律所訂計算標準為之，併此敘明。

basic necessities"; according to Article 17 of the Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries, before the implementation of the new retirement regulations on July 1, 1995, the same rules governing ordinary public functionaries also apply mutatis mutandis to the recompense for surviving dependents of political officials. It is apparent from the above that the criteria for the calculation of pension and recompense for surviving dependents of political officials run parallel to those of ordinary public functionaries under the old regulations. Taking into account the abovementioned Article 8, Paragraph 1, of the Public Functionaries Retirement Act, which provides, "monthly salary as provided in this Act includes basic pay and other cash payment," it follows that, under the Public Functionaries Retirement Act, monthly salary is different from basic pay. Monthly salary includes basic or monthly pay, as well as other cash payment. Thus, for the purpose of calculating pensions of political officials, "monthly salary" includes monthly pay and "other cash pay-

ment." However, the amount of pension relating to "other cash payment" should be governed by criteria under relevant law at the time of such political official's retirement.

J. Y. Interpretation No.448（February 27, 1998）*

ISSUE: Where under the dual system of litigation adopted by the Constitution, the administrative court shall have jurisdiction over cases involving disputes between the people and government agencies over rights and obligations, which court shall have the jurisdiction when the dispute arises from the government agency's sale and/or lease of a public property for and on behalf of the Treasury?

RELEVANT LAWS:

Articles 16 and 77 of the Constitution（憲法第十六條、第七十七條）; J. Y. Interpretation No. 297（司法院釋字第二九七號解釋）; Supreme Administrative Court's Precedents P. T. 270 (Supreme Administrative Court, 1969) and T. T. 159 (Supreme Administrative Court, 1972)（行政法院五十八年判字第二七〇號及六十一年裁字第一五九號判例）; Regulation Governing the Lease of State-owned Arable Land in Taiwan Provinces（臺灣省公有耕地放租辦法）.

KEYWORDS:

dual system of litigation（二元訴訟制度）, public property（公有財產）, the Treasury（國庫）, administrative court（行政法院）, court of general jurisdiction（普通法院）, unilateral administrative action（單方行政行為）, non- administrative act（非行政處分）, division of the power of adjudication（審判權劃分）, public powers（公權力）, public law（公法）, private law（私法）, act of contract（契約行為）, preemption right（（公有地）優先承購權）.**

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* Translated by Raymond T. Chu.

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HOLDING: Article 77 of the Constitution provides that "the Judicial Yuan ("Judiciary") shall be the highest judicial organ of the State in charge of the trial of civil, criminal, and administrative cases, and the imposition of disciplinary measures against public functionaries." Hence, civil cases are distinguishable from administrative litigations in the administration of justice. Moreover, while the people have the right of instituting legal proceedings under Article 16 of the Constitution, it is left to law to prescribe what court has jurisdiction over the suit and how the proceeding should be conducted. This has been clearly expounded in our Interpretation No. 297. Under the existing law, trials of civil and administrative cases are conducted in separate courts of different nature under a dual system of litigation. All disputes arising out of legal relations in the area of the public law are tried by administrative courts, and controversies arising out of relations under private laws are tried at courts of general jurisdiction. Where an administrative agency engages in the sale or lease of a public property for and on behalf of the

解釋文：司法院為國家最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒，憲法第七十七條定有明文，可知民事與行政訴訟之審判有別。又依憲法第十六條人民固有訴訟之權，惟訴訟應由如何之法院受理及進行，應由法律定之，業經本院釋字第二九七號解釋在案。我國關於行政訴訟與民事訴訟之審判，依現行法律之規定，係採二元訴訟制度，分由不同性質之法院審理。關於因公法關係所生之爭議，由行政法院審判，因私法關係所生之爭執，則由普通法院審判。行政機關代表國庫出售或出租公有財產，並非行使公權力對外發生法律上效果之單方行政行為，即非行政處分，而屬私法上契約行為，當事人若對之爭執，自應循民事訴訟程序解決。行政法院五十八年判字第二七〇號判例及六十一年裁字第一五九號判例，均旨在說明行政機關代表國庫出售或出租公有財產所發生之爭議，應由普通法院審判，符合現行法律劃分審判權之規定，無損於人民訴訟權之行使，與憲法並無牴觸。

Treasury, the activity is not a unilateral administrative act taken in exercising the public power vested in the agency, with external legal consequence. Rather, it is a non-administrative act; that is, an act of contract in the area of private law. Any dispute between the parties arising out of or in connection with such sale or lease must therefore be resolved through the procedure of civil litigation. The Supreme Administrative Court's Precedents P. T. 270 (Supreme Administrative Court, 1969) and T. T. 159 (Supreme Administrative Court, 1972) are both intended to explain that any dispute arising out of or in connection with the sale or lease of public property by an administrative agency for and on behalf of the Treasury must be tried by a ordinary court, and are consistent with the existing law with respect to the division of the power of adjudication, without causing detriment to the people's exercise of their right of instituting legal proceedings, and are thus not in conflict with the Constitution.

REASONING: Article 77 of the Constitution provides that "the Judicial

解釋理由書：司法院為國家最高司法機關，掌理民事、刑事、行政訴

Yuan ("Judiciary") shall be the highest judicial organ of the State in charge of the trial of civil, criminal, and administrative cases, and imposition of disciplinary measures against public functionaries." Hence, civil cases are distinguishable from administrative litigations in the administration of justice. Moreover, while the people have the right of instituting legal proceedings under Article 16 of the Constitution, it is left to law to prescribe what court has jurisdiction over the suit and how the proceeding should be conducted. This has been clearly expounded in our Interpretation No. 297. Under the existing law, trials of civil and administrative cases are conducted in separate courts of different nature under a dual system of litigation handled respectively by the administrative courts and the courts of general jurisdiction. All disputes arising out of legal relations in the area of the public law are tried by administrative courts, and controversies arising out of relations under private laws are tried at courts of general jurisdiction. No confusion is allowed in their respective duties and functions. Where an administrative agency engages

訟之審判及公務員之懲戒，憲法第七十七條定有明文，可知民事與行政訴訟之審判有別。又依憲法第十六條人民固有訴訟之權，惟訴訟應由如何之法院受理及進行，應由法律定之，業經本院釋字第二九七號解釋在案。我國關於行政訴訟與民事訴訟之審判，依現行法律之規定，係採二元訴訟制度，行政訴訟與民事訴訟分由不同性質之行政法院及普通法院審理。關於因公法關係所生之爭議，由行政法院審判，因私法關係所生之爭執，則由普通法院審判，各有所司，不容混淆。行政機關代表國庫出售或出租公有財產，並非行使公權力對外發生法律上效果之單方行政行為，即非行政處分，而屬私法上契約行為，當事人若對之爭執，自應循民事訴訟程序解決。行政法院五十八年判字第二七〇號判例謂：「行政機關代表國庫處分官產，係私法上契約行為，人民對此有所爭執，無論主張租用抑或主張應由其優先承購，均應提起民事訴訟以求解決，不得藉行政爭訟程序，請求救濟」；又同院六十一年裁字第一五九號判例謂：「查行政官署依臺灣省公有耕地放租辦法，將公地放租與人民，雖係基於公法為國家處理公務，但其與人民間就該公有土地所發生之租賃關係，仍屬私法上

in the sale or lease of a public property for and on behalf of the Treasury, it is not a unilateral administrative act taken in exercising the public power vested in the agency, with external legal consequence. Rather, it is a non-administrative act; that is, an act of contract in the area of private law. Any dispute between the parties arising out of or in connection with such sale or lease must therefore be resolved through the procedure of civil litigation. The Supreme Administrative Court's Precedent P. T. 270 (Supreme Administrative Court, 1969) holds: "Where an administrative agency disposes of a public property on behalf of the Treasury, it is an act of contract in the area of private law. A person who is in dispute over such sale or lease, regardless of whether he is claiming a lease or claiming that he is entitled to a preemption right, may only institute a civil litigation for resolving the dispute, rather than seeking remedy through the procedure of administrative litigation." Additionally, it is held by the Supreme Administrative Court in its Precedent T. T. 159 (Supreme Administrative Court, 1972): "While the action of

之契約關係，如被告官署因查明原告未自任耕作，經以通知撤銷原告承租權，解除原租賃契約，即係基於私法關係以出租人之地位向原告所為之意思表示，並非基於公法關係以官署地位向原告所為之行政處分，不得循行政爭訟程序以求救濟」，均旨在說明行政機關代表國庫出售或出租公有財產所發生之爭議，應由普通法院審判，符合現行法律劃分審判權之規定，無損於人民訴訟權之行使，與憲法並無牴觸。

an administrative agency in leasing to a citizen a tract of State-owned land under the Regulation Governing the Lease of State-owned Arable Land in Taiwan Provinces is an act under public law for the purpose of performing its duties on behalf of the State, the relation of lease between the agency and the citizen over the State-owned land is a contractual relation in the area of private law. If the defendant agency, upon finding that the land at issue is not being cultivated by the plaintiff, rescinds the lease upon a notice to cancel the plaintiff's right to rent the land, it is a manifestation of intention expressed by such agency in the capacity of a lessor to the plaintiff based on their relation under private law, rather than an administrative act done by the defendant in its capacity as a government agency and addressed to the plaintiff. Hence, no remedy may be sought pursuant to the procedure of administrative litigation." Both decisions are intended to explain that any dispute arising out of or in connection with the sale or lease of public property by an administrative agency for and on behalf of the Treasury must be tried by a ordinary

court, and are consistent with the existing law with respect to the division of the power of adjudication, without causing detriment to the people's exercise of their right of instituting legal proceedings, and are thus not in conflict with the Constitution.

J. Y. Interpretation No.449（March 13, 1998）*

ISSUE: What does the holding in Interpretation No. 363, stating "the application for the establishment of public facilities during the enforcement period of the Act of Encouragement of Investment shall conform to Article 3 of said Act," mean?

RELEVANT LAWS:

Article 53 of the Urban Planning Act（都市計畫法第五十三條）; Articles 3, Paragraph 1, Sub Paragraph 11, and 58-1, Paragraph 1 of the Act of Encouragement of Investment（獎勵投資條例第三條第一項第十一款、第五十八條之一第一項）.

KEYWORDS:

public facilities（公共設施）, development of businesses（興闢業）, urban planning（都市計畫）, encouragement of investment（獎勵投資）.**

HOLDING: The Notice Regarding Rewards for Investment in the Establishment of Retail Markets in Taipei City stipulates that those who apply for investment to establish markets shall be "private parties or groups holding all of

解釋文：台北市獎勵投資興建零售市場須知，對於申請投資興建市場者，訂有須「持有市場用地內全部私有土地使用權之私人或團體」之條件，增加都市計畫法第五十三條所無之限制，應不予適用，業經本院釋字第三六三號

* Translated by Spenser Y. Hor.

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the rights of use to the private land as and for the market use", which is an additional restriction not imposed by Article 53 of the Urban Planning Act, and shall not be applicable as held in J.Y. Interpretation No. 363. The last sentence of the above-mentioned Interpretation stating, "the application for the establishment of public facilities during the enforcement period of the Act of Encouragement of Investment shall conform to Article 3 of said Act," refers to the "development of businesses" under Paragraph 1, Subparagraph 11 of said Article 3. Although a land proprietor who is an natural person, yet plans to form a company limited by shares, may be given priority to invest pursuant to Article 58-1, Paragraph 1 of said Act, whether or not such person may enjoy each respective kind of preference shall be determined by said Act. The above-mentioned J.Y. Interpretation shall be accordingly supplemented.

解釋在案。至該解釋文末段所稱：「在獎勵投資條例施行期間申請興建公共設施，應符合該條例第三條之規定」，係指該條第一項第十一款之興闢業而言。土地所有權人為自然人而未組織股份有限公司者，雖得依該條例第五十八條之一第一項規定優先投資，惟能否享有各種優惠，仍應按該條例規定處理。本院上開解釋，應予補充。

REASONING: To enable private parties or groups to use publicly owned land or to acquire rights to land reserved for public use and owned by

解釋理由書：國家為使有投資意願之私人或團體得使用公有土地或藉政府公權力之介入，取得屬於公共設施保留地之他人土地使用權，加速公共設

other people through intervention of governmental power, and thus accelerate the establishment of public facilities to improve urban development, the nation specifically stipulates in Article 53 of the Urban Planning Act that "if the land (reserved for public facilities) needed by private parties or groups that are approved for investment in urban planning ventures is publicly owned, an application may be filed to lease said publicly owned land from the authority in charge; if the land is privately owned and an agreement to purchase could not be reached, said purchase price shall be readily prepared, and an application requesting the municipality or county government of that jurisdiction to purchase said land on their behalf shall be filed." The prerequisites for such application to invest do not require the applicant to hold the rights of use to all privately owned land within the public-use land. The condition set forth in Paragraph 2, Subparagraph 1-1 of the Notice Regarding Rewards for Investment in the Establishment of Retail Markets in Taipei City promulgated by the Taipei Municipality on July 23, 1981, states that the applicants

施之興建，改善都市發展之狀況，於都市計畫法第五十三條特為規定：「獲准投資辦理都市計畫事業之私人或團體，其所需用之公共設施用地，屬於公有者，得申請該公地之管理機關租用；屬於私有而無法協議收購者，應備妥價款，申請該管直轄市、縣（市）局政府代為收買之」，並未以申請投資者應持有公共設施用地內全部私有土地使用權為提出申請之條件。台北市政府於中華民國七十年七月二十三日發布之台北市獎勵投資興建零售市場須知第二項(一)款(1)目以「持有市場用地內全部私有土地使用權之私人或團體」為申請投資之條件，係增加法律所無之限制，與法律要求各級政府應盡力協助私人投資興建公共設施，改善都市發展之目的不符，有違憲法保障人民權利之意旨，應不予適用，業經本院釋字第三六三號解釋在案。至於獎勵投資條例施行期間，申請興建公共設施而使用之土地，如由公共設施興闢業者循洽購、調處、照價收買程序而取得，對於土地所有權人應受保障之權益不無妨礙，此所以七十三年十二月三十日修正公布之獎勵投資條例（已於七十九年十二月三十一日廢止）第五十八條之一第一項前段規定「依本條例投資興闢尚未開發之公共設

must hold the rights of use to all the privately owned land as and for the market use, which has added a restriction not imposed upon by law. Such restriction contravenes the objective of the law to urge governments of each level to diligently assist private parties in investments to build markets and improve urban development, is in violation of the constitutionally protected rights of the people, and hence shall not be applicable, as held in J.Y. Interpretation No. 363. During the enforcement period of the Act of Encouragement of Investment, if in the application, the land used to build public facilities is acquired through negotiated purchase, mediation, or purchase at-value, this will interfere with the legally protected interests of the land proprietor. Therefore, Article 58-1, Paragraph 1 of the Act of Encouragement of Investment, as amended and promulgated on December 30, 1984, (abrogated on December 31, 1990) states, “For investment in developing as yet undeveloped land reserved for public use pursuant to this Act, the proprietor of said land may enjoy priority. However, in the event of no response or

施用地，土地所有權人得優先投資。但經該管地方政府書面通知其投資，滿二個月不為答復或自願放棄者，其他公共設施興闢業得逕行洽購」，徵諸行政院向立法院提出該條項原草案文字本為：「依本條例投資興闢經都市計畫劃設而尚未開發之公共設施用地時，應由投資人逕行洽購」，對照以觀，得申請投資興建公共設施者，土地所有權人係優先於興闢業者，立法原意至為明顯。本院釋字第三六三號解釋解釋文末段所稱：「在獎勵投資條例施行期間申請興建公共設施，應符合該條例第三條之規定」，係指興闢業者申請興建公共設施應符合該條第一項第十一款所定要件而言。若土地所有權人為自然人而未組織股份有限公司者，雖得依該條例第五十八條之一第一項規定優先投資，惟能否享有各種優惠，仍應按該條例規定處理。本院上開解釋，應予補充。

voluntary relinquishment by said land proprietor upon two months following service of written notice of the investment opportunity by the local government, other 'public facility development of businesses' may negotiate such purchase." As set forth in the original draft proposed by the Executive Yuan to the Legislative Yuan, it reads: "For investment in developing as yet undeveloped land reserved for public use pursuant to this Act, the investor shall negotiate such purchase directly." In contrast, it is evident the legislative intent was to give the land proprietor priority over the business developers to invest in setting up public facilities. The last sentence of J.Y. Interpretation No. 363 stating, "the application for the establishment of public facilities during the enforcement period of the Act of Encouragement of Investment shall conform to Article 3 of said Act," means that the business developers when applying for building public facilities shall conform to Paragraph 1, Subparagraph 11 of the Act. Although the land proprietor, who is an natural person and has not formed a company limited by shares, may be given the

priority to invest, whether or not such person may enjoy each respective kind of preference shall be determined by said Act. The above-mentioned J.Y. Interpretation shall be accordingly supplemented.

J. Y. Interpretation No.450（March 27, 1998）*

ISSUE: The University Act and its Enforcement Rules require all universities and colleges to establish an Office of Military Training. Do such provisions infringe upon university self-government and shall they thus be deemed unconstitutional?

RELEVANT LAWS:

Article 11 of the Constitution（憲法第十一條）; Article 11, Paragraph 1, Subparagraph 6 of the University Act（大學法第十一條第一項第六款）; Article 9, Paragraph 3 of the Enforcement Rules of the University Act（大學法施行細則第九條第三項）; J.Y. Interpretation No. 380（司法院釋字第三八〇號解釋）.

KEYWORDS:

university self-government（大學自治）, academic freedom（學術自由）, freedom of teaching（教學自由）, autonomous right to internal organization（自主組織權）, Office of Military Training（軍訓室）.**

HOLDING: Freedom of teaching as provided for in Article 11 of the Constitution includes "university self-government." Any important matters re-

解釋文：大學自治屬於憲法第十一條講學自由之保障範圍，舉凡教學、學習自由有關之重要事項，均屬大學自治之項目，又國家對大學之監督除

* Translated by Professor Jau-Yuan Hwang.

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

lated to the freedoms of instruction and study are subject items of university self-government. State supervision over universities shall be specifically authorized by statutes. Any such statutes shall be in conformity with the principle of university self-government. The above doctrines have been upheld by J.Y. Interpretation No. 380. Accordingly, universities shall enjoy the autonomous right to internal organization, to the appropriate extent, as long as it is within the scope related to the abovementioned teaching and research. A university may independently decide whether it is necessary to offer such courses as military training or nursing. If so decided, it may further establish offices for such courses and employ appropriate teaching personnel in accordance with the laws. However, Article 11, Paragraph 1, Subparagraph 6, of the University Act and Article 9, Paragraph 3, of its Enforcement Rules specifically prescribe that all universities shall establish the Office of Military Training with staff, in order to take charge of planning and teaching of both military training and nursing courses. Such compulsory provisions have in-

應以法律明定外，其訂定亦應符合大學自治之原則，業經本院釋字第三八〇號解釋釋示在案。大學於上開教學研究相關之範圍內，就其內部組織亦應享有相當程度之自主組織權。各大學如依其自主之決策認有提供學生修習軍訓或護理課程之必要者，自得設置與課程相關之單位，並依法聘任適當之教學人員。惟大學法第十一條第一項第六款及同法施行細則第九條第三項明定大學應設置軍訓室並配置人員，負責軍訓及護理課程之規劃與教學，此一強制性規定，有違憲法保障大學自治之意旨，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

fringed upon the meanings and purposes of university self-government as warranted by the Constitution, and shall become void within one year from the date of this Interpretation.

REASONING: In order to facilitate the integrity of university organization and help fulfill the purposes of college education, the laws may provide for the main structure of a university's internal organization. However, the provision of freedom of teaching under Article 11 of the Constitution serves as a mechanism of institutional protection for academic freedom. University self-government also falls within the protective scope of this Article. Any important matters related to the freedom of teaching and freedom of study, content of instruction, and students' freedom to choose among departments and to select courses are subject items of university self-government. The above doctrines have been upheld by J.Y. Interpretation No. 380. Accordingly, universities shall enjoy the autonomous right to internal organization, to the appropriate extent, as long as it is within the scope

解釋理由書：國家為健全大學組織，有利大學教育宗旨之實現，固得以法律規定大學內部組織之主要架構，惟憲法第十一條關於講學自由之規定，係對學術自由之制度性保障，大學自治亦屬該條之保障範圍。舉凡教學、學習自由、講授內容、學生選擇科系與課程自由等均屬大學自治之項目，業經本院釋字第三八〇號解釋釋示在案。大學於上開教學研究相關之範疇內，就其內部組織亦應享有相當程度之自主組織權，如大學認無須開設某種課程，而法令仍強制規定應設置與該課程相關之規劃及教學單位，即與憲法保障學術自由及大學自治之意旨不符。倘各大學依其自主之決策，認有提供學生修習軍訓或護理課程之必要，自得設置與軍訓或護理課程相關之單位，並依法聘請適任之教學人員。惟大學法第十一條第一項第六款及同法施行細則第九條第三項規定，大學應設置軍訓室並配置人員，負責軍訓及護理課程之規劃與教學，未能顧及大

related to the abovementioned teaching and research. If a university considers it unnecessary to offer certain courses but is compelled by the laws to establish related offices for the planning and teaching of such courses, such requirements are not compatible with the meanings and purposes of academic freedom and university self-government as warranted by the Constitution. If a university itself considers it necessary to offer such courses as military training or nursing, it may further establish offices in relation to such courses and employ appropriate teaching personnel in accordance with the laws. However, Article 11, Paragraph 1, Subparagraph 6, of the University Act and Article 9, Paragraph 3, of its Enforcement Rules prescribe that all universities establish the Office of Military Training with staff, in order to take charge of planning and teaching of both military training and nursing courses. Such provisions fail to take into account the university's right to self-government and therefore violate the said meanings and purposes of the Constitution. As this Interpretation involves adjustments in institutions and organization,

學之自主權限，有違憲法前述意旨。本件解釋涉及制度及組織之調整，有訂定過渡期間之必要，故上開大學法及同法施行細則之規定，應自本解釋公布之日起，至遲於屆滿一年時失其效力。大學法第十一條第一項第一款至第四款所列教務處、學生事務處、總務處、圖書館為支援大學教學及研究所必要，第七款至第九款之秘書室、人事室、會計室為協助大學行政之輔助單位，該法定為大學應設之內部組織，與憲法保障大學自治之意旨尚無牴觸。至大學提供體育設施及活動以健全學生體格固有必要，然是否應開設體育課程而必須設置體育室，亦屬大學自治之範疇，同條第一項第五款之規定仍應由有關機關一併檢討改進，併此指明。

it is necessary to provide for a transitional period. Therefore, the abovementioned provisions of the University Act and its Enforcement Rules shall become void within one year from the date of this Interpretation. The Offices of Academic Affairs, Student Affairs, and Business Affairs and the Libraries as provided for under Article 11, Paragraph 1, Subparagraphs 1 to 4 of the University Act are essential for supporting teaching and research at the universities. The Offices of the Secretariat, Personnel and Accounting under Subparagraphs 7 to 9 are subsidiary units to assist the university administration. Though the said provisions provide that these offices should be part of a university's internal organization, such provisions are not inconsistent with the meanings and purposes of university self-government as warranted by the Constitution. Furthermore, while it is appropriate that universities should provide sports facilities and activities for the benefit of students' physical well-being, it should be nevertheless noted here that whether to offer sports-related courses and to establish the Office of Physical Training still

fall within the scope of university self-government.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Young-Mou Lin filed concurring opinion.

Justice Chi-Nan Chen filed dissenting opinion in part.

Justice Hsiang-Fei Tung filed dissenting opinion.

本號解釋蘇大法官俊雄、林大法官永謀分別提出協同意見書；陳大法官計男提出部分不同意見書；董大法官翔飛提出不同意見書。

J. Y. Interpretation No.451（March 27, 1998）*

ISSUE: Is the directive issued by the Ministry of the Interior unconstitutional in prescribing that a co-owner may not claim and acquire superficies by prescription?

RELEVANT LAWS:

Articles 769, 770, 772, 827, Paragraph 2, and 828, 945 of the Civil Code（民法第七百六十九條、第七百七十條、第七百七十二條、第八百二十七條第二項、第八百二十八條、第九百四十五條）; Interpretation No. 291（司法院釋字第二九一號解釋）; Section 3, Subsection 5 of Guidelines for Review on the Registration of Superficies Acquired by Prescription（時效取得地上權登記審查要點第三點第五款）.

KEYWORDS:

prescription（時效）, positive（acquisitive）prescription（取得時效）, superficies（地上權）, owner of superficies（地上權人）, usufruct（用益物權）, co-owners; owners in common（共有人）, common property（共有物）, joint owners（公同共有人）, unauthorized possession（無權占有）, recording（登記）.**

HOLDING: The prescription system is intended for the public interest.

解釋文：時效制度係為公益而設，依取得時效制度取得之財產權應為

* Translated by Raymond T. Chu.

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

That a property right acquired by acquisitive prescription is protected by the Constitution was made clear in our Interpretation No. 291. Superficies is the right to use the land of another person for the purpose of owning thereon structures or other work or bamboo stands or trees. It is a right of using the land owned by another person, and is by nature a type of usufruct. While a co-owner of land is, by operation of his ownership, entitled to use the whole common property and collect fruits therefrom in proportion to his own share, he must obtain the consent of all the other co-owners before he can use and collect fruits from the specific part of the common property. Upon the unanimous consent of all co-owners, an encumbrance may be created on the common property, and a superficies may likewise be created in favor of one or more of such co-owners. The same holds true where a superficies is created on jointly owned land in favor of one or more of the joint owners. It then follows that one owner or several co-owners or joint owners who has/have taken possession of land under ownership in common or joint ownership with

憲法所保障，業經本院釋字第二九一號解釋釋示在案。地上權係以在他人土地上有建築物，或其他工作物，或竹木為目的而使用其土地之權，故地上權為使用他人土地之權利，屬於用益物權之一種。土地之共有人按其應有部分，本於其所有權之作用，對於共有物之全部雖有使用收益之權，惟共有人對共有物之特定部分使用收益，仍須徵得他共有人全體之同意。共有物亦得因共有人全體之同意而設定負擔，自得為共有人之一人或數人設定地上權。於公同共有之土地上為公同共有人之一人或數人設定地上權者亦同。是共有人或公同共有人之一人或數人以在他人之土地上行使地上權之意思而占有共有或公同共有之土地者，自得依民法第七百七十二條準用同法第七百六十九條及第七百七十條取得時效之規定，請求登記為地上權人。內政部中華民國七十七年八月十七日台內地字第六二一四六四號函發布時效取得地上權登記審查要點第三點第五款規定，共有人不得就共有土地申請時效取得地上權登記，與上開意旨不符，有違憲法保障人民財產權之本旨，應不予適用。

the intention to exercise superficies over the land of other persons is/are entitled to apply to have himself/themselves recorded as owner(s) of superficies by reason of acquisitive prescription under Articles 769 and 770 of the Civil Code made applicable mutatis mutandis pursuant to Article 772 of the Code. The Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter Tai-Nei-Ti No. 62146 dated August 17, 1988, which prescribe in Section 3, Subsection 5, that a co-owner may not apply for the registration of superficies by reason of acquisitive prescription over land under ownership in common, are inconsistent with the essence of our opinion given above and also contrary to the purpose of the Constitution in protecting the property right of the people. Thus, this provision must be held inoperative.

REASONING: The prescription system is intended for the public interest. That a property right acquired by acquisitive prescription is protected by the Constitution was made clear in our Interpreta-

解釋理由書：時效制度係為公益而設，依取得時效制度取得之財產權應為憲法所保障，業經本院釋字第二九一號解釋釋示在案。地上權係以在他人土地上有建築物或其他工作物或竹木為

tion No. 291. It is explicitly provided in Article 832 of the Civil Code that superficies is the right to use the land of another person for the purpose of owning thereon structures or other work or bamboo stands or trees. It is a right over things existing on the land owned by another person for the purpose of using such land, and is by nature a type of usufruct. While a co-owner of land is, by operation of his ownership, entitled to use the whole common property and collect fruits therefrom, such right may be exercised only in proportion to his own share. If a co-owner makes use of or collects fruits from the common property in excess of his share, his act will result in injuries to the interests of other co-owners and thereby constitute infringement of the ownership of other persons. Therefore, a co-owner must obtain the consent of all other co-owners before he can use and collect fruits from the specific part of the common property, rather than enjoying any right to freely use or collect fruits from the whole or any part of the common property. It follows that one or more of the co-owners may enter into an agreement with all the other co-owners

目的而使用其土地之權，為民法第八百三十二條所明定。故地上權為存在於他人土地上之物權，以使用他人土地為目的，屬於用益物權之一種。土地之共有人本於所有權之作用，對於共有物之全部，雖有使用收益之權，惟此使用收益權，仍應按其應有部分而行使，若共有人逾越其應有部分之範圍而為使用收益，即係損及他共有人之利益而與侵害他人之所有權同。故共有人對共有物之特定部分使用收益，仍須徵得他共有人全體之同意，非謂共有人得對共有物之全部或任何一部有自由使用收益之權利。從而共有人之一人或數人自得與他共有人全體訂定共有土地之分管契約，共有物亦得因共有人全體之同意而設定負擔，自得為共有人之一人或數人設定地上權。又土地為數人公同共有者，各公同共有人之權利，及於公同共有土地之全部，此觀民法第八百二十七條第二項之規定自明。惟依民法第八百二十八條規定：「公同共有人之權利義務，依其公同關係所由規定之法律或契約定之。」「除前項之法律或契約另有規定外，公同共有物之處分及其他權利行使，應得公同共有人全體之同意。」準此，公同共有人之一人或數人依其公同關係所由規定之法律或契約而使用收益

for separate administration of the land owned by them in common, and that, upon the unanimous consent of all co-owners, an encumbrance may be created on the common property, and a superficies may likewise be created in favor of one or more of such co-owners. Where the land is jointly owned by several persons, the right of each joint owner extends to the whole of the land under joint ownership. This is expressly stated in the Civil Code in Article 827, Paragraph 2. Nevertheless, the Code also provides in Article 828 that "the rights and duties of joint owners shall be determined in accordance with the law or contract whereby the joint relationship is prescribed," and that "unless otherwise provided by the law or contract as specified in the preceding paragraph, the disposition of the property under joint ownership and the exercise of other rights pertaining thereto are subject to the consent of all joint owners." Hence, where one or several joint owners, by operation of the law or contract whereby the joint relationship is prescribed, make use of or collect fruits from the land under joint ownership, the act constitutes an exercise of the rights

公同共有之土地者，係本於公同關係而行使權利，若公同共有人全體將公同共有之土地為公同共有人之一人或數人設定地上權，則為公同共有物之處分行為，地上權人因該處分行為而取得用益物權。地上權既為一種物權，自得因時效而取得，然地上權取得時效之第一要件須為以行使地上權之意思而占有他人之土地。若依其所由發生之事實之性質，無行使地上權之意思者，非有變為以行使地上權之意思而占有之情事，其取得時效不能開始進行。從而占有土地之始係基於共有人之地位、公同共有人因公同關係享有之權利、抑或無權占有之意思者，既非基於行使地上權之意思，嗣後亦非有民法第九百四十五條所定變為以行使地上權之意思而占有，即不具備取得時效之前提要件。若共有人或公同共有人於占有之共有或公同共有土地，對於使其占有之他共有人或公同共有人表示變為以在他人之土地上行使地上權之意思而占有，自得本於民法第七百七十二條準用第七百六十九條、第七百七十條，主張依時效而取得地上權，請求登記為地上權人。內政部七十七年八月十七日台內地字第六二一四六四號函發布時效取得地上權登記審查要點第三點第五款規定，共有人不得就共

based on the joint relationship. Where a superficies is created by all joint owners over the jointly owned land in favor of one or more of the joint owners, the act constitutes a disposition of the jointly owned property, and the owners of superficies have thus acquired a usufruct in consequence of such act of disposition. Since superficies is a type of right over things, it is of course acquirable by prescription. However, the primary element for acquisition of superficies by acquisitive prescription is possession of the land of others with the intent to exercise superficies thereon. In the absence of such intent as supported by the nature of the facts from which the possession originated, the acquisitive prescription shall not begin to count unless there occurs an event because of which the possession becomes one with such intent. Thus, the possession of the land is based ab initio on the possessor's status as a co-owner, the exercise of the right which a joint owner may enjoy by virtue of the joint relationship, or an intent of taking an unauthorized possession, rather than based on the intent to exercise superficies, nor is it a possession

有土地申請時效取得地上權登記，與上開意旨不符，有違憲法保障人民財產權之本旨，應不予適用。

that becomes subsequently one with the intent to exercise superficies as prescribed in Article 945 of the Civil Code. In other words, the possession lacks the elements required for acquisition by prescription. Conversely, If the co-owner or joint owner who possesses the land under co-ownership or joint ownership expresses to the other co-owners or joint owners who put the land in his possession the intent to make it subsequently a possession for the purpose of exercising superficies, he is certainly entitled to claim acquisition of the superficies by prescription under Articles 769 and 770 of the Civil Code, which are made applicable mutatis mutandis by Article 772 thereof, and to apply to have himself registered as an owner of superficies. The Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter Tai-Nei-Ti No. 62146 dated August 17, 1988, which prescribe in Section 3, Subsection 5, that a co-owner may not apply for the registration of superficies by reason of acquisitive prescription over land under ownership in common, are inconsistent with the essence of

our opinion given above and also contrary to the purpose of the Constitution in protecting the property right of the people. Thus, this provision must be held inoperative.

Justice Chi-Nan Chen filed concurring opinion.

Justice Vincent Sze filed dissenting opinion, in which Justice Chung-Mo Cheng joined.

Justice Ho-Hsiung Wang filed dissenting opinion, in which Justice Tong-Schung Tai joined.

本號解釋陳大法官計男提出協同意見書；施大法官文森、城大法官仲模共同提出不同意見書；王大法官和雄、戴大法官東雄共同提出不同意見書。

J. Y. Interpretation No.452（April 10, 1998）*

ISSUE: Does Article 1002 of the Civil Code violate the principles of equality and proportion as specified in Articles 7 and 23 of the Constitution, thus being void?

RELEVANT LAWS:

Articles 7 and 23 of the Constitution（憲法第七條及第二十三條）; Articles 20, 1001 and 1002 of the Civil Code（民法第二十條、第一千零零一條、第一千零零二條）.

KEYWORDS:

residence（住所）, obligation of living together（同居義務）.**

HOLDING: It stipulates in Article 1002 of the Civil Code that the residence of the wife shall be that of the husband and the residence of the taken-in husband [1] shall be that of the wife; nevertheless, in case there is an agreement that the residence of the husband shall be that of the wife or the residence of the wife shall be that of the taken-in husband, the

解釋文：民法第一千零零二條規定，妻以夫之住所為住所，贅夫以妻之住所為住所。但約定夫以妻之住所為住所，或妻以贅夫之住所為住所者，從其約定。本條但書規定，雖賦予夫妻雙方約定住所之機會，惟如夫或贅夫之妻拒絕為約定或雙方協議不成時，即須以其一方設定之住所為住所。上開法律未能兼顧他方選擇住所及具體個案之特殊

* Translated by Chi-chang Yu.

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

[1] A husband who is taken in to bear the bride's family name and living with the bride's family.

agreement shall be upheld. Though the proviso renders the opportunity for the husband or the wife to make an agreement on the residence, one shall accept the residence of another as his/her residence in the case where the husband or the wife of the taken-in husband refuses to make such an agreement or in the case where no agreement can be made. The above law does not take into consideration that the other party of the marriage also has the right to choose the residence and does not cover specific circumstances, which is in violation of the principle of equality and proportionality of the Constitution. The above law shall become void within one year from the date of this Interpretation. In addition, the designation of the residence of the couple is different from the marital obligation to cohabitation. The residence stipulation is made to determine the effect of legal matters related to the couple, which shall not be viewed as the only place designated by the Civil Code where the couple may perform their marital obligation to cohabitation. Both parties to the marriage have the obligation to live together as long as the marriage shall last,

情況，與憲法上平等及比例原則尚有未符，應自本解釋公布之日起，至遲於屆滿一年時失其效力。又夫妻住所之設定與夫妻應履行同居之義務尚有不同，住所乃決定各項法律效力之中心地，非民法所定履行同居義務之唯一處所。夫妻縱未設定住所，仍應以永久共同生活為目的，而互負履行同居之義務，要屬當然。

regardless of whether or not a residence may have been designated.

REASONING: It stipulates in Article 1002 of the Civil Code that the residence of the wife shall be that of the husband and the residence of the taken-in husband shall be that of the wife; nevertheless, in case there is an agreement that the residence of the husband shall be that of the wife or the residence of the wife shall be that of the taken-in husband, the agreement shall be upheld. In that, the husband or the wife (for the taken-in husband) is vested with the right to designate the residence for the couple. Though for the purpose of respecting the couple, the proviso renders the husband or the wife the opportunity to make an agreement on the residence, one shall accept the residence of the other as his/her residence in the case where the husband or the wife of the taken-in husband refuses to make such an agreement or in the case where no agreement can be made. According to the proviso, the right to determine the residence is vested in the husband or the wife (for the taken-in husband) based on gen-

解釋理由書：民法第一千零零二條規定，妻以夫之住所為住所，贅夫以妻之住所為住所。但約定夫以妻之住所為住所，或妻以贅夫之住所為住所者，從其約定。準此以觀，夫妻共同住所之指定權屬於夫，贅夫則從妻之所指定。雖其但書為尊重夫妻間設定住所之意願，規定在嫁娶婚，夫妻得約定夫以妻之住所為住所，在招贅婚得約定妻以夫之住所為住所，惟如夫或贅夫之妻拒絕為約定或雙方協議不成時，即須以其一方設定之住所為住所。不啻因性別暨該婚姻為嫁娶婚或招贅婚而於法律上為差別之規定，授與夫或贅夫之妻最後決定權。按人民有居住之自由，乃指人民有選擇其住所之自主權。住所乃決定各項法律效力之中心地，夫妻互負同居之義務，固為民法第一千零零一條前段所明定，惟民法並未強制規定自然人應設定住所，且未明定應以住所為夫妻履行同居義務之唯一處所。是夫妻履行同居義務之處所並不以住所為限。鑑諸現今教育普及，男女接受教育之機會均等，就業情況改變，男女從事各種行業之機會幾無軒輊，而夫妻各自就業之處所，

der and the type of marriage. The stipulation in the Constitution that people have the freedom to live means that the people have the right to choose their residences. The residence stipulation is made to determine the effect of legal matters related to the couple. There is no clause in the Civil Code obligating the people to designate a residence nor is there any clause in the Civil Code designating the residence as the only place where the couple may perform the marital obligation to cohabitation, regardless of whether it stipulates in Article 1001 of the Civil Code that either party of the marriage owes the other the marital obligation to cohabitation. As such, the residence shall not be viewed as the only place designated by the Civil Code where the couple may perform their marital obligation to cohabitation. Given that education is very common nowadays and men and women have almost the same opportunity to make career choices, the work place of the husband and the wife may not be the same. The couple may come to an agreement to designate a residence in the case where the couple is willing to accommo date one another.

未必相同，夫妻若感情和睦，能互相忍讓，時刻慮及他方配偶之需要，就住所之設定能妥協或折衷，而有所約定者固可，若夫或贅夫之妻拒不約定住所，則依民法第一千零零二條前段規定，他方配偶即須以其一方設定之住所為住所，未能兼顧他方選擇住所之權利及具體個案之特殊情況，與憲法上平等及比例原則尚有未符，應自本解釋公布日起，至遲於屆滿一年時失其效力。

Nevertheless, one shall accept the residence of the other as his/her residence in the case where the husband or the wife of the taken-in husband refuses to make such an agreement or in the case where no agreement can be made. The above law does not take into consideration that the other party of the marriage also has the right to choose the residence and does not cover specific circumstances, which is in violation of the principle of proportionality and equity of the Constitution. The above law shall become null and void within one year from the date of this Interpretation.

In addition, the designation of the residence of the couple is different from the marital obligation to cohabitation. The marital obligation to cohabitation is owed to one another by both parties of the marriage for the purpose of living together as long as the marriage shall last, regardless of whether or not a residence may have been designated.

又夫妻住所之設定與夫妻應履行同居之義務，尚有不同，夫妻縱未設定住所，仍應以永久共同生活為目的，而互負履行同居之義務，要屬當然。

J. Y. Interpretation No.453（May 8, 1998）*

ISSUE: Does the Business Accounting Act which delegates the certification of business accounting bookkeepers to the executive branch contradict the Constitution?

RELEVANT LAWS:

Article 86, Subparagraph 2 of the Constitution（憲法第八十六條第二款）; Articles 2, Paragraph 2, and 5, Paragraph 4 of the Business Accounting Act（商業會計法第二條第二項、第五條第四項）.

KEYWORDS:

business accounting matters（商業會計事務）, accountant（會計師）, business accounting bookkeeper（商業會計記帳人）, professional services（專門職業）, qualification（職業資格）, certification（認可）, examination（考試）, delegation（委託）, public interest（公共利益）, property rights（財產權）, central governing authority（中央主管機關）.**

HOLDING: According to Article 2, Paragraph 2, of the Business Accounting Act, the term "business accounting matters" refers to the engagement in

解釋文：商業會計事務，依商業會計法第二條第二項規定，謂依據一般公認會計原則從事商業會計事務之處理及據以編制財務報表，其性質涉及公

* Translated by Pijan Wu.

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

business accounting matters and the compilation of financial statements pursuant to generally accepted accounting principles. Its nature relates to the public interest and the private property rights and interests of the people. Accordingly, those whose profession is to deal with business accounting matters shall be equipped with a certain degree of professional accounting knowledge and experience in order to be qualified. Article 5, Paragraph 4, of the Business Accounting Act provides that: "Business accounting matters may be engaged by Accountants or business accounting bookkeepers certified by the central governing authority; the rules for their certification and supervision shall be stipulated by the central governing authority." Since the so-called "business accounting bookkeepers" deal with business accounting matters, their duties are within the category of professional services. According to Article 86, Subparagraph 2, of the Constitution, the qualifications for professional services shall be determined through examinations held under the relevant laws. The portion of Article 5, Paragraph 4, of the Business Accounting Act,

共利益與人民財產權益，是以辦理商業會計事務為職業者，須具備一定之會計專業知識與經驗，始能勝任。同法第五條第四項規定：「商業會計事務，得委由會計師或經中央主管機關認可之商業會計記帳人辦理之；其認可及管理辦法，由中央主管機關定之」，所稱「商業會計記帳人」既在辦理商業會計事務，係屬專門職業之一種，依憲法第八十六條第二款之規定，其執業資格自應依法考選銓定之。商業會計法第五條第四項規定，委由中央主管機關認可商業會計記帳人之資格部分，有違上開憲法之規定，應不予適用。

which delegates to the central governing authority the power to certify the qualification of business accounting bookkeepers, is in violation of the aforementioned constitutional provision and shall no longer be applied.

REASONING: According to Article 86, Subparagraph 2, of the Constitution, the term "professionals and technicians" refers to those who acquire special knowledge or techniques through modern education or technical training processes and engage in practices closely related to the public interest or the life, body, property and other rights of the people.

According to Article 2, Paragraph 2, of the Business Accounting Act, the term "business accounting matters" refers to the engagement in business accounting matters and the compilation of financial statements pursuant to generally accepted accounting principles. Its nature relates to the public interest and the private property rights and interests of the people. Accordingly, those whose profession is to deal with business accounting matters shall be

解釋理由書：憲法第八十六條第二款所稱之專門職業及技術人員，係指具備經由現代教育或訓練之培養過程獲得特殊學識或技能，而其所從事之業務，與公共利益或人民之生命、身體、財產等權利有密切關係者而言。商業會計事務，依商業會計法第二條第二項規定，謂依據一般公認會計原則從事商業會計事務之處理及據以編制財務報表，其性質涉及公共利益與人民財產權益，是以辦理商業會計事務為職業者，自須具備一定之會計專業知識與經驗。同法第五條第四項前段規定：「商業會計事務，得委由會計師或經中央主管機關認可之商業會計記帳人辦理之」，其所以於會計師外亦得由商業會計記帳人辦理，旨在解決中小規模營利事業無力負擔雇用會計師之問題，惟為確保商業會計事務詳實無訛，以利主管機關稽核，執行商業會計記帳業務之人，仍必須對記帳及稅務會計有相當之專業知識與經

equipped with a certain degree of professional accounting knowledge and experience in order to be qualified. Furthermore, the first sentence of Article 5, Paragraph 4, of the Business Accounting Act provides that: "Business accounting matters may be engaged by accountants or business accounting bookkeepers certified by the central governing authority." The reason for permitting business accounting bookkeepers, in addition to accountants, to deal with business accounting matters is to provide help for certain small-to-medium enterprises that cannot afford accountants' fees. Nevertheless, in order to ensure the accuracy of the business accounting matters and to facilitate the auditing by the governing authorities, it is imperative that the business accounting bookkeepers have adequate professional knowledge and experience in bookkeeping, tax preparation and accounting. Therefore, since the business accounting bookkeepers deal with business accounting matters and their duties are within the category of professional services, they may practice only after they have passed the examinations or verification proce-

驗，始足以勝任。因而商業會計記帳人既在辦理商業會計事務，屬專門職業之一種，應經依法考試或檢覈始能取得執業資格。商業會計法第五條第四項將之委由中央主管機關認可商業會計記帳人之資格部分，有違上開憲法之規定，應不予適用。

dures according to the relevant laws. The portion of Article 5, Paragraph 4, of the Business Accounting Act, which delegates to the central governing authority the power to certify the qualification of business accounting bookkeepers, is in violation of the aforementioned constitutional provision and shall no longer be applied.

Justice Jyun-Hsiung Su filed dissenting opinion.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋蘇大法官俊雄、孫大法官森焱分別提出不同意見書。

J. Y. Interpretation No.454（May 22, 1998）*

ISSUE: Is the regulation which provides that an application for long-term residency and household registration submitted by a national residing outside of the Taiwan area and not being listed on the Taiwan household registry upon his/her entry into the Taiwan area may be denied, revoked or cancelled after being granted, and he/she may be deported after such denial or revocation of registration consistent with the people's freedoms of residence and migration that are protected by the Constitution?

RELEVANT LAWS:

Articles 10 and 23 of the Constitution（憲法第十條、第二十三條）; Article 8 of the Household Registration Act（戶籍法第八條）; Article 3, Paragraph 1, of the National Security Act（國家安全法第三條第一項）; Articles 10, Paragraph 1, 11, 12 and 14 of the Act Governing Relations between People of the Taiwan Area and Mainland Area（臺灣地區與大陸地區人民關係條例第十條第一項、第十一條、第十二條、第十四條）; Articles 11, 12 and 14 of the Act Governing Relations with Hong Kong and Macau（香港澳門關係條例第十一條、第十二條及第十四條）; Guideline 1, 3 and 7 of Guidelines for the Nationals' Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country（國

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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人入境短期停留長期居留及戶籍登記作業要點第一點、第三點、第七點）；

KEYWORDS:

freedom of residence（居住自由）, freedom of movement（遷徙自由）, household registry（戶籍）, temporary entry（短期停留）, long-term residency （長期居留）, order to exit within a specified period （限期離境）. **

HOLDING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have the freedom of residence and migration, is to protect the people's freedom to choose and change their residence and to travel, including the right to exit or enter the country. Any restriction to the aforesaid freedom or right of the people must conform to the degree of necessity stipulated in Article 23 of the Constitution, and must be stipulated by the law. The Ministry of the Interior Ordinance No.13557 proclaimed on April 20, 1994, which amended the "Guidelines for the Nationals' Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country," provides,

解釋文：憲法第十條規定人民有居住及遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括出境或入境之權利。對人民上述自由或權利加以限制，必須符合憲法第二十三條所定必要之程度，並以法律定之。中華民國八十三年四月二十日行政院台內字第一三五五七號函修正核定之「國人入境短期停留長期居留及戶籍登記作業要點」第七點規定（即原八十二年六月十八日行政院台內字第二〇〇七七號函修正核定之同作業要點第六點），關於在台灣地區無戶籍人民申請在台灣地區長期居留得不予許可、撤銷其許可、撤銷或註銷其戶籍，並限期離境之規定，係對人民居住及遷徙自由之重大限制，應有法律或法律明確授權之依據。除其中第一項第三款及第二項之相關規定，係

in Guideline 7 (originally Guideline 6 of Ordinance No.20077 of the said Ministry amended and proclaimed on June 18,1993), that the government may refuse to grant long-term residency permits, cancel such permits, or cancel or deregister household registration to nationals not listed on the household registry of Taiwan. These are major restraints on the people's freedom of residence and migration, and thus must be authorized by the law or by authorities legally empowered to do so. With the exception of the provisions in Paragraph 1, Subparagraph 3, and Paragraph 2 which are necessary for the enforcement of special laws such as the National Security Act, the remaining provisions and provisions in Paragraph 2 concerning household registry, and Paragraph 3 concerning deportation upon expiry of visa cannot be reconciled with the objectives of the said constitutional principle, and thus shall become void within one year from the date of this Interpretation. With regard to nationals residing in mainland China, Hong Kong and Macau who wish to apply for a residency permit and household registration in Taiwan,

為執行國家安全法等特別法所必要者外，其餘各款及第二項戶籍登記之相關規定、第三項關於限期離境之規定，均與前開憲法意旨不符，應自本解釋公布之日起，至遲於屆滿一年時失其效力。關於居住大陸及港澳地區未曾在台灣地區設籍之人民申請在台灣地區居留及設定戶籍，各該相關法律設有規定者，依其規定，併予指明。

they shall be governed by the relevant laws, if any.

REASONING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have the freedom of residence and migration, is to protect the people's freedom to select their residence, to change their residence and to travel, including the right to exit or enter the country. The degrees of restriction on the right of entry and residence for nationals listed on Taiwan's household registry, those residing overseas or residing in Hong Kong or Macau may differ reasonably, provided such restriction conforms to the principle of necessity stipulated in Article 23 of the Constitution, and is provided for by law or by rules prescribed by administrative bodies with the express authorization from legislative bodies. Article 8 of the Household Registration Act, amended and promulgated on July 17, 1973, states that: "household registration guidelines for nationals of the Republic of China who reside overseas shall be set by the Ministry of the Interior along with the Ministry of Foreign Affairs

解釋理由書：憲法第十條規定人民有居住及遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括出境或入境之權利。對人民入境居住之權利，固得視規範對象究為台灣地區有戶籍人民，僑居國外或居住港澳等地區之人民，及其所受限制之輕重而容許合理差異之規範，惟必須符合憲法第二十三條所定必要之程度，並以法律定之，或經立法機關明確授權由行政機關以命令定之。六十二年七月十七日修正公布之戶籍法第八條規定：「僑居國外之中華民國人民，其戶籍登記辦法，由內政部會同外交部及僑務委員會定之」（現已刪除），乃立法機關本於實際需要授權行政機關就戶籍登記之事項為補充規定。行政機關據此訂定之行政命令應遵守授權之目的及範圍，不得牴觸母法或對人民之權利增加法律所無之限制。惟內政部並未依據上開授權訂定辦法，送請立法院查照。八十二年六月十八日行政院台內字第二〇〇七七號函修正核定，同年六月二十六日實施之「國人入境短期停留長期居留及戶籍登記作業要點」第六點第一項規定：「得在台

and the Overseas Chinese Affairs Commission" (which is abolished as of this date). It is a supplementary provision to the household registration guidelines and has been introduced by administrative bodies with authorization granted by legislative bodies based on actual needs. Administrative orders prescribed by administrative bodies shall fall within the objective and scope of such authorization, and shall not place excessive restrictions on the people's rights in violation of the empowering statute. However, the Ministry of the Interior had not furnished their guidelines, which prescription was authorized by the abovementioned Article, to the Legislative Yuan for approval. Guideline 6, Paragraph 1, of the Ministry of the Interior Ordinance No. 20077, amended and proclaimed on June 18, 1993, which was entitled "Guidelines for the Nationals' Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country," provides that: "Nationals who are eligible for long-term residency or filing application for household registration in the Taiwan region shall have their eligibility taken away,

灣地區長期居留或申請戶籍登記人民，有左列情形之一者，應不予許可，並撤銷其居留許可及限期離境。(一)有事實足認為有妨害國家安全或社會安定之重大嫌疑者。(二)曾有犯罪紀錄者。(三)未經許可而入境者。(四)以偽造、變造證件或冒用身分矇混申請或入境者。(五)有事實足認其為通謀而為虛偽之結婚或收養者。」同點第二項：「前項各款人民如已辦妥戶籍登記者，得予撤銷，並限期離境。」八十三年四月二十日行政院台內字第一三五五七號函修正核定，同年五月十三日實施之同作業要點第七點第一項規定：「在台灣地區無戶籍人民申請在台灣地區長期居留，有左列情形之一者，得不予許可：(一)有事實足認為有妨害國家安全或社會安定之重大嫌疑者。(二)曾有犯罪紀錄者。(三)未經許可入境者。(四)以偽造、變造證件或冒用身分申請或入境者。(五)曾協助他人非法入出境，或身分證件曾提供他人持以非法入出境者。(六)有事實足認其係通謀而為虛偽之結婚或收養者。(七)健康檢查不合格者。(八)曾從事與許可目的不符之活動或工作者。(九)曾逾期停留者。」同點第二項：「在臺灣地區無戶籍人民申請在臺灣地區戶籍登記，有前項第一款至第六款情

their residency permit cancelled and be ordered to exit the country within a specified time, if they fall under any of the following categories: (1) there is evidence suspecting that the person poses a threat to national security or social stability; (2) persons with criminal records; (3) unauthorized entrants; (4) persons who have applied for entry or entered using forged or altered documentation or fake identification; (5) there is evidence suspecting that the person participated in a fraudulent marriage or adoption scheme." Paragraph 2 of the same Guideline provides: "In the event nationals falling under the aforementioned categories are registered on the household registry, such registration shall be cancelled and they shall be ordered to exit the country within a specified period." The Ministry of Interior Ordinance No.13557, which was proclaimed on April 20, 1994, and became effective on May 13 of the same year, amended the said Guidelines and provided in Guideline 7, Paragraph 1, that: "Applications by Taiwanese nationals for long-term residency permits in the Taiwan region may be refused if any of the following applies:

形之一者，得不予許可。但依第六點第一項第二款至第五款申請者，不在此限。」同點第三項：「有第一項第一款至第七款及前項得不予許可情形之人民，其已許可者，由內政部警政署入出境管理局（以下簡稱境管局）撤銷其許可，已辦妥戶籍登記者，由境管局通知戶政機關撤銷或註銷其戶籍；已入營服役者，由境管局通知原徵集之役政機關，轉報國防部解除其徵集。並限期離境。」同點第四項：「第一項第八款及第九款情形，其不予許可長期居留期間自其出境之日起算為一年。」現行作業要點第七點第一項所稱「在台灣地區無戶籍人民」，依同作業要點第三點，係指(一)僑居國外或居住港澳地區未曾在台灣地區設有戶籍之人民。(二)取得我國國籍之人民而言。同作業要點第七點第一項第三款及第二項規定對於未經許可入境者，申請長期居留及戶籍登記，得不予許可，係為執行國家安全法第三條第一項之規定所必要，與台灣地區與大陸地區人民關係條例第十條第一項、香港澳門關係條例第十一條、第十二條規定意旨亦屬相符，與憲法尚無牴觸。又第七點第一項第一款、第二款、第四款至第九款之情形，均欠缺法律或法律授權之依據，即逕以命令限制人民居住

(1) there is evidence suspecting that the person poses a threat to national security or social stability; (2) persons with criminal records; (3) unauthorized entrants; (4) persons applying for entry or having entered using forged or altered documentation or fake identification, (5) persons who have assisted in the illegal entry of another or provided their identification documents to another for the purpose of illegal entry, (6) there is evidence suspecting that the person participated in a fraudulent marriage or adoption scheme, (7) persons who fail the health examination, (8) persons who have participated in activities or work contradictory to the permitted objectives, and/or (9) persons who have overstayed their visas." Paragraph 2 of the same Guideline provides: "Applications by nationals, who are not listed on the household registry in the Taiwan region, for listing on the household registry may be refused if any of the foregoing Subparagraphs apply. However, applicants mentioned in Guideline 6, Paragraph 1, Subparagraphs 2 to 5 are not bound by this limitation." Paragraph 3 of the said Guideline states: "Approvals

及遷徙之自由，同點第二項之戶籍登記相關規定及第三項關於限期離境之規定，除台灣地區與大陸地區人民關係條例第十四條、香港澳門關係條例第十四條設有強制出境之規定外，同作業要點上開規定對於在台灣地區無戶籍人民一概適用，亦屬欠缺法律之依據，與憲法保障人民居住遷徙自由之意旨不符，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。關於居住大陸及港澳地區未曾在台灣地區設籍之人民申請在台灣地區居留及設定戶籍，各該相關法律設有規定者，依其規定，併予指明。

granted to nationals to whom any of Subparagraphs 1 to 7 of Paragraph 1 and the aforementioned Paragraph apply shall be cancelled by the Bureau of Immigration of the Ministry of the Interior (the "Bureau"), and the Bureau shall deregister such nationals' listing on the household registration. In the event such nationals have joined the armed forces, the Bureau shall notify the original conscription authorities and refer the matter to the Ministry of National Defense for cancellation of the conscription. The said nationals shall be ordered to leave the country within a specified period. Paragraph 4 of the same Guideline states: "The non-permissive long-term residency period referred to in Paragraph 1, Subparagraphs 8 and 9, is one year from the date of exit." "Nationals not listed on the household registry of the Taiwan region" referred to in Guideline 7, Paragraph 1, of the current Guidelines means, according to Guideline 3 of the same Guidelines, (1) nationals residing overseas or in Hong Kong or Macau who have never had a household registry; or (2) people who have become citizens of the Republic of China. In the same Guide-

lines, Guideline 7, Paragraph 1, Subparagraph 3, and Paragraph 2 provide that applications for long-term residency and household registration by illegal entrants may be withheld. This is necessary for the execution of Article 3, Paragraph 1, of the National Security Act, and is congruent with the objectives of the provisions in Article 10, Paragraph 1, of the Act Governing Relations between People of the Taiwan Area and Mainland Area and Articles 11 and 12 of the Act Governing Relations with Hong Kong and Macau, and does not breach the Constitution. Further, Guideline 7, Paragraph 1, Subparagraphs 1, 2, and 4 to 9, lack the legal foundation and authority of a law; hence, they are merely orders restricting the people's freedom to residence and movement. The relevant provisions regarding household registration in Paragraph 2 of the said Guideline and the provisions concerning orders to exit within a specified period as stipulated in Paragraph 3, except for the deportation provision found in Article 14 of the Act Governing Relations between People of the Taiwan Area and Mainland Area and Article 14 of the Act Governing

Relations with Hong Kong and Macau, which purport to govern all nationals not listed on the Taiwan household registry, lack legal foundation and are in conflict with the constitutionally protected residence and movement rights of the people. The said provisions shall become void within one year from the date of this Interpretation. With regard to nationals residing in mainland China, Hong Kong and Macau who wish to apply for a residency permit and household registration in Taiwan, they shall be governed by the relevant laws, if any.

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。

J. Y. Interpretation No.455（June 5, 1998）*

ISSUE: The directive of the Central Personnel Administration, Executive Yuan, states, "Drafted personnel on the basis of retaining position with suspended pay, upon honorary discharge from military service and restoration of their former civilian positions, shall have their years of military service accredited and combined with their previous civilian service in accordance with Law." Does said directive constitute discriminatory treatment toward a person who joins the public civilian service after military service, thus conflicting with the principle of equality so specified in Article 7 of the Constitution?

RELEVANT LAWS:

Articles 5, 7, 20, 153, 155 and 156 of the Constitution（憲法第五條、第七條、第二十條、第一百五十三條、第一百五十五條、第一百五十六條）; Articles 2, 32, Paragraphs 1 and 2, of the Act Governing Preferential Treatment to Military Soldiers and Their Dependents（軍人及其家屬優待條例第二條、第三十二條第一項、第二項）; Article 17, Paragraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第十七條第二項）.

KEYWORDS:

equal protection（平等保護）, military reserve personnel combination of creditable service（後備軍人轉任公職時併計軍中服役之年資）.**

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* Translated by Professor S. M. Yu.

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

HOLDING: The nation owes government employees the obligation of remuneration and pension to pay for their living expenses. A military serviceman is a kind of government employee and has the right to receive a pension or to have his creditable military service combined with creditable public civilian service in accordance with law. The adoption of creditable military service should not differ whether his service was voluntary or compulsory, or was served before or during public civilian service. Article 32, Paragraph 1, of the Act Governing Preferential Treatment to Military Soldiers and Their Dependents provides: "When a military reservist joins the public civilian service, his years of military service shall be taken into account in the calculation of creditable service." This provision is based on the abovementioned right in accordance with the constitutional principle of equal protection. The interpretative letter of the Central Personnel Administration, Executive Yuan, (63) Jui Si Tze 09646 dated May 11, 1974, states that: "drafted personnel on the basis of retaining position with suspended payment,

解釋文：國家對於公務員有給予俸給、退休金等維持其生活之義務。軍人為公務員之一種，自有依法領取退伍金、退休俸之權利，或得依法以其軍中服役年資與任公務員之年資合併計算為其退休年資；其中對於軍中服役年資之採計並不因志願役或義務役及任公務員之前、後服役而有所區別。軍人及其家屬優待條例第三十二條第一項規定，「後備軍人轉任公職時，其原在軍中服役之年資，應予合併計算。」即係本於上開意旨依憲法上之平等原則而設。行政院人事行政局六十三年五月十一日（六三）局肆字第〇九六四六號函釋，關於「留職停薪之入伍人員，於退伍復職後，依規定須補辦考績，並承認其年資」，致服義務役軍人僅得於任公務員後服役者始得併計公務員退休年資，與上開意旨不符。此項年資之採計對擔任公務員者之權利有重大影響，應予維護，爰依司法院大法官審理案件法第十七條第二項，諭知有關機關於本解釋公布之日起一年內，基於本解釋意旨，逕以法律規定或由行政院會同考試院，依上開條例第三十二條第二項之授權妥為訂定。

when discharged from military service and restored to their former civilian positions, shall have their merit evaluations performed retroactively according to law, and have their military service accredited." The result of the interpretation is that people in compulsory military service can have such service accredited to their creditable public civilian service only when they serve in the military after joining the civil service. Such interpretation is contrary to the purpose of law as stated above. Such calculation of creditable service impacts materially on the right of government employees whose right should be protected. In accordance with Article 17, Paragraph 2, of the Constitutional Interpretation Procedure Act, we hereby notify the relevant agencies to implement, by law or through the joint decision of the Executive and Examination Yuans, within one year from the date of this Interpretation, the purpose of this Interpretation appropriately, as authorized under Article 32, Paragraph 2, of the abovementioned Act.

REASONING: The nation owes

解釋理由書：國家對於公務員

government employees the obligation of remuneration and pension to pay for their living expenses. A military serviceman is a kind of government employee and has the right to receive a pension or to have his creditable military service combined with his creditable public civilian service in accordance with law. The adoption of creditable military service should not differ whether his service was voluntary or compulsory, or was served before or during public civilian service. According to Article 20 of the Constitution, people have the obligation to serve in the military as provided by law. Soldiers in compulsory or voluntary military service may have different professional expertise or lengths of service, but their duty of loyalty and services provided are similar. Therefore, their legal right to a proper calculation of creditable service shall not be different. Article 32, Paragraph 1, of the Act Governing Preferential Treatment to Military Soldiers and Their Dependents provides “When a military reservist joins the public civilian service, his years of military service shall be taken into account in the calculation of creditable service.” Un-

有給予俸給、退休金等維持其生活之義務。軍人為公務員之一種，自有依法領取退伍金、退休俸之權利，或得依法以其軍中服役年資與任公務員之年資合併計算為其退休年資；其中對於軍中服役年資之採計並不因志願役或義務役及任公務員之前、後服役而有所區別。按憲法第二十條規定，人民有依法律服兵役之義務，義務役軍人與志願役軍人之服役時間長短與專業知識或屬有間，但於服役期間所應負之忠誠義務與其所服之勤務，與志願役軍人尚無差別，軍人依法所應享有服役年資計算之權益，不宜因其役別為義務役或志願役而有所不同。軍人及其家屬優待條例第三十二條第一項規定，「後備軍人轉任公職時，其原在軍中服役之年資，應予合併計算。」依同條例第二條之定義，其「後備軍人」並無志願役或義務役之別，即係本於上開意旨依憲法上之平等原則而設。行政院人事行政局六十三年五月十一日（六三）局肆字第〇九六四六號函釋，關於「留職停薪之入伍人員，於退伍復職後，依規定須補辦考績，並承認其年資」，致義務役軍人僅得於任公務員後服役始得併計公務員退休年資，其於任公務員前服義務役之年資則不予採計，與前述意旨不符。此項年資之採計

der the definition of the same Act provided in Article 2, there is no distinction between compulsory or voluntary service in the meaning of "military reserve personnel," thus complying with the abovementioned constitutional principle of equal protection. The interpretative letter of the Central Personnel Administration, Executive Yuan, (63) Jui Si Tze 09646 dated May 11, 1974, states that: "drafted personnel on the basis of retaining position with suspended payment, when discharged from military service and restored to their former civilian position, shall have their merit evaluation performed retroactively according to law, and have their military service accredited." As a result of such interpretation, military service is accredited, for people in compulsory military service, only if such service starts after they join the public civilian service, but not prior to joining the public civilian service. This interpretation is contrary to the abovementioned purpose of law. The proper calculation of creditable service impacts materially on the rights of government employees, and should be protected. In accordance with Article 17,

對擔任公務員者之權利有重大影響，應予維護，爰依司法院大法官審理案件法第十七條第二項，諭知有關機關於本解釋公布之日起一年內，基於本解釋意旨，逕以法律規定或由行政院會同考試院，依上開條例第三十二條第二項之授權妥為訂定。

Paragraph 2, of the Constitutional Interpretation Procedure Act. We hereby notify the relevant agencies to implement, by law or through a joint decision of the Executive and Examination Yuans, within one year from the date of this Interpretation, the purpose of this Interpretation appropriately, as authorized under Article 32, Paragraph 2, of the abovementioned Act.

Justice Yueh-Sheng Weng filed concurring opinion.

本號解釋翁大法官岳生提出協同意見書。

J. Y. Interpretation No.456（June 5, 1998）*

ISSUE: Article 25, Paragraph 1, of the Enforcement Rules of the Labor Insurance Act, as amended prior to 1996, provides that the labor insurance program should be offered and limited to full-time employees and staff members. Does the provision contradict the Constitution?

RELEVANT LAWS:

Articles 23 and 153 of the Constitution（憲法第二十三條、第一百五十三條）; Articles 6, Paragraph 1, Subparagraphs 1 to 5, and 8, Paragraph 1, Subparagraphs 1 and 2 of the Labor Insurance Act（勞工保險條例第六條第一項第一款至第五款、第八條第一項第一款及第二款）; Article 25, Paragraph 1, of the Enforcement Rules of the Labor Insurance Act（勞工保險條例施行細則第二十五條第一項）; Article 9, Paragraph 1, of the Labor Standards Act（勞動基準法第九條第一項）.

KEYWORDS:

labor insurance program（勞工保險）, full-time workers（專任員工）, part-time workers（非專任員工）, insured persons（被保險人）, insured units（投保單位）, principle of proportionality（比例原則）.**

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* Translated by Mr. Cing-Kae Chiao.

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

HOLDING: Article 153 of the Constitution proclaims that the nation shall implement a policy of labor protection. The government, in the interest of protecting the lives of workers and promoting social security, has enacted the Labor Insurance Act. The employees and staff members or laborers referred to in Article 6, Paragraph 1, Subparagraphs 1 to 5, of the Act, shall all join the Labor Insurance Program as insured persons and their employers or the organizations or institutions they are affiliated with shall become insured units. In addition, the employees and staff members referred to in Article 8, Paragraph 1, Subparagraphs 1 and 2, of the Act may also participate in the Labor Insurance Program as other qualified employees and staff members or laborers stipulated in the Act. For the employees and staff members or laborers participating in the Labor Insurance Program as insured persons, the Act does not limit its coverage to full-time employees and staff members. However, prior to the September 13, 1996 amendments to the Enforcement Rules of the Labor Insurance Act, Article 25, Paragraph 1, of said Rules

解釋文：憲法第一百五十三條規定國家應實施保護勞工之政策。政府為保障勞工生活，促進社會安全，乃制定勞工保險條例。同條例第六條第一項第一款至第五款規定之員工或勞動者，應以其雇主或所屬團體或所屬機關為投保單位，全部參加勞工保險為被保險人；第八條第一項第一款及第二款規定之員工亦得準用同條例之規定參加勞工保險。對於參加勞工保險為被保險人之員工或勞動者，並未限定於專任員工始得為之。同條例施行細則於中華民國八十五年九月十三日修正前，其第二十五條第一項規定：「依本條例第六條第一項第一款至第五款及第八條第一項第一款、第二款規定加保者，以專任員工為限。」以此排除非專任員工或勞動者之被保險人資格，雖係防杜不具勞工身分者掛名加保，巧取保險給付，以免侵蝕保險財務為目的，惟對於符合同條例所定被保險人資格之非專任員工或勞動者，則未能顧及其權益，與保護勞工之上開意旨有違。前揭施行細則第二十五條第一項規定就同條例所未限制之被保險人資格，逾越法律授權訂定施行細則之必要範圍，限制其適用主體，與憲法第二十三條規定之意旨未符，應不適用。

stipulated that "for those joining the Labor Insurance Program in accordance with Article 6, Paragraph 1, Subparagraphs 1 to 5, and Article 8, Paragraph 1, Subparagraphs 1 to 2, of the Act, the coverage is restricted to full-time employees and staff members." Although this explicit exclusion of non-full-time employees and staff members or laborers from receiving the qualifications as insured persons is intended to serve the purposes of preventing those who do not have the status of workers from joining the Labor Insurance Program as imposters, thereby obtaining insurance benefits unlawfully, and draining the financial foundation of the program, it has not taken into account the rights and privileges of those non-full-time employees and staff members or laborers who are qualified as insured persons as stipulated in the same Act. Therefore, this exclusion is in conflict with the intention of protecting workers as proclaimed by the Constitution. Accordingly, by excluding those workers who are not disqualified by the Act as insured persons and limiting the subject of its coverage, the abovementioned Article 25, Paragraph 1, of the En-

forcement Rules of the Labor Insurance Act has exceeded the necessary boundaries of the authorization which the law has offered to prescribe in its Enforcement Rules. As it is incompatible with the purposes proclaimed in Article 23 of the Constitution, the said Paragraph shall no longer be applicable.

REASONING: Article 153 of the Constitution proclaims that the nation shall implement a policy of labor protection. The Government, in the interest of protecting the lives of workers and promoting social security, has enacted the Labor Insurance Act. In addition, pursuant to Article 23 of the Constitution, the freedom and rights of the citizens can only be restricted by the laws and should not exceed the necessary boundaries. When a law authorizes the administrative institution to prescribe implementing regulations in general, the said institution can enact the Enforcement Rules to implement the detailed and technical aspects of the enforcement of the authorizing law, provided that the regulations shall be consistent with the legislative purposes and do

解釋理由書：憲法第一百五十三條規定國家應實施保護勞工之政策。政府為保障勞工生活，促進社會安全，乃制定勞工保險條例。又依憲法第二十三條規定限制人民之自由權利，應以法律定之，且不得逾越必要之程度。法律概括授權行政機關訂定施行細則者，該管行政機關於符合立法意旨且未逾越母法規定之限度內，得就執行法律有關之細節性、技術性事項，以施行細則定之。惟其內容不得牴觸母法或對人民之自由權利增加法律所無之限制。本院釋字第三六七號解釋理由說明甚詳。勞工保險條例第六條第一項第一款至第五款規定之員工或勞動者應以其雇主或所屬團體或所屬機關為投保單位，全部參加勞工保險為被保險人。同條例第八條第一項第一款及第二款規定之員工亦得準用同條例之規定參加勞工保險。依勞動

not overstep the boundaries of the authorizing law. Furthermore, the contents of the Enforcement Rules shall not conflict with the authorizing law, violate the freedom and rights of the citizens, or add restrictions that are not specified in the authorizing law. The above has been explained in detail by this Yuan in the Interpretation No. 367. The employees and staff members or laborers referred to in Article 6, Paragraph 1, Subparagraphs 1 to 5, of the Labor Insurance Act, shall deem their employers or the organizations or institutions they are affiliated with as insured units, and shall all join the Labor Insurance Program as insured persons. In addition, the employees and staff members referred to in Article 8, Paragraph 1, Subparagraphs 1 and 2, of the Act may also participate in the program as other qualified employees and staff members or laborers stipulated in the Act. Pursuant to Article 9, Paragraph 1, of the Labor Standards Act, the types of work performed by the workers may be temporary, short-term, seasonal, for special purposes or of a continuous nature, but their status as workers remains the same. Since the application of the Labor Insurance Act is closely related to the rights and interests of the workers, the scope of insured persons should be determined by law. Article 6, Paragraph 1, Subparagraphs 1 to 5, of the Act provides that employees and staff members or laborers who are insured persons shall be limited to those who are employed on a regular basis. Article 25, Paragraph 1, of the Enforcement Rules of the Labor Insurance Act, prior to its amendment on September 13, 1996, provided that "Persons who are insured under Article 6, Paragraph 1, Subparagraphs 1 to 6, and Article 8, Paragraph 1, Subparagraphs 1 and 2, of the Act shall be limited to those who are employed on a regular basis." (This provision has been deleted.) The Council of Labor Affairs, Executive Yuan, in its letter dated August 4, 1988, (88) Tai-Lao-Bao-Er-Zi No. 1678606, explained the term "employed on a regular basis" to mean that the worker is employed by the employer and works entirely within the employer's working hours; or that the worker is under the employer's control and works outside the employer's premises, and receives full-time remuneration. Those who work part-time and receive part-time remuneration are not employed on a regular basis and may not be insured by the employer. Only those who are employed on a regular basis may participate in labor insurance. The purpose of the above provisions is to prevent those who do not have the status of workers from registering for insurance in order to obtain insurance benefits and thereby undermine the financial soundness of the insurance program. However, with regard to those who are employed on a regular basis, the Enforcement Rules may not restrict the scope of insured persons beyond the provisions of the Act. Article 25, Paragraph 1, of the Enforcement Rules of the Labor Insurance Act, prior to its amendment on September 13, 1996, is inconsistent with the Act and is therefore void.

基準法第九條第一項規定，勞工從事之工作雖有臨時性、短期性、季節性、特定性及繼續性之別，於其為勞工之身分並無軒輊。由於適用勞工保險條例所定被保險人之資格如何，影響勞工之權益，自應以法律定之。同條例對於參加勞工保險為被保險人之員工或勞動者，並未限定於專任員工始得為之，可知立法意旨於此已就憲法第二十三條所定比例原則為衡量。勞工保險條例施行細則於民國八十五年九月十三日修正前，其第二十五條第一項規定：「依本條例第六條第一項第一款至第五款及第八條第一項第一款、第二款規定加保者，以專任員工為限。」（現行規定業已刪除）行政院勞工委員會七十七年八月四日台七十七勞保二字第一六七八六號函復就「專任員工」解釋，指受僱勞工於僱用單位之工作時間內全部在僱用單位服務；或受僱用單位之支配，於室外服務，並依規定支領全部時間之報酬者而言。如僅以部分時間為僱用人工作，支領部分工時之報酬者，則非專任人員，即不得由投保單位為之投保，參加勞動保險為被保險人。用以排除非專任員工或勞動者之被保險人資格，雖係防杜不具勞工身分者掛名加保，巧取保險給付，以免侵蝕保險財務為目的，惟對於

plication of the qualifications of the insured persons stipulated in the Labor Insurance Act affects the rights and interests of workers, it shall be prescribed by law. The same Act, in addressing the qualifications for employees and staff members or laborers to participate in the Labor Insurance Program as insured persons, does not restrict them to full-time employees and staff members. Therefore, it is quite clear that its legislative intent and purposes have taken into account the principle of proportionality as proclaimed in Article 23 of the Constitution. Prior to the September 13, 1996 amendments to the Enforcement Rules of the Labor Insurance Act, Article 25, Paragraph 1, of said Rules stipulated that "for those joining the Labor Insurance Program in accordance with Article 6, Paragraph 1, Subparagraphs 1 to 5, and Article 8, Paragraph 1, Subparagraphs 1 and 2, of the Act, the coverage is restricted to full-time employees and staff members." (This Paragraph has since been repealed). However, the Council of Labor Affairs of the Executive Yuan issued an interpretative letter titled Lao-Pao-Erh-Tzyh No. 16786 on August 4,

符合同條例所定被保險人資格之非專任員工或勞動者，則未能顧及其權益，與保護勞工之上開意旨有違。前揭施行細則第二十五條第一項規定就同條例所未限制之被保險人資格，逾越法律授權訂定施行細則之必要範圍，限制其適用主體，與憲法第二十三條規定之意旨未符，應不適用。

1988, stating that "the term 'full-time employees' refers to those workers employed by a hiring unit to provide services in the entirety of their working hours for that hiring unit, or workers controlled by a hiring unit to do full-time field work and receive full-time wages in accordance with related regulations. Those employed for part-time work and receiving part-time wages from their employers are not full-time employees or staff members. Therefore, they are not qualified to join the insured units and participate in the Labor Insurance Program as insured persons." The purposes of this letter are to exclude non full-time employees or staff members or laborers from receiving the qualifications as insured persons. Although they are intended to prevent those who do not have the status of labor from joining the Labor Insurance Program as imposters, thereby obtaining insurance benefits unlawfully, and draining the financial foundation of the program, they have not taken into account the rights and interests of those non-full-time employees and staff members or laborers who are qualified as insured persons as stipulated in the same

Act. Therefore, this exclusion is in conflict with the intention of protecting workers as proclaimed by the Constitution. Accordingly, by excluding those workers who are not disqualified by the Act as insured persons and limiting the subject of its coverage, the abovementioned Article 25, Paragraph 1, of the Enforcement Rules of the Labor Insurance Act has exceeded the necessary boundaries of the authorization which the law has offered to prescribe in its Enforcement Rules. As it is incompatible with the purposes proclaimed in Article 23 of the Constitution, the said Paragraph shall no longer be applicable.

J. Y. Interpretation No.457（June 12, 1998）*

ISSUE: Are the relevant provisions of the Regulation for Handling of the Veterans Affairs Commission-Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death, which deprive a married daughter of a veteran of her heirship in respect of the distributed farmland and its subsequent cultivation upon the veteran's death, in violation of the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 10-VI of the Amendments to the Constitution（憲法增修條文第十條第六項）; Section 4-III of the Regulation for Handling of the Veterans Affairs Commission-Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death as proclaimed by the Veterans Affairs Commission, the Executive Yuan（行政院國軍退除役官兵輔導委員會發布之「本會農場有眷場員就醫、就養或死亡開缺後房舍土地處理要點」第四點第三項）.

KEYWORDS:

principle of gender equality（男女平等原則）, substantive gender equality（兩性地位實質平等）, distributed state farmland（配耕國有農場土地）, sexual and marital discrimination（性別及已婚之差別待遇）.**

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* Translated by Vincent C. Kuan.

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

HOLDING: "All citizens of the Republic of China, irrespective of sex, shall be equal before the law; the state shall further substantive gender equality." The foregoing provisions are unambiguously set forth in Article 7 of the Constitution and Article 10-VI of the Amendments to the Constitution, respectively. The state organ, in implementing public administration missions, shall also comply with the aforesaid constitutional provisions while engaging in private acts that are subject to private law. The Regulation for Handling of the Veterans Affairs Commission-Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death as proclaimed by the Veterans Affairs Commission, the Executive Yuan, are undoubtedly designed to ensure the livelihood of veterans and their surviving dependents, whereby parcels of state farmland are distributed to veterans as special and preferential treatment by the state. As such, the rights and legal benefits so conferred are different from those acquired by ordinary citizens. A legal relationship of loan for use is formed between

解釋文：中華民國人民，無分男女，在法律上一律平等；國家應促進兩性地位之實質平等，憲法第七條暨憲法增修條文第十條第六項定有明文。國家機關為達成公行政任務，以私法形式所為之行為，亦應遵循上開憲法之規定。行政院國軍退除役官兵輔導委員會發布之「本會各農場有眷場員就醫、就養或死亡開缺後房舍土地處理要點」，固係基於照顧榮民及其遺眷之生活而設，第配耕國有農場土地，為對榮民之特殊優惠措施，與一般國民所取得之權利或法律上利益有間。受配耕榮民與國家之間，係成立使用借貸之法律關係。配耕榮民死亡或借貸之目的使用完畢時，主管機關原應終止契約收回耕地，俾國家資源得合理運用。主管機關若出於照顧遺眷之特別目的，繼續使其使用、耕作原分配房舍暨土地，則應考量眷屬之範圍應否及於子女，並衡酌其謀生、耕作能力，是否確有繼續輔導之必要，依男女平等原則，妥為規劃。上開房舍土地處理要點第四點第三項：「死亡場員之遺眷如改嫁他人而無子女者或僅有女兒，其女兒出嫁後均應無條件收回土地及眷舍，如有兒子准由兒子繼承其權利」，其中規定限於榮民之子，不論結婚與否，均承認其所謂繼承之權

a veteran and the state as far as the distributed farmland is concerned. Upon the death of the veteran or the fulfillment of the loan for use, the competent authority should terminate the contract to reclaim the farmland so as to use the national resources in a reasonable manner. If, instead, the competent authority allows the veteran's surviving dependents to continue using and cultivating the originally distributed housing and farmland for the specific purpose of ensuring their livelihood, it should then consider whether the scope of the term "dependents" should extend to the veteran's children, and should consider their abilities to earn a living and cultivate the farmland to determine whether it is necessary to continue the assistance before making appropriate plans based on the principle of gender equality. Section 4-III of the aforesaid Regulation for Handling of the Housing and Lands provides, "If the surviving spouse of the deceased veteran remarries but without issue or only has daughter(s), the land and housing shall be reclaimed unconditionally upon the marriage of the daughter(s); and the rights of the veteran

利，與前述原則不符。主管機關應於本解釋公布之日起六個月內，基於上開解釋意旨，就相關規定檢討，妥為處理。

may be inherited by his son, if any." The relevant provisions stating to the effect that the right of inheritance in respect of a deceased veteran is limited to his son regardless of the son's marital status are inconsistent with the aforesaid principle. Therefore, the competent authority shall, within six months from the date of this Interpretation, carefully review and revise the relevant provisions based on the aforesaid essence of this Interpretation.

REASONING: "All citizens of the Republic of China, irrespective of sex, shall be equal before the law; the state shall further substantive gender equality." The foregoing provisions are unambiguously set forth in Article 7 of the Constitution and Article 10-VI of the Amendments to the Constitution, respectively. The state organ, in carrying out public administration missions, shall also comply with the aforesaid constitutional provisions while formulating rules and engaging in private acts that are subject to private law. The Regulation for Handling of the Veterans Affairs Commission-Owned Housing and Farmlands Vacated by Mar-

解釋理由書：中華民國人民，無分男女，在法律上一律平等；國家應促進兩性地位之實質平等，憲法第七條暨憲法增修條文第十條第六項定有明文。國家機關訂定規則，以私法行為作為達成公行政目的之方法，亦應遵循上開憲法之規定。行政院國軍退除役官兵輔導委員會中華民國六十九年七月十一日發布之「本會各農場有眷場員就醫、就養或死亡開缺後房舍土地處理要點」，係國家為因應政府遷台初期客觀環境之需要，安置國軍退除役官兵，照顧此等有眷榮民之生活，經由行政院國軍退除役官兵輔導委員會將所經營之國有農場耕地配予榮民耕種，乃對榮民所採之特殊優惠措施，與一般國民所取得

ried Veterans after Their Hospitalization, Retirement or Death as proclaimed by the Veterans Affairs Commission, Executive Yuan, on July 11, 1980, are designed by the state to deal with the circumstances in the wake of the government's retreat to Taiwan by helping veterans to settle down and earn a living. Under the said regulations, numerous parcels of state farmland administered by the Veterans Affairs Commission are distributed to veterans as special and preferential treatment by the state. As such, the rights and legal benefits so conferred are different from those acquired by the ordinary citizens. A legal relationship of loan for use is formed between a veteran and the state as far as the distributed farmland is concerned. A loan for use is a contract without compensation that forms a specific relationship between the loaner and loanee. Upon the death of the veteran or the fulfillment of the loan for use, the competent authority should terminate the contract to reclaim the farmland so as to use the national resources in a reasonable manner. If, instead, the competent authority allows the veteran's surviving dependents to continue using and

之權利或法律上利益有間。受配耕榮民與國家之間，係成立使用借貸之法律關係。使用借貸為無償契約，屬貸與人與借用人間之特定關係。配耕榮民死亡或依借貸之目的使用完畢時，主管機關原應終止契約收回耕地，俾國家資源得合理運用。主管機關若出於照顧遺眷之特別目的，使其繼續使用、耕作原分配房舍暨土地，則應考量眷屬之範圍應否及於子女，並衡酌其謀生、耕作能力，是否確有繼續輔導之必要，使具相同法律上身分地位者，得享同等照顧，依男女平等原則，妥為規劃。上開房舍土地處理要點第四點第三項：「死亡場員之遺眷如改嫁他人而無子女者或僅有女兒，其女兒出嫁後均應無條件收回土地及眷舍，如有兒子准由兒子繼承其權利」，其中規定限於榮民之子，無視其有無謀生能力及輔導必要，又不問結婚與否，均得繼承其權利。姑不論農場耕地之配耕可否作為繼承之標的，竟僅以性別及已否結婚，對特定女性為差別待遇，與男女平等原則有違。主管機關應於本解釋公布之日起六個月內，基於上開解釋意旨，就相關規定檢討，妥為處理。

cultivating the originally distributed housing and farmland for the specific purpose of ensuring their livelihood, it should then consider whether the scope of the term "dependents" should extend to the veteran's children, and weigh their abilities to earn a living and cultivate the farmland to determine whether it is necessary to continue with the assistance to enable those with equal legal status and standing to enjoy the same benefits before making appropriate plans based on the principle of gender equality. Section 4-III of the aforesaid Regulation for Handling of the Housing and Lands provides, "If the surviving spouse of the deceased veteran remarries but is without issue or only has daughter(s), the land and housing shall be reclaimed unconditionally upon the marriage of the daughter(s); and the rights of the veteran may be inherited by his son, if any." The relevant provisions, which state to the effect that the right of inheritance in respect of a deceased veteran is limited to his son regardless of whether the son is capable of making a living, whether it is necessary to render assistance, and whether the son is married, are inconsis-

tent with the principle of gender equality without having to consider whether the distributed farmland may be the subject matter of inheritance because they have gone so far as to give discriminatory treatment to a specific class of women based on sex and marital status. Therefore, the competent authority shall, within six months from the date of this Interpretation, carefully review and revise the relevant provisions based on the aforesaid essence of this Interpretation

J. Y. Interpretation No.458（June 26, 1998）*

ISSUE: Does the Directive T.T.S.T. No. 38452 of the Ministry of Finance alter tax benefits provided by law and increase the taxation of productive enterprises, thus rendering it unconstitutional?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 3 and 15 of the Act of Encouragement of Investment（獎勵投資條例第三條、第十五條）; Categories and Criteria of Productive Industries Eligible for Encouragement（生產事業獎勵項目及標準）.

KEYWORDS:

productive enterprise（生產事業）, tax privilege（賦稅優惠）, taxable income（課稅所得額）.**

HOLDING: The Directive T.T.S. T. No. 38452 of the Ministry of Finance dated December 14, 1977, states: "Except for the income generated from the products produced by a productive enterprise itself, the trading income and non-operating income, if any, of such

解釋文：財政部中華民國六十六年十二月十四日臺財稅字第三八四五二號函：「生產事業除自行生產產品所發生之所得外，如有兼營其他非自行生產產品買賣業務所發生之所得暨非營業收入者，該項買賣業務所發生之所得及非營業收入，不適用獎勵投資條例納稅

* Translated by Dr.C.Y.Huang of Tsar & Tsai Law Firm.

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

enterprise from dealing in the products other than those produced by it shall not be eligible for the tax ceiling under the Act of Encouragement of Investment." The said directive was made by the competent authority ex officio, in implementing Article 15 of the Act of Encouragement of Investment (hereinafter the "Act") and the Categories and Criteria of Productive Industries Eligible for Encouragement promulgated in accordance with Article 3 of the Act, in connection with the computation of the annual taxable amount on the operating income and other income of the encouraged productive enterprise. Such directive conforms to the intent of the Act which provides that the tax deduction/exemption only applies to the income derived from the products in the category eligible for encouragement produced by the encouraged productive enterprise. It neither alters the tax benefit set by law nor increases the taxation of the productive enterprise, and it is not in conflict with the principle of taxation by law under the Constitution.

限額之規定」，係主管機關基於職權，為執行獎勵投資條例第十五條及行政院依同條例第三條授權所發布之「生產事業獎勵類目及標準」，對受獎勵之生產事業營業及其他收入計算全年課稅所得額所為之釋示，與該條例對稅捐減免優惠以受獎勵生產事業自行生產獎勵類目產品所發生之所得為限之意旨相符，並未變更法律所定稅賦優惠規定，亦未增加生產事業之租稅負擔，與憲法租稅法定主義並無牴觸。

REASONING: The Act of En-

解釋理由書：獎勵投資條例

couragement of Investment (revoked on January 30, 1991) was enacted to encourage investment activities and accelerate the nation's economic development. The privilege of tax deduction/exemption is a major encouragement to realize the legislative intent. However, the national economic development may have different needs at different stages, and the categories and criteria of productive enterprises eligible for encouragement should also be changed to cope with economic development strategies and objective environments. Article 3, Paragraph 3, and Article 15 (Article 10 of the amended Act promulgated on July 26, 1977) of the Act therefore authorize that, in connection with the categories and criteria of encouragement for the productive enterprises as specified by the Executive Yuan in accordance with Paragraph 1 of the said Articles, only those that meet such categories and criteria of encouragement can enjoy the privilege of a 20% (for important technology-based enterprises) or 25% (for productive enterprises) income tax (including surcharge) ceiling of the annual taxable income under Article 15, Paragraph 1, of

（七十九年十二月三十一日因施行期間屆滿而失效）係為獎勵投資活動，加速國家經濟發展之目的所制定，採用稅捐減免優惠為主要獎勵方法，以實現其立法意旨。惟國家經濟發展隨各個時期而有不同之需求，受獎勵之生產事業類目及標準自亦須因應經濟發展策略及客觀環境而變動。該條例第三條第三項及第十五條（六十六年七月二十六日修正公布之獎勵投資條例為第十條）遂授權行政院就各該條第一項所定之各類生產事業規定之獎勵類目及標準，須符合獎勵類目及標準者，始得享受第十五條第一項有關生產事業及重要生產事業之營利事業所得稅及附加捐總額，不得超過其全年課稅所得額百分之二十及二十五租稅優惠之規定。財政部六十六年十二月十四日臺財稅字第三八四五二號函：「生產事業除自行生產產品所發生之所得外，如有兼營其他非自行生產產品買賣業務所發生之所得暨非營業收入者，該項買賣業務所發生之所得及非營業收入，不適用獎勵投資條例納稅限額之規定」，係主管機關基於職權，為執行獎勵投資條例第十五條及行政院依同條例第三條授權所發布之「生產事業獎勵類目及標準」，對受獎勵之生產事業營業及其他收入計算全年課稅所得額所為之

the Act. The Directive T.T.S.T. No. 38452 of the Ministry of Finance dated December 14, 1977, states: "Except for the income generated from the products produced by a productive enterprise itself, the trading income and non-operating income, if any, of such enterprise from dealing in the products other than those produced by it shall not be eligible for the tax ceiling under the Act of Encouragement of Investment." The said directive was made by the competent authority ex officio, in implementing Article 15 of the Act and the Categories and Criteria of Productive Industries Eligible for Encouragement promulgated in accordance with Article 3 of the Act, in connection with the computation of the annual taxable amount on the operating income and other income of the encouraged productive enterprise. Such directive conforms to the intent of the Act which provides that the tax deduction/exemption only applies to the income derived from the products in the category eligible for encouragement produced by the encouraged productive enterprise. It neither alters the tax benefit set by law nor increases the taxation of the productive

釋示，與該條例對稅捐減免優惠以受獎勵生產事業自行生產獎勵類目產品所發生之所得為限之意旨相符，並未變更法律所定稅賦優惠規定，亦未增加生產事業之租稅負擔，與憲法租稅法定主義並無牴觸。

enterprise, and it is not in conflict with the principle of taxation by law under the Constitution.

J. Y. Interpretation No.459（June 26, 1998）*

ISSUE: Does Interpretation Y.T. No.1850, which rules that a conscript or any of his family members who disagrees with the classification of the conscript's physical condition made by the *hsien* (county) magistrate in charge of conscription shall not file an administrative appeal, violate the constitutional protection of the people's right of instituting legal proceedings?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 21, 26 and 27 of the Regulation on Conscription（徵兵規則第二十一條、第二十六條、第二十七條）; Article 34 of the Conscription Act（兵役法第三十四條）; Article 69 of the Enforcement Act of the Conscription Act（兵役法施行法第六十九條）.

KEYWORDS:

conscription（徵兵）, physical examination in connection with military services（兵役體檢）, administrative appeals（訴願）, administrative actions（行政訴訟）, *hsien*（county）magistrate（縣長）.**

HOLDING: Classifications of the physical conditions of conscripts in

解釋文：兵役體位之判定，係徵兵機關就役男應否服兵役及應服何

* Translated by BAKER & McKENZIE.

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

connection with their military services are unilateral administrative acts of the conscription authorities. These administrative acts have direct legal effects on whether these conscripts will serve in the military and, if so, on the type of military services these conscripts will be subjected to. Such classifications have profound impacts on the rights of the conscripts and should be viewed as administrative decisions pursuant to the Administrative Appeal Act and Administrative Proceedings Act. In the event any of the conscripts who have been subjected to such classification considers that the classification is unlawful or improper, he is entitled to pursue an administrative appeal and administrative litigation. Interpretation Yuan-tze No. 1850 of the Judicial Yuan does not conform to the above principle and should no longer be cited as an authority, so that the constitutional right of citizens to litigate can be preserved. Article 69 of the Enforcement Act of Conscription Act -- which provides that waiver of, prohibition from and delayed conscription or calling up for, military services shall first be determined and then redetermined by the competent au-

種兵役所為之決定而對外直接發生法為，對役男在憲法上之權益有重大影響，應為訴願法及行政訴訟法上之行政處分。受判定之役男，如認其判定有違法或不當情事，自得依法提起訴願及行政訴訟。司法院院字第一八五〇號解釋，與上開意旨不符，應不再援用，以符憲法保障人民訴訟權之意旨。至於兵役法施行法第六十九條係規定免役、禁役、緩徵、緩召應先經主管機關之核定及複核，並未限制人民爭訟之權利，與憲法並無牴觸；其對複核結果不服者，仍得依法提起訴願及行政訴訟。

thority -- does not inhibit the right of citizens to litigate and does not contravene the Constitution. Anyone who disagrees with the redetermination is still entitled to pursue an administrative appeal and administrative litigation.

REASONING: Article 16 of the Constitution provides that citizens have the right to litigate and file administrative appeals, which right aims to protect the citizens from and provide them remedy for derogation of their rights by public administration through administrative appeals and procedures instituted under national laws, and to ensure that the administrative authorities which make administrative decisions or their superiors can self-rectify their illegal or improper decisions pursuant to the system of administrative appeals. Unilateral administrative acts of public authority by administrative authorities, to the extent they relate to particular public law matters which have legal effects, are not differentiated on the basis of the language or methodology used, of of whether there are subsequent acts or of whether it is stated that an appeal

解釋理由書：憲法第十六條規定人民有訴願及訴訟之權利，旨在保障人民遭受公權力侵害時，可循國家依法所設之程序，提起訴願或行政訴訟，俾其權利獲得最終之救濟，並使作成行政處分之機關或其上級機關藉訴願制度，自行矯正其違法或不當處分，以維法規之正確適用及人民之合法權益。按行政機關行使公權力，就特定具體之公法事件所為對外發生法律上效果之單方行政行為，不因其用語、形式以及是否有後續行為或有無記載得聲明不服之文字而有異。凡直接影響人民權利義務關係，且實際上已對外發生效力者，如仍視其為非行政處分，自與憲法保障人民訴願及訴訟權利之意旨不符，業經本院釋字第四二三號解釋在案。

against the acts may be launched. It would be inconsistent with the constitutional right of citizens to litigate and file administrative appeals if acts, which directly affect the rights and obligations of the citizens and which have effects in reality, are still considered non-administrative acts. The above is supported by Interpretation No. 423 of this Judicial Yuan.

Article 34 of the Conscription Act provides that: "conscripts who have been physically examined shall be classified into classes A, B, C, D and E; conscripts classified under classes A or B are considered suitable for immediate military services and should serve in the active and supplementary forces, with some of those remaining (after troop levels have been met) serving in Type A National Service and the rest serving in Type B National Service; conscripts classified under class C should serve in Type B National Service; conscripts classified under Class D are absolved of the obligation to serve in the military; and conscripts classified under class E are those hard to classify and will be subject to a supplemental physical

經徵兵檢查之男子，應區分體位為甲、乙、丙、丁、戊五等，甲、乙等體位為適於服現役者，應服常備兵現役及補充兵現役，其超額者服甲種國民兵役，再超額者服乙種國民兵役，丙等體位服乙種國民兵役，丁等體位為不合格者免役，戊等為難以判定者，應補行體格檢查至能判定時為止，為兵役法第三十四條所明定。因此，兵役體位判定，係徵兵機關就役男應否服兵役及應服何種兵役所為之決定而對外直接發生法律效果之單方行政行為，此種判定役男為何種體位之決定行為，不問其所用名稱為何，對役男在憲法上之權益有重大影響，應為訴願法及行政訴訟法上之行政處分。從而，受判定之役男，如認其判定有違法或不當情事，自得依法提起訴願及行政訴訟。

examination to determine their classification." For the above reasons, classifications on the physical conditions of conscripts are unilateral administrative acts of the conscription authorities. These administrative acts have direct legal effects on whether these conscripts will serve in the military and, if so, on the type of military services these conscripts will be subjected to. Such acts of classification, regardless of how they are named, have profound impacts on the rights of the conscripts and should be viewed as administrative decisions pursuant to the Administrative Appeal Act and Administrative Proceedings Act. In the event any of the conscripts who have been subjected to such classification considers that the classification is unlawful or improper, he is entitled to pursue an administrative appeal and administrative litigation.

Interpretation Yuan-tze No. 1850 of the Judicial Yuan, which ruled that "a conscript or any of his family members who disagrees with the classification of the conscripts made by the county chief shall not file an ordinary administrative

司法院院字第一八五〇號解釋認：「被徵服兵役之壯丁或其家屬，對於辦理徵兵事務之縣長，以徵兵官之資格，所為關於緩役或免役之裁決有不服者，在修正陸軍徵募事務暫行規則第三十三條至第三十五條，既有申訴之特別

appeal but shall find his remedy either pursuant to Articles 33 to 35 of the Provisional Regulation on Army Conscription or through an appeal to the immediate superiors of those in charge of the conscription," should no longer be cited as an authority, as it is not in conformity with the above principle and so that the constitutional right of citizens to litigate can be preserved. Article 69 of the Enforcement Act of the Conscription Act ─ which provides that waiver of, prohibition from and delayed conscription or calling up for, military services shall first be determined and then re-determined by the relevant authority ─ does not inhibit the right of citizens to litigate and does not contravene the Constitution. Anyone who disagrees with the re-determination is still entitled to pursue an administrative appeal and administrative litigation.

規定，則其救濟方法，自應依該規定，向其直接上級徵兵官為之，不得提起普通訴願」，與上開意旨不符，應不再援用，以符憲法保障人民訴訟權之意旨。至於兵役法施行法第六十九條係規定免役、禁役、緩徵、緩召應先經主管機關之核定及複核，並未限制人民爭訟之權利，與憲法並無牴觸；其對複核結果不服者，仍得依法提起訴願及行政訴訟。

Justice Chi-Nan Chen filed dissenting opinion

本號解釋陳大法官計男提出不同意見書。

J. Y. Interpretation No.460（July 10, 1998）*

ISSUE: Does the Ministry of Finance directive declaring that a structure on land used as a "house of worship" is not a "residence" as defined in Article 9 of the Land Tax Act for tax exemption purposes constitute discrimination against any particular religion and is it thus in violation of the Constitutional provision guaranteeing the people's freedom of religion?

RELEVANT LAWS:

Articles 7, 13 and 19 of the Constitution（憲法第七條、第十三條、第十九條）; Articles 6 and 9 of the Land Tax Act（土地稅法第六條、第九條）; Article 8, Paragraph 1, Subparagraph 9 of the Regulation Governing the Reduction or Exemption of Land Tax（土地稅減免規則第八條第一項第九款）; Ministry of Finance in its directive Tai-Tsai-Shui-Tze No. 31627 (March 14, 1983)（財政部七十二年三月十四日台財稅字第三一六二七號函）; J. Y. Interpretation No. 420（司法院釋字第四二〇號解釋）.

KEYWORDS:

tax reduction or exemption（稅捐減免）, homestead; residence for own use（自用住宅）, residential land for own use（自用住宅用地）, house of worship（神壇）, negative construction（消極性釋示）, doctrine of statutory taxation（租

* Translated by Raymond T. Chu.

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

稅法定主義）, principle of equality of actual taxation （實質課稅之公平原則）, privacy（私密性）, land value increment tax（土地增值稅）, freedom of religious belief（信仰宗教之自由）, foundation（財團法人）, religious organizations（宗教團體）, discrimination（差別待遇）.**

HOLDING: Under Article 6 of the Land Tax Act, reasonable tax reduction or exemption may be allowed for land used for such purposes as religion and reasonable homesteads, in order to develop the economy, encourage land utilization and promote social welfare. The second sentence of the Article grants the administrative authorities the power to establish the criteria of and procedure for such reduction or exemption. While the term "homestead land" is explicitly defined in Article 9 of said Act, the law is silent on the meaning of "residence." The view expressed by the Ministry of Finance in its directive Tai-Tsai-Shui-Tze No. 31627 (March 14, 1983) that "a structure on land used as a house of worship is not land used for 'residence' for own use as defined in Article 9 of the Land Tax

解釋文：土地稅法第六條規定，為發展經濟，促進土地利用，增進社會福利，對於宗教及合理之自用住宅等所使用之土地，得予適當之減免；同條後段並授權由行政機關訂定其減免標準及程序。同法第九條雖就自用住宅用地之定義設有明文，然其中關於何謂「住宅」，則未見規定。財政部中華民國七十二年三月十四日台財稅字第三一六二七號函所稱「地上建物係供神壇使用，已非土地稅法第九條所稱之自用『住宅』用地」，乃主管機關適用前開規定時就住宅之涵義所為之消極性釋示，符合土地稅法之立法目的且未逾越住宅概念之範疇，與憲法所定租稅法定主義尚無牴觸。又前開函釋並未區分不同宗教信仰，均有其適用，復非就人民之宗教信仰課予賦稅上之差別待遇，亦與憲法第七條、第十三條規定之意旨無違。

Act" is a negative construction of the term "residence" made by the competent authority in applying the aforesaid statute, and is consistent with the legislative purposes of the Land Tax Act, without going beyond the scope of the concept of residence. It is thus not in conflict with the doctrine of taxation by law as embodied in the Constitution. Furthermore, the directive is applicable to all religions without distinctions, and does not bring about any discrimination in taxation between different religions. It is therefore not contrary to the intent expressed in Articles 7 and 13 of the Constitution.

REASONING: That the people have the duty to pay tax as prescribed by law is explicitly provided in Article 19 of the Constitution. The expression "to pay tax as prescribed by law" means that the ranges of both tax payment and tax exemption are subject to explicit prescription of law. When any doubt occurs in connection with the application of any statutory provision, however, the competent authority is certainly empowered to make interpretation in accordance with

解釋理由書：人民有依法律納稅之義務，為憲法第十九條所明定。所謂依法律納稅，兼指納稅及免稅之範圍，均應依法律之明文。惟法律條文適用時發生疑義者，主管機關自得為符合立法意旨之闡釋，本院釋字第二六七號解釋敘述甚明。涉及租稅事項之法律，其解釋應本於租稅法定主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之，亦經本院釋字第四二〇號解釋釋示在案。

the legislative purposes of the law. This has been clearly explicated in our Interpretation No. 267. It is also held by this Yuan in Interpretation No. 420 that laws involving taxation should be construed in light of the essence of the principle of taxation by law and the respective legislative purpose of the law, with due consideration to be given to the economic significance and the principle of equality of actual taxation.

The Land Tax Act provides in Article 6 that "in order to develop the economy, encourage land utilization and promote social welfare, reasonable tax reduction or exemption may be allowed for land used for national defense, government agencies, public facilities, covered sidewalks, research institutes, education, transportation, irrigation, water supply, salt production industry, religions, medical care, sanitation, graveyards and cemeteries, charitable or public welfare organizations, reasonable homesteads, and other purposes, and for rezoned, reclaimed, and improved land; the criteria of and procedure for such reduction or exemption shall be es-

土地稅法第六條規定：「為發展經濟，促進土地利用，增進社會福利，對於國防、政府機關、公共設施、騎樓走廊、研究機構、教育、交通、水利、給水、鹽業、宗教、醫療、衛生、公私墓、慈善或公益事業及合理之自用住宅等所用之土地，及重劃、墾荒、改良土地者，得予適當之減免；其減免標準及程序，由行政院定之。」又同法第九條規定：「本法所稱自用住宅用地，指土地所有權人或其配偶、直系親屬於該地辦竣戶籍登記，且無出租或供營業用之住宅用地。」雖未就「住宅」之定義有所界定，然法規之適用除須依法條之明文外，尚應受事物本質之內在限制。而依一般觀念，所謂住宅，係指供人日常

tablished by the Executive Yuan." Article 9 of the same Act provides: "The term 'homestead land' in this Act refers to the land used for a residence for which the landowner or his spouse or any linear relative thereof has effectuated household registration and which is not held by any lease or used for commercial purposes." Although no definition is given by the law of the term "residence," it must be noted that the application of any law and regulation is not only governed by the text of the law but also subject to the intrinsic limits of the nature of the matter, and that as a general concept a "residence" is a fixed structure on land that serves as a place for people's daily living and is usually equipped with basic functional facilities for living, with space controllable and manageable by the residents as well as privacy. The view expressed by the Ministry of Finance in its directive Tai-Tsai-Shui-Tze No. 31627 (March 14, 1983) that a structure on land used as a house of worship is not "residential" land for own use as defined in Article 9 of the Land Tax Act, and that no preferential tax rate may be allowed under Article 34 of the

住居生活作息之用，固定於土地上之建築物；外觀上具備基本生活功能設施，屬於居住者支配管理之空間，具有高度的私密性。財政部七十二年三月十四日台財稅字第三一六二七號函謂：建物係供神壇使用，已非土地稅法第九條所稱之自用「住宅」用地，不得依同法第三十四條規定按優惠稅率計課土地增值稅，乃主管機關適用土地稅法第九條，就住宅之涵義所為之消極性釋示，符合土地稅法之立法目的且未逾越住宅概念之本質，依首開解釋意旨，與憲法所定租稅法定主義尚無牴觸。

Act for the purpose of assessment of land value increment tax thereon, is a negative construction of the term "residence" made by the competent authority in applying Article 9 of the Land Tax Act, and is consistent with the legislative purposes of the Land Tax Act, without going beyond the scope of the concept of residence. On the ground of the essence of this Interpretation as stated above, the directive is, thus, not in conflict with the doctrine of taxation by law as embodied in the Constitution.

Article 13 of the Constitution provides that "the people shall have the freedom of religious belief." This means that people have the freedom to believe in or not to believe in any religion and the freedom to participate in or not to participate in any religious activities. In addition, the state may not grant any aid or award to or impose any restraint on any particular religion, nor shall the state confer any privilege on any person or place any person at a disadvantage because of his religious belief. Under Article 6 of the Land Tax Act, tax on land for religious uses may be

憲法第十三條規定：「人民有信仰宗教之自由。」係指人民有信仰與不信仰任何宗教之自由，以及參與或不參與宗教活動之自由；國家亦不得對特定之宗教加以獎助或禁止，或基於人民之特定信仰為理由予以優待或不利益。土地稅法第六條規定宗教用地之土地稅得予減免，只須符合同條授權訂定之土地稅減免規則第八條第一項第九款所定之減免標準均得適用，並未區分不同宗教信仰而有差別。神壇未辦妥財團法人或寺廟登記者，尚無適用該款所定宗教團體減免土地稅之餘地，與信仰宗教之自由無關。又「神壇」既係由一般信奉人

reduced or exempted. The provision is applicable insofar as the land meets the criteria for tax reduction or exemption specified in the Regulation Governing the Reduction or Exemption of Land Tax, Article 8, Paragraph 1, Subparagraph 9, established by authority granted under the same article of the act, with no distinction between religions. Where a house of worship has not effectuated the registration as a foundation or temple, the land tax reduction or exemption accorded to religious organizations under said subparagraph is not available thereto, and this has nothing to do with the freedom of religion. Furthermore, to the extent that a "house of worship" is a place where an altar is freely set up by believers to offer sacrifices to gods and for the followers to pay to worship, it is distinguishable by nature from a residence, which is characterized by privacy. The Ministry of Finance directive mentioned above, which declares that a structure on land used as a house of worship is not a "residence" under Article 9 of the Land Tax Act, does not bring about any discrimination in taxation between different religions, and is therefore not in

士自由設壇祭祀神祇，供信眾膜拜之場所，與前述具有私密性之住宅性質有異。上揭財政部函釋示供「神壇」使用之建物非土地稅法第九條所稱之住宅，並非就人民之宗教信仰課予賦稅上之差別待遇，亦與憲法第七條、第十三條規定意旨無違。

conflict with the intent expressed in Articles 7 and 13 of the Constitution.

J. Y. Interpretation No.461（July 24, 1998）*

ISSUE: (1) Article 3, Paragraph 3, Subparagraph 1, of the 1997 Amendment to the Constitution provides that the legislators may interpellate the Premier and the heads of ministries and other agencies under the Executive Yuan while the Legislative Yuan is in session. Does the term "heads" provided in the said Subparagraph include the Chief of the General Staff?

(2) Does the Chief of the General Staff as the chief staff member for the Ministry of Defense have a duty to be present upon being invited by the Committee of the Legislative Yuan?

RELEVANT LAWS:

Articles 53, 54, 56, 62, 63 and 67 of the Constitution（憲法第五十三條、第五十四條、第五十六條、第六十二條、第六十三條、第六十七條）; Article 3, Paragraphs 1 and 2 of the Amendment to the Constitution（憲法增修條文第三條第一項、第二項）; Article 9 of the Organic Act of General Staff Headquarters of Ministry of National Defense（國防部參謀本部組織法第九條）.

KEYWORDS:

interpellation（質詢）, the Chief of the General Staff（參謀總長）, national security（國家安全）,separation of powers（權力分立）, constitutional practice（憲政慣例）.**

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* Translated by Pijan Wu.

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

HOLDING: Article 3, Paragraph 3, Subparagraph 1, of the Amendment to the Constitution, promulgated on July 21, 1997, provides that the Executive Yuan has the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration, while the Legislators may interpellate, during the sessions, the Premier and the heads of ministries and other agencies under the Executive Yuan. This is an institutional design in the Constitution based on the principles of democracy and accountability. Since the Ministry of National Defense is in charge of affairs concerning national defense, the Legislators may interpellate the Premier and the Minister of National Defense on the policy statements and administrative reports involving the issues of national defense. The Chief of the General Staff, who is the chief staff member for, and reports directly to, the Minister of National Defense in the administrative system, is not a head of ministry under the Constitution. Therefore, the above provision does not apply.

解釋文：中華民國八十六年七月二十一日公布施行之憲法增修條文第三條第二項第一款規定行政院有向立法院提出施政方針及施政報告之責，立法委員在開會時，有向行政院院長及行政院各部會首長質詢之權，此為憲法基於民意政治及責任政治之原理所為制度性之設計。國防部主管全國國防事務，立法委員就行政院提出施政方針及施政報告關於國防事務方面，自得向行政院院長及國防部部長質詢之。至參謀總長在行政系統為國防部部長之幕僚長，直接對國防部部長負責，自非憲法規定之部會首長，無上開條文之適用。

The Legislative Yuan is the highest legislative body of the country and has the power to decide by resolution upon statutory and budgetary bills as well as other important matters of the State. In order to exercise the above power conferred by the Constitution, the Legislative Yuan may, in accordance with Article 67 of the Constitution, set up various committees in which government officials and private parties concerned are invited to be present and answer questions. Since the Executive Yuan is accountable to the Legislative Yuan under the Constitution, the heads of ministries and the subordinates thereof, except for those who are mandated by law to exercise their functions independently and are free from external check, are under the obligation to be present and give answers when invited by those various committees according to Article 67, Paragraph 2, of the Constitution. The Chief of the General Staff, as the chief staff member for the Minister of National Defense, is in charge of important affairs concerning national defense, including the compilation and execution of budg-

立法院為國家最高立法機關，有議決法律、預算等議案及國家重要事項之權。立法院為行使憲法所賦予上開職權，得依憲法第六十七條規定，設各種委員會，邀請政府人員及社會上有關係人員到會備詢。鑑諸行政院應依憲法規定對立法院負責，故凡行政院各部會首長及其所屬公務員，除依法獨立行使職權，不受外部干涉之人員外，於立法院各種委員會依憲法第六十七條第二項規定邀請到會備詢時，有應邀說明之義務。參謀總長為國防部部長之幕僚長，負責國防之重要事項，包括預算之擬編及執行，與立法院之權限密切相關，自屬憲法第六十七條第二項所指政府人員，除非因執行關係國家安全之軍事業務而有正當理由外，不得拒絕應邀到會備詢，惟詢問內容涉及重要國防機密事項者，免予答覆。至司法、考試、監察三院院長，本於五院間相互尊重之立場，並依循憲政慣例，得不受邀請備詢。三院所屬非獨立行使職權而負行政職務之人員，於其提出之法律案及有關預算案涉及之事項，亦有上開憲法規定之適用。

ets. Such powers and duties are closely related to the jurisdiction of the Legislative Yuan. Accordingly, the Chief of the General Staff is a government official under Article 67, Paragraph 2, of the Constitution, who may not reject the invitation to be present at the committee meetings unless there is a justifiable reason that relates to the execution of military activities concerning national security. Nevertheless, the Chief of the General Staff does not have to answer questions involving important national defense intelligence. As for the presidents of the Judicial, Examination and Control Yuans, they do not have to accept invitations to be present and answer questions based on mutual respect and constitutional convention. However, the personnel of the Judicial, Examination and Control Yuans who have administrative duties and are not mandated to exercise their functions independently shall also be subject to the above constitutional rule with respect to the statutory or budgetary bills proposed by their Yuans.

REASONING: As provided in

解釋理由書：憲法第五十四條

Article 54 of the Constitution, the Executive Yuan shall have a Premier, a Vice Premier, a certain number of Ministers and heads of other agencies, and a certain number of Ministers without Portfolio. Also, in accordance with Article 3, Paragraph 1, of the Amendment to the Constitution promulgated on July 21, 1997, the Premier shall be appointed by the President of the Republic of China. On the other hand, Article 56 of the Constitution remains unchanged, which provides that the Vice Premier, Ministers, heads of other agencies and Ministers without Portfolio shall be appointed by the President upon the Premier's recommendation. Furthermore, in accordance with Article 3, Paragraph 2, Subparagraph 1, of the Amendment to the Constitution, promulgated on July 21, 1997, the Executive Yuan has the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration. While the Legislative Yuan is in session, the Legislators may interpellate the Premier, the Ministers and the heads of other agencies under the Executive Yuan. This is an insti-

規定行政院設院長、副院長各一人，各部會首長若干人，及不管部會之政務委員若干人。又依八十六年七月二十一日公布施行之憲法增修條文第三條第一項規定，行政院院長由總統任命之。憲法第五十六條規定行政院副院長、各部會首長及不管部會之政務委員，由行政院院長提請總統任命之，則未修正。其次，行政院有向立法院提出施政方針及施政報告之責。立法委員在開會時，有向行政院院長及行政院各部會首長質詢之權，為憲法增修條文第三條第二項第一款所明定。此係憲法基於民意政治及責任政治原理所為之制度性設計。國防部為行政院所屬部會之一，主管全國國防事務，立法委員就行政院提出施政方針及施政報告關於國防事務方面，自得向行政院院長及國防部部長質詢之。至參謀總長在行政系統為國防部部長之幕僚長，國防部參謀本部組織法第九條定有明文。就其執掌事項直接對國防部部長負責，自非憲法增修條文第三條第二項第一款所稱之部會首長。立法委員即無從依該規定，於立法院會議時對於參謀總長行使質詢權。

tutional design in the Constitution based on the principles of democracy and accountability. Since the Ministry of National Defense is a ministry under the Executive Yuan and is in charge of affairs concerning national defense, the Legislators may interpellate the Premier and the Minister of National Defense on the policy statements and administrative reports involving the issues of national defense. The Chief of the General Staff, as stipulated in Article 9 of the Organic Act of General Staff Headquarters of Ministry of National Defense, is the chief staff member for, and reports directly to, the Minister of National Defense in the administrative system, but is not a Minister or agency head as referred to in Article 3, Paragraph 2, Subparagraph 1, of the Amendment to the Constitution. Therefore, the Legislators may not exercise the power to interpellate the Chief of the General Staff during the sessions in accordance with the above provision.

The Legislative Yuan, consisting of Legislators elected from among and by the people, is the highest legislative body

立法院為國家最高立法機關，由人民選舉之立法委員組織之，代表人民行使立法權，有議決法律案、預算案、

of the State and represents the people in exercising legislative power. As separately provided in Article 62 and Article 63, the Legislative Yuan has the power to decide by resolution upon statutory and budgetary bills, and motions concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, as well as other important matters of the State. In accordance with Article 53 of the Constitution, the Executive Yuan is the highest administrative organ of the State. Article 3, Paragraph 2, Subparagraph 1, of the Amendment to the Constitution, promulgated on July 21, 1997, provides that the Executive Yuan shall be accountable to the Legislative Yuan. The Legislative Yuan may, pursuant to Article 67 of the Constitution, which remains unchanged after the Amendment to the Constitution, set up various committees in which the government officials and private parties concerned are invited to be present and answer questions. Therefore, even though the Constitution has been amended many times, it is still based on the principles of democracy and accountability. The principle of separation and

戒嚴案、大赦案、宣戰案、媾和案、條約案及國家其他重要事項之權，憲法第六十二條及六十三條分別定有明文。依憲法第五十三條規定，行政院為國家最高行政機關，憲法增修條文第三條第二項並規定，行政院應對立法院負責。憲法第六十七條又規定：「立法院得設各種委員會。」「各種委員會得邀請政府人員及社會上有關係人員到會備詢。」憲法增修條文就此未加修改。是憲法雖迭經增修，其本於民意政治及責任政治之原理並無變更；而憲法所設計之權力分立、平等相維之原則復仍維持不變。立法院為行使憲法所賦予前述職權，其所設之各種委員會自得邀請政府人員及社會上有關係人員到會備詢，藉其答覆時所說明之事實，或發表之意見而明瞭相關議案涉及之事項。抑有進者，立法委員對於不明瞭之事項，尚得經院會或委員會之決議，要求有關機關就議案涉及之事項，提供參考資料。受要求之機關，非依法律規定或其他正當理由，不得拒絕，業經本院釋字第三二五號解釋有案。立法委員於詢問以前，或不知有相關參考資料，須待詢問而後知之；於有關機關提供參考資料以後，倘對其內容發生疑義，須待進一步詢問，以期澄清者，其邀請到會之政府人員，尤不得

equality of powers remains unchanged, too. In order to exercise the above power conferred by the Constitution, the Legislative Yuan may invite government officials and private parties concerned to be present and answer questions in the various committees by which the Legislators may understand the matters involved in the bills or motions through the statement of facts made or the opinions expressed in the answers. Furthermore, as stated in J. Y. Interpretation No. 325, the Legislative Yuan may request the related agencies to provide reference materials in respect of the matters involved in the bills or motions that need to be clarified through resolutions of the plenary meetings or the committee meetings; the requested agency may not reject without a legal basis or other justifiable reasons. [The rationale is that] Legislators may not learn there are relevant reference materials unless and until they conduct the interpellation; moreover, if the Legislators have questions regarding the contents of the reference materials provided by the related agencies, they may further interpellate for the purpose of clarifica-

置之不理。又因我國憲法上中央政制，與一般內閣制有別，立法委員既不得兼任官吏，則負責事前起草或事後執行法案之政府人員，於議案審議過程中參與備詢，自有其必要。故立法院各種委員會依憲法第六十七條第二項規定，邀請政府人員到會備詢時，行政院各部會首長及其所屬人員，除依法獨立行使職權，不受外部干涉之檢察官、公平交易委員會委員等人員外，於立法院各種委員會依憲法第六十七條第二項規定邀請到會備詢時，有應邀說明之義務。參謀總長為行政院所屬國防部部長之幕僚長，其統御、指揮之參謀本部及陸、海、空、勤等各軍種總部，並非獨立於行政系統以外之組織。參謀總長雖非增修條文第三條第一項第一款所稱之行政院各部會首長，乃屬憲法第六十七條第二項規定之政府人員，要無疑義。參謀總長負責國防之重要職責，包括預算之擬編及執行，均與立法院之權限密切相關，立法院所設各種委員會就與參謀總長職務相關之事項，邀請其列席備詢，除有正當理由外，不得拒絕應邀到會備詢。惟詢問之內容涉及重要國防機密事項者，則免予答覆。至司法、考試、監察三院既得就其所掌有關事項，向立法院提出法律案；各該機關之預算案並應

tion. In such case, the invited government officials may not turn down the request. In addition, since the central government system under the Constitution is different from the common parliamentary system and the Legislators shall not concurrently hold a government post, it is necessary for the government officials in charge of initiating or executing the bills to participate in the legislative process by answering questions. Consequently, the heads of ministries and their subordinates are under the obligation to be present and answer questions when requested by the various committees of the Legislative Yuan, as provided by Article 67, Paragraph 2, of the Constitution, with the exception of those who discharge their duties independently and are free from external check, such as prosecutors and Commissioners of the Fair Trade Commission. The Chief of the General Staff is the chief staff member for the Minister of National Defense under the Executive Yuan. The headquarters of the General Staff, Army, Navy and Air Force under his/her command are not agencies outside of the administration.

經立法院審查，則其所屬非獨立行使職權而負行政職務之人員，於其提出之法律案及有關預算案涉及之事項，亦有依上開憲法規定，應邀說明之必要。惟司法、考試、監察三院院長，固得依憲法第七十一條規定列席立法院會議陳述意見，若立法院所設各種委員會依憲法第六十七條第二項規定邀請政府人員到會備詢，本於五院間相互尊重之立場，並依循憲政慣例，得不受邀請列席備詢。三院所屬獨立行使職權，不受任何干涉之人員，例如法官、考試委員及監察委員亦同。

trative system. Therefore, there is no doubt that although he/she is not a Minister or an agency head under Article 3, Paragraph 2, Subparagraph 1, of the Amendment to the Constitution, promulgated on July 21, 1997, he/she is a government official as provided in Article 67, Paragraph 2, of the Constitution. In charge of important affairs concerning national defense, including the compilation and execution of budgets, the Chief of the General Staff has powers and duties that are closely related to the jurisdiction of the Legislative Yuan. The Chief of the General Staff may not reject the invitations by the various committees of the Legislative Yuan to be present at the committee meetings unless there is a justifiable reason that relates to the execution of military activities concerning national security. Nevertheless, the Chief of the General Staff does not have to answer questions involving important national defense intelligence. With respect to the Judicial, Examination and Control Yuans, since they may present bills of act, for matters within their jurisdictions, to the Legislative Yuan, which also re-

views their budgetary bills, the subordinates of these Yuans who have administrative duties and are not mandated to exercise their functions independently shall also be subject to the above constitutional rule, i.e., they have to be present and answer questions, when the statutory or budgetary bills proposed by their Yuans are concerned. Nevertheless, while the presidents of the Judicial, Examination and the Control Yuans may be present in the plenary meeting of the Legislative Yuan and give opinions pursuant to Article 71 of the Constitution, they are not required to be present and answer questions in response to the request by the committees of the Legislative Yuan according to Article 67, Paragraph 2, i.e., requests for government officials to be present and answer questions. This is based on the mutual respect between the five Yuans and the constitutional convention. This exemption also applies to the personnel of the Judicial, Examination and Control Yuans who independently exercise functions and are free from external check, such as judges and Members of the Examination and Control Yuans.

Justice Young-Mou Lin filed dissenting opinion in part.

本號解釋林大法官永謀提出部分不同意見書。

J. Y. Interpretation No.462（July 31, 1998）*

ISSUE: (1) Under the Constitution, is a faculty member, who is dissatisfied with his/her evaluation committee's decision over his/her career advancement, entitled to bring an administrative appeal and later an administrative litigation to challenge their decision?

(2) What are the due process requirements for conducting a faculty promotion evaluation?

RELEVANT LAWS:

Articles 15, 16 and 23 of the Constitution（憲法第十五條、第十六條、第二十三條）; J. Y. Interpretation Nos. 243, 266, 269, 298, 323, 382, 423, 430 and 459（司法院釋字第二四三號、第二六六號、第二六九號、第二九八號、第三二三號、第三八二號、第四二三號、第四三〇號及第四五九號解釋）; Articles 18 and 20 of the University Act（大學法第十八條、第二十條）; Articles 8 and 24 of the Junior College Act（專科學校法第八條、第二十四條）; Articles 14 and 41 of the Educators Appointment Act（教育人員任用條例第十四條、第四十一條）; Articles 7 and 9 of the Regulation Governing the Screening of Qualification of University, Independent College and Junior College Teachers（大學、獨立學院及專科學校教師資格審定辦法第七條、第九條）; Prece-

* Translated by Dennis T.C.Tang.

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

dent P.T. No. 398 (Ad. Ct. 1962（行政法院五十一年判字第三九八號判例）.

KEYWORDS:

faculty promotion review（教師升等評審）, faculty evaluation（教師評審）, academic performance review（學術審議）, right to work（工作權）, right to sue（訴訟權）, academic freedom（學術自由）, duty to give reasons（提出理由之義務）, an administrative act（行政處分）, the principle of expertise evaluation（專業評量之原則）, administrative appeal（訴願）, administrative litigation（行政訴訟）.**

HOLDING: The authority of the faculty evaluation committee of each department, college and university over the faculty promotion review is a public authority with specified scope conferred by the law. The promotion decisions made by such a faculty committee are analogous to the decisions made on the promotion qualifications of university faculties by the Academic Performance Review Committee of the Ministry of Education. Both decisions have a significant impact on the status of faculties, such as qualifications, and therefore should be classified as administrative acts subject to administrative appeal and administrative litiga-

解釋文：各大學校、院、系（所）教師評審委員會關於教師升等評審之權限，係屬法律在特定範圍內授予公權力之行使，其對教師升等通過與否之決定，與教育部學術審議委員會對教師升等資格所為之最後審定，於教師之資格等身分上之權益有重大影響，均應為訴願法及行政訴訟法上之行政處分。受評審之教師於依教師法或訴願法用盡行政救濟途徑後，仍有不服者，自得依法提起行政訴訟，以符憲法保障人民訴訟權之意旨。行政法院五十一年判字第三九八號判例，與上開解釋不符部分，應不再適用。

tion. An evaluated faculty member who is not satisfied with the decision and has exhausted all administrative remedies available in the Teachers Act or Administrative Appeal Act is entitled to bring administrative litigation to exercise the right of instituting legal proceedings guaranteed by Article 16 of the Constitution. The ruling of Precedent P.T. No. 398 of the Administrative Court in 1962 should no longer be applied to the extent that it is in conflict with the Interpretation rendered above.

The review of promotion qualifications of faculties concerns the quality of faculties and standards of teaching and research in universities and also the people's right to work as well as the possession of vocational qualifications. To meet the principle of proportionality (Verhältnismäßigkeitsprinzip) requirement provided in Article 23 of the Constitution, such a review should be authorized by the law and the procedures promulgated by the competent agency should guarantee an objective, credible, fair and accurate evaluation of the professional, promotion.

大學教師升等資格之審查，關係大學教師素質與大學教學、研究水準，並涉及人民工作權與職業資格之取得，除應有法律規定之依據外，主管機關所訂定之實施程序，尚須保證能對升等申請人專業學術能力及成就作成客觀可信、公平正確之評量，始符合憲法第二十三條之比例原則。且教師升等資格評審程序既為維持學術研究與教學之品質所設，其決定之作成應基於客觀專業知識與學術成就之考量，此亦為憲法保障學術自由真諦之所在。故各大學校、院、系（所）教師評審委員會，本於專業評量之原則，應選任各該專業領域具有充

academic capabilities of the applicant for Since such evaluation procedures are set up to maintain the quality of academic research and teaching, the decision should be made based upon objective professional expertise and academic achievements. This is the essence of academic freedom guaranteed by the Constitution. Pursuant to such a principle of evaluation of expertise, the faculty evaluation committee of each department, college and university should first select competent experts or academicians in each particular professional field to conduct the evaluation and then report the evaluation to the committee for review. The faculty evaluation committee of each department, college and university should defer to the evaluation made by experts or academicians unless the committee can present definite reasons based upon academic expertise for questioning the credibility and accuracy of the evaluation. An administrative agency or an administrative court may review an evaluation in dispute to see if the relevant procedures have been followed and if the judgment or evaluation made is illegal or obviously inappropriate.

分專業能力之學者專家先行審查，將其結果報請教師評審委員會評議。教師評審委員會除能提出具有專業學術依據之具體理由，動搖該專業審查之可信度與正確性，否則即應尊重其判斷。受理此類事件之行政救濟機關及行政法院自得據以審查其是否遵守相關之程序，或其判斷、評量有無違法或顯然不當之情事。現行有關各大學、獨立學院及專科學校教師資格及升等評審程序之規定，應本此解釋意旨通盤檢討修正。

Current provisions regarding faculty qualifications and promotion evaluation procedures in universities, independent colleges and junior colleges should be thoroughly reviewed and revised in accordance with this Interpretation.

REASONING: Article 16 of the Constitution guarantees the people's right to administrative appeal as well as to sue in a court of law. Such a right will not differ because of a person's status. This has been reiterated repeatedly in Interpretations Nos. 243, 266, 298, 323, 382 and 430 rendered by the [Judicial] Yuan regarding people possessing the status of civil servants or others also involved in various litigations. There exists an administrative act regardless of the terms or modes employed therein, whenever 1) an administrative agency exercises public authority and unilaterally makes a decision over specific matters; or 2) an institute established in accordance with the law exercises public authority based either on direct authorization of the law or on authorization made by a competent administrative agency in accordance with

解釋理由書：人民有訴願及訴訟之權，憲法第十六條定有明文。此項權利，並不因其身分而受影響，此迭經本院釋字第二四三號、第二六六號、第二九八號、第三二三號、第三八二號及第四三〇號等解釋在案，就人民因具有公務員或其他身分關係而涉訟之各類事件中，闡釋甚明。而行政機關行使公權力或依法設立之團體，直接依法律規定或經政府機關就特定事項依法授與公權力者，就該特定事項所作成之單方行為，不問其用語、形式，皆屬行政處分，此亦經本院釋字第二六九號、第四二三號及第四五九號解釋在案。

the law over specific matters and unilaterally makes a decision over specific matters. This also has been reiterated repeatedly in Interpretations Nos. 269, 423 and 459 rendered by the [Judicial] Yuan.

The faculties in universities, independent colleges and junior colleges are divided into four levels: professors, associate professors, assistant professors and lecturers. According to Articles 18 and 20 of the University Act, Articles 8 and 24 of the Junior College Act provide that faculty promotions should be reviewed by the faculty evaluation committee of each department, college and university. The qualifications for teachers in schools of various levels are provided in the Educators Appointment Act. And Article 14 of this Act authorizes the Ministry of Education to promulgate the Regulation Governing the Screening of Qualification of University, Independent College and Junior College Teachers. Articles 7 and 9 of the said Regulation provide that faculty qualifications should be reviewed first by the faculty evaluation committees of each school and then submitted to the Aca-

大學、獨立學院、專科學校教師分教授、副教授、助理教授及講師，有關教師之升等，由各該學校設校、院、系（所）教師評審委員會評審，大學法第十八條、第二十條及專科學校法第八條、第二十四條定有明文。教育人員任用條例就公立各級學校教師之任用資格有所規定，同法第十四條並授權教育部訂定「大學、獨立學院及專科學校教師資格審查辦法」，該辦法第七條及第九條規定，教師資格之審查，由學校教師評審委員會審核通過後，送教育部提交學術審議委員會審議決定，經審查合格者，始發給教師證書。至私立學校教師之任用資格及其審查程序，依教育人員任用條例第四十一條，亦準用前開條例之規定。是各大學校、院、系（所）及專科學校教師評審委員會關於教師升等之評審，係屬法律授權範圍內為公權力之行使，其對教師之資格等身分上之權益有重大影響，均為各該大學、院、校所為之行政處分。受評審之教師於依教

demic Performance Review Committee of the Ministry of Education for approval before a teaching certificate is issued. Article 41 of the same Act provides that the provisions of the Act shall apply, where appropriate, to the qualifications for teachers of private schools and the review procedures thereof. Therefore, faculty promotion decisions made by the faculty evaluation committee of each department, college, and university as well as of vocational academies are exercises of public authority with specified scope conferred by law. Such decisions have a significant impact on the status of faculties, and therefore should be classified as administrative acts. An evaluated faculty member who is not satisfied with the decision and has exhausted all administrative remedies available is entitled to bring administrative litigation to exercise the right of instituting legal proceedings guaranteed by Article 16 of the Constitution. The 1962 Precedent P.T. No. 398 of the Administrative Court ruling that, “only those people whose rights or interests are adversely affected by an illegal or inappropriate administrative act made by a central or local

師法或訴願法等用盡行政救濟途徑後，仍有不服者，自得依法提起行政訴訟，以符憲法保障人民訴訟權之意旨。行政法院五十一年判字第三九八號判例：「依訴願法第一條規定，提起訴願，唯人民對於中央或地方官署所為不當或違法之處分致損害其權利或利益者，始得為之。至各級公務人員以公務員身分所受主管官署之懲戒處分，則與以人民身分因官署處分而受損害者有別，自不得對之提起訴願。」其與上開解釋不符部分，應不再適用。

agency may bring administrative appeal pursuant to Article 1 of the Administrative Appeal Act, whereas civil servants of all levels suffering from disciplinary actions taken by the employing agency may not bring administrative appeal as the situation is different from the former," should no longer be applied to the extent that it is in conflict with the Interpretation rendered above.

According to Article 15 of the Constitution, the people's right to work should be guaranteed. Therefore all kinds of proper jobs necessary for earning a living should be protected by the state, and any restriction on vocational freedom must be based on just reasons and cannot go beyond necessity. The review of promotion qualifications of faculties has an impact upon the quality of faculties, standards of teaching and research in universities, the right to work, as well as the possession of vocational qualifications. To meet the principle of proportionality requirement contained in Article 23, such a review should be authorized by law and the procedures promulgated by the competent

按憲法第十五條規定，人民之工作權應予保障，是以凡人民作為謀生職業之正當工作，均應受國家之保障，對於職業自由之限制，應具有正當之理由，並不得逾越必要程度。大學教師升等資格之審查，關係大學教師素質與大學教學、研究水準，並涉及人民工作權與職業資格之取得，除應有法律規定之依據外，主管機關所訂定之實施程序，尚須保證對升等申請人專業學術能力及成就作成客觀可信、公平正確之評量，始符合憲法第二十三條之比例原則。教師升等資格評審程序既為維持學術研究與教學之品質所設，其決定之作成應基於客觀專業知識與學術成就之考量，此亦為憲法保障學術自由真諦之所在。是以各大學校、院、系（所）及專科學校教師

agency should guarantee an objective, credible, fair and accurate evaluation of the professional, academic capabilities of the applicant for promotion. Since such evaluation procedures are set up for the maintenance of quality academic research and teaching, the decision should be made based upon objective professional expertise and academic achievements. This is the essence of academic freedom guaranteed by the Constitution. Pursuant to such a principle of expertise evaluation, the faculty evaluation committee of each department, college and university should first select competent experts or academicians in each particular professional field to conduct the evaluation and then report the evaluation to the committee for review. The faculty evaluation committee of each department, college and university should defer to the evaluation made by experts or academicians unless the committee can present definite reasons based upon academic expertise for questioning the credibility and accuracy of the evaluation. When necessary, the committee should provide the applicant with an opportunity to make a written or oral presen-

評審委員會，本於專業評量之原則，應選任各該專業領域具有充分專業能力之學者專家先行審查，將其結果報請教師評審委員會評議。教師評審委員會除能提出具有專業學術依據之具體理由，動搖該專業審查之可信度與正確性，否則即應尊重其判斷；評審過程中必要時應予申請人以書面或口頭辯明之機會；由非相關專業人員所組成之委員會除就名額、年資、教學成果等因素予以斟酌外，不應對申請人專業學術能力以多數決作成決定。受理此類事件之行政救濟機關及行政法院自得據以審查其是否遵守相關之程序，或其判斷、評量是否以錯誤之事實為基礎，是否有違一般事理之考量等違法或顯然不當之情事。現行有關各大學、獨立學院及專科學校教師資格及升等評審程序之規定，應本此解釋意旨通盤檢討修正。又行政法院五十七年判字第四一四號判例，業經本院釋字第三三八號解釋不予適用在案，併此指明。

tation during the review procedures. Where the committee is composed of faculties of non-relevant expertise, it may only consider factors such as quota, seniority, and teaching performance and should not decide on the academic capabilities of the applicant by majority vote. An administrative agency or an administrative court may review the evaluation decision under dispute to see if the relevant procedures have been followed, and if the judgment or evaluation made is illegal or obviously inappropriate. Current provisions regarding faculty qualifications and promotion evaluation procedures in universities, independent colleges and vocational academies should be thoroughly reviewed and revised in accordance with this Interpretation.

J. Y. Interpretation No.463（September 11, 1998）*

ISSUE: Does "total budget" enunciated in Article 164 of the Constitution include extra or special budgets?

RELEVANT LAWS:

Article 164 of the Constitution（憲法第一百六十四條）; Article 10, Paragraph 8, of the Constitutional Amendment（憲法增修條文第十條第八項）; Articles 75 and 76 of the Budget Act（預算法第七十五條、第七十六條）; Article 3 of the Regulation Governing the Management and Use of Provincial and City Government Budget Balancing Funds Held by the Central Government for General Distribution（中央統籌分配稅款平衡省市預算基金收支保管及運用辦法第三條）.

KEYWORDS:

budget（預算）, education（教育）, science and culture（科學與文化）, total budget（預算總額）, extra budget（追加預算）, special budget（特別預算）.**

HOLDING: Article 164 of the Constitution clearly requires that the budgets for educational programs, scientific studies, and cultural services in the central and local governments shall reach

解釋文：憲法第一百六十四條明確規範中央及地方之教育科學文化之預算，須達預算總額之一定比例，以確保國家及各地方自治團體對於人民之教育、科學與文化生活得有穩定而必要的

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

a certain percentage of the total national budget to ensure stable and sufficient public expenditure for education, science and culture in the state and municipalities. This Article reflects the emphasis on educational, scientific and cultural development in the Constitution. The "total budget" in the Article does not include extra or special budgets. This principle has been previously confirmed by Interpretations Nos. 77 and 231 of this Yuan. A government drafts its budget plan based on expected income and expenditure for the coming year. With the budget plan, government agencies will be able to perform their functions and the government's finances will be set. Accordingly, there should be one single budget plan. In case of special circumstances or any emergency listed in the various subparagraphs of Article 75 of the Budget Act, the Executive Yuan may propose a special budget in addition to the annual total budget. Article 76 of the Budget Act sets forth the review procedure of special budgets. With respect to the issue of how to calculate the expenditures for educational programs, scientific studies, and

公共支出，此係憲法重視教育科學文化發展所設之規定。本條所謂「預算總額」，並不包括追加預算及特別預算在內，業經本院釋字第七十七號及第二三一號解釋在案。政府就未來一年間之計畫所預期之收入及支出編列預算，以使國家機關正常運作，並規範國家之財政，原則上應制定單一之預算。惟為因應特殊緊急情況，有預算法第七十五條各款規定之情形時，行政院得於年度總預算外另提出特別預算，其審議依預算法第七十六條為之。至憲法第一百六十四條所稱教育科學文化經費之具體內容如何、平衡省市預算基金等項目，是否應計入預算總額發生之爭論，中華民國八十六年七月二十一日修正公布之憲法增修條文第十條第八項既規定：「教育、科學、文化之經費，尤其國民教育之經費應優先編列，不受憲法第一百六十四條規定之限制。」有關該等預算之數額、所佔比例、編列方式、歸屬範圍等問題，自應由立法者本其政治責任而為決定。是以與憲法第一百六十四條之所謂「預算總額」及教育、科學、文化等經費所佔中央、地方預算之比例等相關問題，已無再行解釋之必要。

culture in Article 164 of the Constitution and the issue of whether provincial and city budget balancing funds should be included in the "total budget," a provision in the Constitutional Amendment shall be noted. Article 10, Paragraph 8, of the Constitutional Amendment, promulgated on July 21, 1997, reads: "Priority shall be given to funding education, science, and culture, and in particular funding for compulsory education, the restrictions in Article 164 of the Constitution notwithstanding." Because of this Paragraph, issues regarding what amount, what percentage, how to propose, and how to allocate such budgets are left for the legislators to decide, in accordance with their political accountability. Therefore, we do not need to decide pending questions such as the extent of "total budget" in Article 164 of the Constitution and the percentage of expenditure for education, science, and culture in the central and local governments.

REASONING: Article 164 of the Constitution reads: "Expenditures for educational programs, scientific studies,

解釋理由書：憲法第一百六十四條：「教育、科學、文化之經費，在中央不得少於其預算總額百分之十五，

and cultural services shall not be, in respect of the central government, less than 15 percent of the total national budget; in respect of each province, less than 25 percent of the total provincial budget; and in respect of each municipality or hsien, less than 35 percent of the total municipal or hsien budget. Educational and cultural foundations established in accordance with law shall, together with their property, be protected. ”This Article clearly requires that the budgets for educational programs, scientific studies, and cultural services in the central and local governments reach a certain percentage of the total national budget to ensure stable and sufficient public expenditure for education, science and culture in the state and municipalities. This Article reflects the emphasis on education, science and cultural development in the Constitution. “Percentage” in the article means the ratio of the annual total expenditure in the budget plan. It does not include extra budgets that were added thereafter. “Total budget” means the total annual expenditure in the total annual budget planned by governments. It does not in-

在省不得少於其預算總額百分之二十五，在市、縣不得少於其預算總額百分之三十五，其依法設置之教育文化基金及產業，應予以保障。」明確規範中央及地方之教育科學文化之預算，須達預算總額之一定比例，以確保國家及各地方自治團體對於人民之教育、科學與文化生活得有穩定而必要的公共支出，此係憲法重視教育科學文化發展所設之規定。本條所謂「百分比」係指編製預算時，在歲出總額所佔之比例數而言，追加預算並不包括在該項預算總額之內；而所謂「預算總額」，係指政府編製年度總預算時所列之歲出總額而言，並不包括特別預算在內，業經本院釋字第七十七號、第二三一號分別解釋在案。政府就未來一年間之計畫所預期之收入及支出編列預算，以使國家機關正常運作，並規範國家之財政，原則上應制定單一之預算。惟為因應特殊緊急情況，有預算法第七十五條各款規定之情形時，行政院得於年度總預算外另提出特別預算，其審議依預算法第七十六條為之。如多數立法委員審議特別預算時認有不符法定條件者，自得決議刪除，或要求行政院重新編製。與本條相關之其他問題，諸如：(一)行政院及省市政府八十一年度至八十三年度等所編列之特

clude special budgets. This principle has been previously confirmed by Interpretations Nos. 77 and 231 of the Judicial Yuan. A government drafts its budget plan based on expected income and expenditure for the coming year. With the budget plan, government agencies will be able to perform their functions and the government's finances will be set. Accordingly, there should be one single budget plan. In case of special circumstances or any emergency listed in the various subparagraphs of Article 75 of the Budget Act, the Executive Yuan may propose a special budget in addition to the total annual budget. Article 76 of the Budget Act sets forth the review procedure of special budgets. In reviewing a special budget, a majority in the Legislative Yuan may reach a resolution to delete the special budget or to request the Executive Yuan to modify the budget, if it finds the budget does not meet the requirements in law. Other issues related to this article, inter alia, are: (I) Do special budgets proposed by the Executive Yuan and by provincial and city governments for the years 1992 to 1994 meet the re-

別預算案，與預算法第七十五條規定是否相符，有無規避憲法第一百六十四條之疑問，(二)關於行政機關編製之八十五年度總預算所涉及之下列疑問：1.關於中央政府總預算歲出政事別科目中「教育、科學、文化支出」歸屬範圍問題，2.關於預算法第七十五條編列特別預算有關法定要件之適用及教科文經費提列比例問題，3.關於以「補助地方國民教育經費」方式於省及縣市政府計算教科文支出百分比問題，4.關於鄉鎮預算不宜併入縣市總預算中計列教科文支出問題，(三)憲法第一百六十四條中所稱「預算總額」，是否包含「平衡省市預算基金」？中央統籌分配稅款平衡省市預算基金收支保管及運用辦法第三條，將其全部包含列入總預算中致變相縮減中央政府應支出之教科文經費，是否違憲所發生之爭論，八十六年七月二十一日修正公布之憲法增修條文第十條第八項既規定：「教育、科學、文化之經費，尤其國民教育之經費應優先編列，不受憲法第一百六十四條規定之限制。」有關該等預算之數額、所佔比例、編列方式、歸屬範圍等問題，自應由立法者本其政治責任而為決定。是以與憲法第一百六十四條之所謂「預算總額」及教育、科學、文化等經費所佔中

quirements in Article 75 of the Budget Act? Are those budgets consistent with Article 164 of the Constitution? ; (II) There are several questions with respect to the annual total budget for the year 1996 proposed by the executive branch: (1) The question of how to allocate "educational, scientific and cultural expenditure "under the title of government affairs in the total budget of the Central Government. (2) The question of how to apply the requirements for special budgets in Article 75 of the Budget Act and the proportions to allocate with respect to expenses for education, science and culture. (3) The question of how to calculate the percentage of expenditure for education, science and culture when [the central government] provides "subsidies for compulsory education" to provincial, hsien and municipal governments. (4) The question of whether expenditures for education, science and culture of the hsien and municipal governments should include those of the hsiang and town; and (III) The question of whether the "total budget" in Article 164 of the Constitution should include "provincial and city

央、地方預算之比例等相關問題，已無再行解釋之必要。

budget balancing funds." The question of whether Article 3 of the Regulation Governing the Management and Use of Provincial and City Government Budget Balancing Funds Held by the Central Government for General Distribution violates the Constitution because Article 3 includes all [balancing funds] in the "total budget" and leads to reduction of expenditure for education, science and culture by the central government. Article 10, Paragraph 8, of the Constitutional Amendment, promulgated on July 21, 1997, reads: "Priority shall be given to funding education, science, and culture, and in particular funding for compulsory education, the restrictions in Article 164 of the Constitution notwithstanding. "Because of this Paragraph, issues regarding what amount, what percentage, how to propose, and how to allocate such budgets are left for the legislators to decide, in accordance with their political accountability. Therefore, we do not need to decide pending questions such as the extent of the "total budget" in Article 164 of the Constitution and the percentage of expenditure on education, science,

and culture in the central and local governments.

J. Y. Interpretation No.464（September 11, 1998）*

ISSUE: Does the categorization of "public service" under "The Precautionary Matters on Payment of Compensation to Those Who after Receipt of Pension or Living Subsidy Voluntarily Resume Public Service" promulgated by the Executive Yuan contradict the legislative purpose or constitutional guarantee of the people's rights of existence and property?

RELEVANT LAWS:

Articles 15, 85, 86 and 172 of the Constitution（憲法第十五條、第八十五條、第八十六條、第一百七十二條）; Article 27, Schedule Note 4(2)-5, of the Armed Forces Officers Service Act（陸海空軍軍官服役條例第二十七條附表「附註」四之(二)之五）; Article 12, Subparagraph 2, of the Public Functionaries Retirement Act（公務人員退休法第十二條第二款）; Article 13, Subparagraph 2, of the Act Governing the Retirement of School Teachers and Staff（學校教職員退休條例第十三條第二款）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）; Precautionary Matters on the Payment of Compensation to Those Who after Receipt of Pension or Living Subsidy Voluntarily Resume Public Service（退休俸及生活補助費人員自行就任公職支領待遇

* Translated by Professor S. M. Yu.

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

注意事項）; Regulation for the Suspension of Pension Payment on Military Officers and Sergeants Who Assume Public Service（支領退休俸軍官士官就任公職停發退休俸辦法）.

KEYWORDS:

public functionaries（公務員）, public service（公職）, right to existence（生存權）, property right（財產權）.**

HOLDING: The stipulation under Article 27, Schedule Note 4(2)-5, of the Armed Forces Officers Service Act relating to the payment of pension has the purpose of avoiding double payment when retired officers who receive a pension (including other subsidies) also perform public services with pay, adding to the burden of the Treasury. The term "public functionaries" in the Schedule Note refers to those "performing public services with pay" without regard to the name of the title or size of the pay. The categorization of public service under "The Precautionary Matters on the Payment of Compensation to Those Who after Receipt of Pension or Living Subsidy Voluntarily Resume Public Service" promulgated and amended under letter

解釋文：陸海空軍軍官服役條例第二十七條附表「附註」四之(二)之5，關於退休俸支領之規定，旨在避免受領退休俸（包含其他補助）之退役軍官，於就任由公庫支薪之公職時，重複領取待遇，致違一人不得兩俸之原則，加重國家財政之負擔。該附表所稱之擔任「公務員」，係指擔任「有給之公職」之意，不問其職稱之如何，亦不問其待遇之多寡，均屬之。行政院於中華民國六十八年一月十九日以（六八）台人政肆字第〇一三七九號函修訂發布之「退休俸及生活補助費人員自行就任公職支領待遇注意事項」關於所定就任公職之職務類別，既係主管機關為執行上開條例未盡明確之附表所為必要之補充規定，與立法意旨無所違背，其於憲法保障生存權、財產權亦無牴觸。

(68) Tai-Jen-Cheng-Four No. 01379 dated January 19, 1979, of the Executive Yuan is a necessary supplementary provision to implement the rather ambiguous schedule of the abovementioned Act which does not contradict the legislative purpose or the constitutional guarantee of the people's rights of existence and property.

REASONING: Ordinances, regulations or rules promulgated by the executive branch under delegation of the law or to implement the law should be consistent with the relevant provisions in the Constitution or law, as is stipulated under Article 172 of the Constitution and Article 27, Schedule Note 4(2)-5, of the Armed Forces Officers Service Act relating to the payment of pension in the event that the retired officer becomes a public functionary, to the effect that if the pay (including dependent allowances) is higher or equal in amount to the pension, the pension payment is suspended; if lower than the pension, only the differential is paid. The purpose of pensions is to provide for retired officers after their long service to the country, not to reward or subsidize them when they resume public

解釋理由書：行政機關基於法律授權或為執行法律而依其職權所訂定之命令，依憲法第一百七十二條之意旨，固不得牴觸憲法或法律，然陸海空軍軍官服役條例第二十七條附表「附註」四之(二)之 5，關於軍官支領退休俸者，如擔任公務員，其所任職務，每月待遇（含眷補）高於或等於退休俸者，其退休俸停發；其每月待遇低於退休俸者，發給差額之此一規定，本係國家對軍官執干戈捍衛社稷之長年奉獻所予之照顧，俾其退役後之生活有所保障，非在酬報、補貼退役人員再任公職時之薪津所得，更非准許退役人員於給與退休俸外，猶得於另行就任公職時重複領取公庫支付之薪津，致違一人不得兩俸之原則，而加重國家財政之負擔。因是該附表所稱擔任「公務員」云者，參諸公務員退休制度之相關法律，例如

service. It certainly does not permit duplication of pay from the public treasury. As to the meaning of "public functionaries" in the Schedule Note, reference to legislation relevant to the public functionaries retirement system reveals that, for example, in Article 12, Subparagraph 2, of the Public Functionaries Retirement Act and Article 13, Subparagraph 2, of the Act Governing the Retirement of School Teachers and Staff, it means "performing public service with pay, irrespective of the title or amount." The Executive Yuan in letter (68) Tai-Jen-Chen-Four No. 01379 dated January 19, 1979, promulgated "The Precautionary Matters on the Payment of Compensation to Those Who after Receipt of Pension on Living Subsidy Voluntarily Resume Public Service" (then amended via letter [78] Tai-Jen-Four No. 09445 dated May 23, 1989, of the Executive Yuan, until repealed and replaced in letter [85] Tai-Jen- Cheng-Gai No. 45806 dated December 31, 1996, of the Executive Yuan, by "The Regulation for the Suspension of Pension Payment on Military Officers and Sergeants Who Assume Public Service") which provides for six categories of public

公務人員退休法第十二條第二款、學校教職員退休條例第十三條第二款等關於停止領受退休金之規定，當係指擔任「有給之公職」之意，固不問其職稱之如何，亦不問其待遇之多寡，要均包括在內。行政院於六十八年一月十九日以（六八）台人政肆字第〇一三七九號函修訂發布之「退休俸及生活補助費人員自行就任公職支領待遇注意事項」（嗣於七十八年五月二十三日經行政院以（七八）台人政肆字第〇九四四五號函核定修正，迨八十五年十二月三十一日行政院復以（八五）台人政給字第四五八〇六號函發布本注意事項自八十六年一月一日起停止適用，代之以施行之「支領退休俸軍官士官就任公職停發退休俸辦法」）所定關於就任公職之職務分類即：(一)民意代表(二)政務官(三)各機關學校或公營事業機構編制內教職員(四)各機關學校臨時編制職員(五)各機關學校或公營事業機構約聘約僱人員(六)軍事單位一般及評價聘僱聘任各等人員。此既係主管機關為執行上開條例未盡明確之附表所為必要補充之規定，與立法意旨無違，亦於憲法保障之生存權、財產權無所牴觸。至於憲法第八十五條、第八十六條第一款係關於公務人員選拔、考銓之規定，並非就何者為公

lic service: (1) representatives of the people; (2) political appointees; (3) regularly appointed teachers and other staff of government organizations, schools and colleges or state-owned enterprises; (4) temporarily appointed staff of government organizations, schools or colleges; (5) contractually appointed personnel of government organizations, schools, colleges or state-owned enterprises; and (6) general and evaluated, contractually appointed personnel of military units. This is a necessary supplementary provision by the competent authority to implement the rather ambiguous schedule for the above-mentioned Act which does not contradict the legislative purpose or the constitutional guarantee of the people's rights of existence and property. The provisions of Article 85 and Article 86, Subparagraph 1, of the Constitution are related to the selection, examination and qualification of public functionaries, not their definition. Furthermore, under Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act, this Yuan can only review the constitutionality of the relevant laws or regulations applied by

務人員加以界定；且依司法院大法官審理案件法第五條第一項第二款規定，本院僅得就確定終局裁判所適用之法令是否牴觸憲法予以審查，至若該裁判適用法令之當否，則非在本院所得審查之列，是本件聲請人等應否屬於前開注意事項所定自行就任公職之人員，乃法院事實認定之問題，不在解釋之範疇，併此敘明。

the finally adjudicated judgment, not the appropriateness of the laws or regulations applied by the court. Whether the petitioners are those who voluntarily resume public service is a question of fact for the court, and is not within the scope of Interpretation of this Yuan.

J. Y. Interpretation No.465（September 25, 1998）*

ISSUE: Is the public notice issued by the Council of Agriculture, Executive Yuan, in respect of the management of protected wildlife and the punishment of illegal sales of such wildlife in violation of the principle of unambiguous authorization?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Article 3, 4-II, 23 and 33 of the Wildlife Conservation Act as enacted and promulgated on June 23, 1989（七十八年六月二十三日制定公布之野生動物保育法第三條、第四條第二項、第二十三條、第三十三條）; Articles 24, 35 and 40 of the Wildlife Conservation Act as amended and promulgated on October 29, 1994（八十三年十月二十九日修正公布之野生動物保育法第二十四條、第三十五條、第四十條）.

KEYWORDS:

freedom right （自由權）, property right（財產權）, principle of proportionality（比例原則）, public notice of the list of protected wildlife（保育類野生動物名錄公告）, principle of unambiguous authorization（授權明確性原則）.**

HOLDING: The public notice of the list of protected wildlife issued by the

解釋文：行政院農業委員會中華民國七十八年八月四日公告之保育類

* Translated by Vincent C. Kuan.

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

Council of Agriculture, Executive Yuan, on August 4, 1989, specifying to the effect that the elephant family *(Elephantidae)* falls into the category of endangered and protected wildlife and is thus included in the list of wildlife so protected, was authorized by virtue of Article 4-II of the Wildlife Conservation Act as enacted and promulgated on June 23, 1989. The content and scope of the authorization at issue have been expressly specified in Article 3 (v) and Article 4-I of the aforesaid Act, which does not conflict with the Constitution. In addition, the penalties imposed by Article 33 of the said Act (amended as Article 40 thereof on October 29, 1994) on any person engaging in illegal sales of the aforesaid protected animals and their products as published are essential to the conservation of endangered and scarce wildlife so as to achieve the objective of preserving the environment and ecology. The said provisions are not designed to prescribe additional penalties to infringe retroactively upon the freedom and property right of the people, nor do they go beyond the scope necessary to promote public interests. Therefore, they are not in

野生動物名錄，指定象科為瀕臨絕種保育類野生動物並予公告，列其為管制之項目，係依據同年六月二十三日制定公布之野生動物保育法第四條第二項之授權，其授權之內容及範圍，同法第三條第五款及第四條第一項已有具體明確之規定，於憲法尚無違背。又同法第三十三條（八十三年十月二十九日修正為第四十條）對於非法買賣前開公告之管制動物及製品者予以處罰，乃為保育瀕臨絕種及珍貴稀有野生動物之必要，以達維護環境及生態之目標，亦非增訂處罰規定而溯及的侵害人民身體之自由權及財產權，且未逾增進公共利益所必要之範圍，與憲法並無牴觸。至公告列為瀕臨絕種保育類野生動物前，經已合法進口之野生動物或其屍體、角、骨、牙、皮、毛、卵、器官及其製品，於公告後因而不得買賣、交換、或意圖販賣而陳列，致人民財產權之行使受有限制，有關機關自應分別視實際受限制程度等具體情狀，檢討修訂相關規定為合理之補救，以符憲法保障人民財產權之意旨。

conflict with the Constitution. In respect of those wildlife or the carcasses, horns, bones, hides, furs, eggs, organs of such wildlife and their products that were legally imported prior to the public notice declaring them as endangered and protected wildlife, as the property right of the people is restricted due to the prohibition against the sale, trade or display thereof with the intent to sell the same subsequent to the public notice at issue, the authorities concerned shall review and revise the relevant provisions to reasonably remedy the various situations after considering such specific circumstances as the actual limitations on various products so that the constitutional intent to protect the property right of the people will be complied with.

REASONING: The public notice of the list of protected wildlife issued by the Council of Agriculture, Executive Yuan, on August 4, 1989, specifying to the effect that the elephant family *(Elephantidae)* falls into the category of endangered and protected wildlife and is thus included in the list of wildlife so pro-

解釋理由書：行政院農業委員會中華民國七十八年八月四日公告之保育類野生動物名錄，指定象科為瀕臨絕種保育類野生動物並予公告，列其為管制之項目，係依據同年六月二十三日制定公布之野生動物保育法第四條第二項之授權，其授權之內容及範圍，同法第三條第五款及第四條第一項已有具體明

tected, was authorized by virtue of Article 4-II of the Wildlife Conservation Act as enacted and promulgated on June 23, 1989. The content and scope of the authorization at issue have been expressly specified in Article 3 (v) and Article 4-I of the aforesaid Act, which should be in line with the principle of unambiguous authorization and thus does not conflict with the Constitution. Furthermore, under Article 23 of the said Act (amended as Article 24, 35? thereof on October 29, 1994), no endangered wildlife or the carcasses, horns, bones, hides, furs, eggs, organs of such wildlife and their products may be imported, exported, purchased or sold without obtaining approval from the authorities concerned. Therefore, any purchase or sale without approval is certainly an illegal sale of the aforesaid protected animals and their products as published. The penalties imposed by Article 33 of the said Act (amended as Article 40 thereof on October 29, 1994) on any person engaging in illegal sales of the aforesaid protected animals and their products as published are essential to the conservation of endangered and scarce wildlife so

確之規定，難謂與授權明確原則不符，於憲法尚無違背。又依同法第二十三條（八十三年十月二十九日修正為第二十四條、第三十五條）規定，瀕臨絕種野生動物之屍體、骨、角、牙、毛、皮、器官及製品等，應經主管機關之許可始得進出口或買賣。未經許可之買賣，自屬非法買賣前開公告之管制動物及製品，同法第三十三條（八十三年十月二十九日修正為第四十條）規定予以處罰，乃為保育瀕臨絕種及珍貴稀有野生動物之必要，且係就公告後之行為始予處罰，自無增訂處罰規定而溯及的侵害人民身體之自由權及財產權可言，凡此措施均在彌補我國過去對於環境生態保護之不足，為貫徹維護環境及生態目標之不得已手段，尚與比例原則無違，亦為增進公共利益所必要，與憲法並無牴觸。至公告列為瀕臨絕種保育類野生動物前，經已合法進口之野生動物或其屍體、角、骨、牙、皮、毛、卵、器官及其製品，於公告後因而不得買賣、交換、或意圖販賣而陳列，致人民財產權之行使受有限制，有關機關自應分別視實際受限制程度等具體情狀，檢討修訂相關規定為合理之補救，以符憲法保障人民財產權之意旨。

as to achieve the objective of preserving the environment and ecology. In addition, the said provisions are intended to punish those actions occurring after the publication at issue, but not designed to prescribe additional penalties to infringe retroactively upon the freedom and property right of the people. All of the relevant measures are meant to remedy the past inadequacies of our nation in respect of environmental and ecological protection, and no other alternative means are available to implement the objectives of conserving the environment and ecology. Accordingly, since they do not contradict the principle of proportionality, nor do they go beyond the scope necessary to promote public interests, they are not in conflict with the Constitution. In respect of those wildlife or the carcasses, horns, bones, hides, furs, eggs, organs of such wildlife and their products that were legally imported prior to the public notice declaring them as endangered and protected wildlife, as the property right of the people is restricted due to the prohibition against the sale, trade or display thereof with the intent to sell the same subsequent to the public no-

tice at issue, the authorities concerned shall review and revise the relevant provisions to reasonably remedy the various situations after considering such specific circumstances as the actual limitations on various products so that the constitutional intent to protect the property right of the people will be complied with.

J. Y. Interpretation No.466（September 25, 1998）*

ISSUE: Under the dual system of litigation specifically adopted by the Constitution, should a payment dispute arising under the Public Functionaries Insurance Act be resolved in accordance with the procedures for administrative litigation?

RELEVANT LAWS:

Articles 16 and 77 of the Constitution（憲法第十六條及第七十七條）.

KEYWORDS:

proceeding for relief（訴訟救濟）, administrative litigation（行政訴訟）,civil litigation（民事訴訟）, public functionaries（公務人員）, dual litigation system（二元訴訟制度）.**

HOLDING: Article 16 of the Constitution stipulates that the people have a right of instituting legal proceedings. Its aims are to ensure that people may institute proceedings pursuant to legal procedures and to guarantee them a fair trial. The question as to whether proceedings for relief shall follow the proce-

解釋文：憲法第十六條規定人民有訴訟之權，旨在確保人民得依法定程序提起訴訟及受公平之審判。至於訴訟救濟究應循普通訴訟程序抑或依行政訴訟程序為之，則由立法機關依職權衡酌訴訟案件之性質及既有訴訟制度之功能等而為設計。我國關於民事訴訟與行政訴訟之審判，依現行法律之規定，分

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

dures for general litigation or administrative litigations is for the legislative authorities to determine, within their duty, by taking into consideration the nature of cases in litigation and the existing litigation system. The adjudication of civil litigation and administrative litigation cases in this State is performed by courts of different description in accordance with the existing laws. The State adopts a dual system of litigation. Unless otherwise stipulated by the laws, disputes arising from relationships governed by private laws shall be determined by ordinary courts; disputes arising from relationships governed by public laws shall be adjudicated by administrative courts.

由不同性質之法院審理，係採二元訴訟制度。除法律別有規定外，關於因私法關係所生之爭執，由普通法院審判；因公法關係所生之爭議，則由行政法院審判之。

The State has enacted the Public Functionaries Insurance Act in order to guarantee protection of the livelihood of government employees. The task for administering the public functionaries' insurance program is assigned, by the Ministry of Civil Service of the Examination Yuan, to the Central Trust of China (being a department under the Ministry of Finance of the Executive Yuan) which is to

國家為提供公務人員生活保障，制定公務人員保險法，由考試院銓敘部委託行政院財政部所屬之中央信託局辦理公務人員保險，並於保險事故發生時予以現金給付。按公務人員保險為社會保險之一種，具公法性質，關於公務人員保險給付之爭議，自應循行政爭訟程序解決。惟現行法制下，行政訴訟除附帶損害賠償之訴外，並無其他給付類型訴訟，致公務人員保險給付爭議縱經行

make cash payment when an insured peril occurs. Since public functionaries insurance is a type of social insurance and is of a public-law nature, payment disputes arising under the public functionaries' insurance program shall be resolved in accordance with the procedures for administrative litigations. However, under the existing laws, administrative litigations do not include proceedings for payment except for supplementary proceedings for compensation. Consequently, an affirmative determination of a payment dispute arising under the public functionaries' insurance program does not necessarily guarantee an indemnity payment to the party involved. The relevant authority should complete the reformation of the whole administrative proceeding system at the earliest opportunity. Before completion of the reformation of the relevant legal system, in the event an order for payment under administrative relief procedures cannot be realized, permission shall be granted for the judicial relief proceedings to be instituted in the ordinary courts so as to conform to the objectives of the first abovementioned provision of the Constitution.

政救濟確定，該當事人亦非必然即可獲得保險給付。有關機關應儘速完成行政訴訟制度之全盤修正，於相關法制尚未完備以前，為提供人民確實有效之司法救濟途徑，有關給付之部分，經行政救濟程序之結果不能獲得實現時，應許向普通法院提起訴訟謀求救濟，以符首開憲法規定之意旨。

REASONING: The Judicial Yuan is the highest judicial organization of the State, and as expressly stated in Article 77 of the Constitution, it is responsible for the determination of civil, criminal and administrative litigations and for disciplining government employees. Article 16 of the Constitution stipulates that the people have a right of instituting legal proceedings. Its aims are to ensure that people may institute proceedings pursuant to legal procedures and to guarantee them a fair trial. The question as to whether proceedings for relief shall follow the procedures for general litigation or administrative litigations is for the legislative authorities to determine, within their duty, by taking into consideration the nature of cases in litigation and the existing litigation system. The adjudication of civil litigation and administrative litigation cases in this State is performed by courts of different description in accordance with the existing laws. The State adopts a dual system of litigation. Unless otherwise stipulated by the laws, disputes arising from relationships governed by private laws shall be determined by ordinary courts;

解釋理由書：司法院為國家最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒，憲法第七十七條定有明文。而憲法第十六條規定人民有訴訟之權，旨在確保人民得依法定程序提起訴訟及受公平之審判。至於訴訟救濟究應循普通訴訟程序抑或依行政訴訟程序為之，則由立法機關依職權衡酌訴訟案件之性質及既有訴訟制度之功能等而為設計。我國關於民事訴訟與行政訴訟之審判，依現行法律之規定，分由不同性質之法院審理，係採二元訴訟制度。除法律別有規定外，關於因私法關係所生之爭執，由普通法院審判；因公法關係所生之爭議，則由行政法院審判之。公務人員保險給付之爭議究由何種法院審理、循何種程序解決，法律既無明文規定，則當依事件之性質並考量既有訴訟制度之功能定其救濟途徑。

disputes arising from relationships governed by public laws shall be adjudicated by administrative courts. With regard to payment disputes arising under the public functionaries insurance program, the law does not expressly stipulate the court or procedure for the resolution of such, thus relief procedures shall be determined taking into account the nature of the case at hand and the functions of the existing litigation system.

In an attempt to guarantee protection of the livelihood of government employees, the State has, pursuant to the Public Functionaries Insurance Act, assigned the task of administering the public functionaries' insurance, through the Ministry of Civil Service of the Examination Yuan, to the Central Trust of China (being a department under the Ministry of Finance of the Executive Yuan) which is to make cash payments to the insured when any one of four insured perils-- disability, retirement, death or death of dependents-- occurs. Since public functionaries' insurance is a type of social insurance and is of a public-law nature, payment disputes

國家為提供公務人員生活保障，依公務人員保險法規定，由考試院銓敘部委託行政院財政部所屬之中央信託局辦理公務人員保險，並於發生殘廢、養老、死亡、眷屬喪葬四項保險事故時予以被保險人現金給付。按公務人員保險為社會保險之一種，具公法性質，關於公務人員保險給付之爭議，自應循行政爭訟程序解決，且公務人員之公法上財產請求權遭受侵害時，得依訴願及行政訴訟程序請求救濟，亦經本院釋字第二六六號及第三一二號解釋闡釋在案。惟現行法制下，行政訴訟除附帶損害賠償之訴外，並無其他給付類型訴訟，致公務人員保險給付爭議縱經行政救濟確定，該當事人亦非必然即可獲得保險給

arising under the public functionaries' insurance program shall be resolved in accordance with the procedures for administrative proceedings. In addition, it has already been explained in this Yuan's Interpretations Nos. 266 and 312 that government employees, upon infringement of their right under the public law to request property, may seek relief by initiating appeals or procedures for administrative litigations. However, under the existing laws, administrative litigations do not include proceedings for payment except supplementary proceedings for compensation. Consequently, an affirmative determination of a payment dispute arising under the public functionaries' insurance program does not necessarily guarantee an indemnity payment to the party involved. The relevant authority should complete the reformation of the whole administrative proceeding system at the earliest opportunity. Before completion of the reformation of the relevant legal system, in the event an order for payment under administrative relief procedures cannot be realized, permission shall be granted for the judicial relief proceedings

付。有關機關應儘速完成行政訴訟制度之全盤修正，於相關法制尚未完備以前，為提供人民確實有效之司法救濟途徑，有關給付之部分，經行政救濟程序之結果不能獲得實現時，應許向普通法院提起訴訟謀求救濟，以符首開憲法規定之意旨。

to be instituted in the ordinary courts so as to conform to the objectives of the first abovementioned provision of the Constitution.

Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋孫大法官森焱提出部分不同意見書。

J. Y. Interpretation No.467（October 22, 1998）*

ISSUE: What is the status of the provincial level of government now that the 1997 Amendments to the Constitution are in effect?

RELEVANT LAWS:

Article 9 of the Amendments to the Constitution（憲法增修條文第九條）.

KEYWORDS:

self-government（自治）, public legal person（公法人）.**

HOLDING: Despite the fact that Article 9 of the 1997 Amendments to the Constitution is in effect, the provincial government is still a local government. In view of the fact that it no longer has jurisdiction over matters regarding local self-government and has been deprived of the autonomous right to internal organization, it shall not be recognized as a public legal person of local self-government. However, if legislation, in accordance with the spirit and purpose of the abovementioned Amendments to the Constitution, empow-

解釋文：中華民國八十六年七月二十一日公布之憲法增修條文第九條施行後，省為地方制度層級之地位仍未喪失，惟不再有憲法規定之自治事項，亦不具備自主組織權，自非地方自治團體性質之公法人。符合上開憲法增修條文意旨制定之各項法律，若未劃歸國家或縣市等地方自治團體之事項，而屬省之權限且得為權利義務之主體者，於此限度內，省自得具有公法人資格。

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* Translated by Professor Jyh-Pin Fa.

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

ers the provincial government to exercise exclusive power of local self-government and to have certain legal rights and responsibilities, it certainly may thus acquire the status of a public legal person.

REASONING: The division of powers between the central and local governments is regulated by the Constitution and statutes with constitutional delegation. A local governments meeting the following criteria will be considered as a public legal person of local self-government: (1) it may enact and enforce regulations regarding local self-government; and (2) it has the organic power of self-government. Article 9 of the 1997 Amendments to the Constitution provides that members of the governing body of the province, including the chairman, will be nominated by the Premier and appointed by the President; members of the advisory council will also be nominated by the Premier and appointed by the President; the provincial government shall execute orders of the Executive Yuan and supervise counties on matters of local self-government; the

解釋理由書：本件係聲請人於行使職權時，就依憲法增修條文第九條之規定省是否仍具有公法人之地位，發生適用憲法之疑義而聲請解釋，非關法規違憲審查之問題，合先說明。

中央與地方權限劃分係基於憲法或憲法特別授權之法律加以規範，凡憲法上之各級地域團體符合下列條件者：一、享有就自治事項制定規章並執行之權限，二、具有自主組織權，方得為地方自治團體性質之公法人。八十六年七月二十一日公布施行之憲法增修條文第九條第一項分別規定：「省、縣地方制度，應包括左列各款，以法律定之，不受憲法第一百零八條第一項第一款、第一百零九條、第一百十二條至第一百十五條及第一百二十二條之限制：一、省設省政府，置委員九人，其中一人為主席，均由行政院院長提請總統任命之。二、省設省諮議會，置省諮議會議員若干人，由行政院院長提請總統任命

elections for members of the Taiwan Provincial Assembly and the Government of the Taiwan Provinces shall be suspended following the conclusion of the current terms of offices of these two official bodies; and future modification of the functions, operations, and organization of the Taiwan Provincial Government may be specified by law. Accordingly, the provincial government is still a local government. Moreover, as the Taiwan Province no longer has jurisdiction over matters of local self-government and has been deprived of the autonomous right to internal organization, it shall not be recognized as a public legal person of local self-government.

之。」「六、中央與省、縣之關係。七、省承行政院之命，監督縣自治事項。」同條第二項規定：「第十屆台灣省議會議員及第一屆台灣省省長之任期至中華民國八十七年十二月二十日止，台灣省議會議員及台灣省省長之選舉自第十屆台灣省議會議員及第一屆台灣省省長任期之屆滿日起停止辦理。」同條第三項規定：「台灣省議會議員及台灣省省長之選舉停止辦理後，台灣省政府之功能、業務與組織之調整，得以法律為特別之規定。」依上開規定，省為地方制度層級之地位仍未喪失，惟台灣省自八十七年十二月二十一日起既不再有憲法規定之自治事項，亦不具備自主組織權，自非地方自治團體性質之公法人。

In addition to those organizations which share national sovereignty, other organizations may also be considered as public legal persons if their memberships are mandatory, if they are entitled to exercise public authorities and if they have the capacity to carry out legal rights and responsibilities. Therefore, in addition to national and local-level governments with the right of self-government, there are

查因憲法規定分享國家統治權行使，並符合前述條件而具有公法人地位之地方自治團體外，其他依公法設立之團體，其構成員資格之取得具有強制性，而有行使公權力之權能，且得為權利義務主體者，亦有公法人之地位。是故在國家、地方自治團體之外，尚有其他公法人存在，早為我國法制所承認（參照國家賠償法第十四條、農田水利會組織通則第一條第二項、八十七年十

other public legal persons which have long been recognized by law. The Legislative Yuan has full discretion to decide whether to authorize the provincial government with the necessary competency to become a public legal person.

月二日立法院三讀通過之訴願法第一條第二項）。上開憲法增修條文第九條就省級政府之組織形態、權限範圍、與中央及縣之關係暨台灣省政府功能、業務與組織之調整等項，均授權以法律為特別之規定。立法機關自得本於此項授權，在省仍為地方制度之層級前提下，依循組織再造、提昇效能之修憲目標，妥為規劃，制定相關法律。符合上述憲法增修意旨制定之法律，其未劃歸國家或縣市等地方自治團體之事項，而屬省之權限且得為權利義務主體者，揆諸前開說明，省雖非地方自治團體，於此限度內，自得具有其他公法人之資格。

Of course, the special law on the reorganization of the Taiwan Provincial Government provided in Article 9, Paragraph 3, of the Amendments to the Constitution shall not conflict with other prescriptions provided in the same Article of the Constitution.

憲法增修條文第九條第三項規定，鑑於臺灣省原職掌之功能業務龐大，而相關職權法令之全盤修正曠日廢時，為期其制度及功能、業務為適當之規劃與調整，乃授權立法機關得制定特別法以迅為因應，非謂立法機關得不受憲法增修條文第九條第一項第一款及第二款對省級政府之組織形態決定之限制而為不同之規定，同條第一項其他各款亦然，並此敘明。

Justice Chi-Nan Chen filed concurring opinion in part.

Justice Young-Mou Lin filed concurring opinion in part.

Justice Sen-Yen Sun filed concurring opinion.

Justice Hsiang-Fei Tung filed dissenting opinion, in which Justice Vincent Sze joined.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋陳大法官計男、林大法官永謀分別提出部分協同意見書；孫大法官森焱提出協同意見書；董大法官翔飛、施大法官文森共同提出不同意見書；劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.468（October 22, 1998）*

ISSUE: Are the relevant provisions of the Presidential and Vice Presidential Election and Recall Act and the Rules on Joint Endorsements and Its Verification for Presidential and Vice Presidential Election , which require joint endorsements of the presidential and vice presidential candidates by a certain number of people, as well as provision of security deposit, in violation of the Constitution?

RELEVANT LAWS:

Articles 17, 23, 45 and 46 of the Constitution（憲法第十七條、第二十三條、第四十五條及第四十六條）; Article 2 of the Regulation on the Joint Endorsements and the Verification Thereof for the Presidential and Vice Presidential Election（總統副總統選舉連署及查核辦法第二條）.

KEYWORDS:

Right of equality（平等權）, legislative discretion（立法裁量）, legislature（立法機關）, principle of clarity and definiteness of law（法律明確性原則）, the right of election（選舉權）.**

HOLDING: Article 46 of the Constitution of the Republic of China pro-

解釋文：憲法第四十六條規定：總統、副總統之選舉，以法律定

* Translated by Vincent C. Kuan.

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

vides, “The election of the President and the Vice President shall be prescribed by law.” The legislature, in enacting applicable laws to regulate the procedure for the election of the President and the Vice President based on the aforesaid article, should follow the principles of fairness and reasonableness. Paragraphs II and IV of Article 23 of the Presidential and Vice Presidential Election and Recall Act stipulate that those applying to register for the candidacy for President and Vice President by method of joint endorsements shall, within the statutorily prescribed period of time, garner at least 1.5 percent of the total number of electors in the most recent election of centrally elected representatives, which is not only intended to signify the reasonable degree of political support for the candidate opting for the joint-endorsement system as equitably comparable to the requirement for a candidate recommended by a political party, but also to prevent the people from needlessly participating in presidential and vice presidential elections, thus wasting social resources. Hence it is not to be regarded as an unnecessary restriction on

之。立法機關依此制定法律，規範總統、副總統之選舉程序，應符合公平合理之原則。總統副總統選舉罷免法第二十三條第二項及第四項規定，總統、副總統候選人須於法定期間內尋求最近一次中央民意代表選舉選舉人總數百分之一點五以上之連署，旨在採行連署制度，以表達被連署人有相當程度之政治支持，藉與政黨推薦候選人之要件相平衡，並防止人民任意參與總統、副總統之候選，耗費社會資源，在合理範圍內所為適當之規範，尚難認為對總統、副總統之被選舉權為不必要之限制，與憲法規定之平等權亦無違背。又為保證連署人數確有同條第四項所定人數二分之一以上，由被連署人依同條第一項提供保證金新台幣一百萬元，並未逾越立法裁量之範圍，與憲法第二十三條規定尚無違背。總統副總統選舉連署及查核辦法係主管機關依總統副總統選舉罷免法第二十三條第九項授權所訂定，其授權有明確之目的及範圍，同辦法第二條第三項關於書件不全、不符規定或保證金不足者，中央選舉委員會應拒絕受理其申請之規定，符合法律授權之意旨，與憲法並無牴觸。惟關於上開被選舉權行使之要件，應隨社會變遷及政治發展之情形，適時檢討改進，以副憲法保障人

the right to be elected as president or vice president, nor is it in violation of the right of equality as stipulated by the Constitution. Furthermore, under Paragraph I of the aforesaid article the candidate seeking joint endorsements is required to make a security deposit in the amount of NT$1,000,000 so as to assure that the number of joint endorsements indeed reaches one half of the population stipulated in Paragraph IV of said article. Thus it does not exceed the scope of legislative discretion, nor does it violate Article 23 of the Constitution. The Regulation on the Joint Endorsements and the Verification Thereof for the Presidential and Vice Presidential Election was established by the competent agency under the authority delegated by Article 23-IX of the Presidential and Vice Presidential Election and Recall Act. The purpose and scope of the authorities thereof are clearly defined. The provisions of Article 2-III of said Regulation, which require that the Central Election Committee should reject an application where the documentation is incomplete or inconsistent with the applicable requirements, or the security deposit is

民參政權之本旨，乃屬當然。

insufficient, are in line with the intent of legal authorization and thus do not violate the Constitution. Nevertheless, in respect of the requirements for the exercise of the aforesaid right to be elected, review and improvement should, of course, be conducted in due time as social conditions and political environments change, so as to conform to the constitutional intent to safeguard the people's suffrage.

REASONING: Article 46 of the Constitution of the Republic of China provides, "The election of the President and the Vice President shall be prescribed by law." With respect to the procedure for the election of the President and the Vice President, the legislature may certainly enact laws to regulate such procedure in a fair and reasonable manner. So long as the contents of the legal norms do not exceed the necessary limits, there should be no violation of the suffrage as guaranteed under Article 17 of the Constitution, as well as the right to be elected as president and vice president provided in Article 45 thereof. Article 23-I of the Presidential and Vice Presidential Election and Recall

解釋理由書：憲法第四十六條規定：總統、副總統之選舉，以法律定之。總統、副總統之選舉程序，立法機關自得制定法律為公平合理之規範。如法律規範之內容並未逾越必要之限制，即不得謂侵害憲法第十七條保障之選舉權及第四十五條規定之總統、副總統被選舉權。總統副總統選舉罷免法第二十三條第一項：「依連署方式申請登記為總統、副總統候選人者，應於選舉公告發布後五日內，向中央選舉委員會申請為被連署人，申領連署人名冊格式，並繳交連署保證金新台幣一百萬元。」第二項：「中央選舉委員會受理前項申請後，應定期公告申請人為被連署人，並函請直轄市、縣（市）選舉委員會於公告之次日起四十五日內，受理被連署人

Act provides, “A person who applies to register for the candidacy for President or Vice President by method of joint endorsements shall apply to the Central Election Commission within five days after the proclamation of the election, obtain joint-endorsement register forms and make a security deposit in the amount of NT$1,000,000.” Paragraph II thereof reads, “Upon receiving such application referred to in the preceding paragraph, the Central Election Commission shall, within a fixed period of time, proclaim the applicant to be a candidate for a joint-endorsement campaign, and shall request the municipal and county (city) election commissions in writing to accept joint-endorsement forms submitted by the candidate for the joint-endorsement campaign or his or her agent within forty-five days beginning as of the day following the day when the proclamation is issued.” And, Paragraph IV thereof further provides, “If, within the period of time referred to in Paragraph II hereof, the number of joint endorsements reaches at least 1.5 percent of the total number of electors in the most recent election of centrally elected repre-

或其代理人提出連署書件。」第四項：「連署人數，於第二項規定期間內，已達最近一次中央民意代表選舉選舉人總數百分之一點五以上時，中央選舉委員會應定期為完成連署之公告，發給被連署人完成連署證明書，並發還保證金。」以上規定限被連署人於中央選舉委員會公告被連署人之次日起四十五日內尋求最近一次中央民意代表選舉選舉人總數百分之一點五以上之連署，第九任總統副總統選舉法定連署人數為二十萬一千三百十八人。總統副總統選舉罷免法第二十三條第八項前段規定：「直轄市、縣（市）選舉委員會受理前項連署書件後，應予抽查，並應於抽查後，將受理及抽查結果層報中央選舉委員會。」依第九任總統副總統選舉時抽查連署案件之經驗以觀，各組總統、副總統候選被連署人提出之連署書件合計一百零五萬二千五百九十件，均經各直轄市、縣（市）選舉委員會及中央選舉委員會全數逐件以人工並利用電腦查核（見中央選舉委員會八十六年六月二十六日八十六中選一字第七二〇四〇號復函）。綜上以觀，與採行連署制度以表達被連署人有相當程度之政治支持，並兼顧與總統副總統選舉罷免法第二十二條所定政黨推薦候選人之要件相平衡，

sentatives, the Central Election Commission shall, within a fixed period of time, proclaim the completion of the joint-endorsement campaign and issue a certificate of completion to the candidate for the joint-endorsement campaign, and shall also refund the security deposit." The foregoing provisions require that a candidate for the joint-endorsement campaign garner at least 1.5 percent of the total number of electors in the most recent election of centrally elected representatives within forty-five days beginning as of the day following the day when the Central Election Commission proclaims the candidates for the joint-endorsement campaigns, which means that the statutory number of joint endorsements for the 9th Presidential and Vice Presidential Election was 201,318. The first part of Article 23-VIII of the Presidential and Vice Presidential Election and Recall Act provides, "Upon receiving the joint-endorsement documents referred to in the preceding paragraph, the municipal or county (city) election commissions shall inspect the endorsements by random samples and, upon completion of the random inspect-

且防止人民任意參與總統、副總統之候選，耗費社會資源，在合理範圍內所為適當之規範，尚難認為對總統、副總統之被選舉權為不必要之限制，與憲法規定之平等權亦無違背。又依同法第二十三條第五項規定：「於規定期間內連署人數不足前項規定人數二分之一以上者，保證金不予發還。」可見新台幣一百萬元保證金之提供係為確保連署人數有同條第四項所定人數二分之一以上，於達此人數時，即予發還。既非強制被選舉人負擔鉅額之選舉費用，亦難認係對總統、副總統被選舉權之不當限制，其保證金額之酌定，並未逾越立法裁量之範圍，與憲法尚無違背。總統副總統選舉連署及查核辦法係主管機關依總統副總統選舉罷免法第二十三條第九項授權所訂定，其授權有明確之目的及範圍。依連署方式申請登記為總統副總統候選人者，應於限期內提出連署人名冊、連署切結書及加蓋連署人印章之連署人國民身分證影本暨繳交連署保證金。於規定期間內連署人數不足法定人數二分之一以上者，保證金不予發還。為總統副總統選舉罷免法第二十三條所明定。上開辦法第二條第三項關於書件不全、不符規定或保證金不足者，中央選舉委員會應拒絕受理其申請之規定，

tion, the results of the reception and of the random inspection shall be reported to the Central Election Commission." Judging from the random inspections made during the 9th Presidential and Vice Presidential Election, the aggregate number of joint-endorsement documents submitted by various teams of presidential and vice presidential candidates amounted to 1,052,590, which were verified item by item through various municipal or county (city) election commissions and the Central Election Commission by both manpower and computers (*See* Official Reply of the Central Election Commission, Directive Ref. No. CSY-(86)-72040, June 26, 1997). In light of the above, the adoption of the joint-endorsement system, which signifies a reasonable degree of political support for the candidate opting for the system, serves not only to equitably balance against the requirement for a candidate recommended by a political party as provided in Article 22 of the Presidential and Vice Presidential Election and Recall Act, but also to prevent the people from needlessly participating in presidential and vice presidential elec-

符合法律授權之意旨，與憲法並無牴觸。惟關於上開被選舉權行使之要件，應隨社會變遷及政治發展之情形，適時檢討改進，以副憲法保障人民參政權之意旨，乃屬當然。

tions, thus wasting social resources. Hence it is not to be regarded as an unnecessary restriction on the right to be elected as president or vice president, nor is it in violation of the right of equality as stipulated by the Constitution. Furthermore, Article 23-V of said Act provides, "If the number of joint endorsements does not reach one half of the number required under the preceding paragraph within the prescribed period of time, the security deposit will not be refunded." Thus it is clear that the lodgment of the NT$1,000,000 security deposit is designed to ensure that the number of joint endorsements reaches one half of the number provided in Paragraph IV of said article, and that the security deposit will be refunded once the number is reached. Since it neither compels the candidates to bear undue burdens of excessive amount of campaign costs, nor imposes inadequate restrictions on a person's right to be elected as president or vice president, the determination of the amount of the security deposit does not exceed the scope of legislative discretion, and thus does not violate the Constitution. The Regulation

on the Joint Endorsements and the Verification Thereof for the Presidential and Vice Presidential Election was established by the competent agency under the authority delegated by Article 23-IX of the Presidential and Vice Presidential Election and Recall Act. The purpose and scope of the authorities thereof are clearly defined. Those applying to register for the candidacy for President and Vice President by method of joint endorsements shall, within the statutorily prescribed period of time, submit the register of joint endorsements, affidavits and photocopies of the joint signatories' identity cards to which their seals are affixed, and lodge the security deposit for the purpose of joint endorsements. If the number of joint endorsements does not reach one half of the statutorily required number within the prescribed period of time, the security deposit will not be refunded, which is unambiguously provided in Article 23 of the Presidential and Vice Presidential Election and Recall Act. The provisions of Article 2-III of the aforesaid Regulation, which require that the Central Election Committee should reject an application where the

documentation is incomplete or inconsistent with the applicable requirements, or the security deposit is insufficient, are in line with the intent of legal authorization and thus do not violate the Constitution. Nevertheless, in respect of the requirements for the exercise of the aforesaid right to be elected, review and improvement should, of course, be conducted in due time as social conditions and political environments change, so as to conform to the constitutional intent to safeguard the people's suffrage.

J. Y. Interpretation No.469（November 20, 1998）*

ISSUE: The Precedent of the Supreme Court states, in reference to a public servant's negligence in discharging his/her duty as provided in Article 2, Paragraph 2, of the State Compensation Act, that the situation upon which a claim for damages may arise is limited to the case where the public servant is obligated to discharge certain duties to the victim but fails to do so. Is the limitation imposed by the said Precedent excessive and beyond the meaning and intent of the State Compensation Act, and does it thus contravene Article 15 of the Constitution governing protection of the people's property right?

RELEVANT LAWS:

Article 24 of the Constitution（憲法第二十四條）; Article 2, Paragraphs 2 and 3 of the State Compensation Act（國家賠償法第二條第二項、第三項）.

KEYWORDS:

state compensation（國家賠償）.**

HOLDING: The stipulation of law is not confined to the powers granted to the national authorities in the execution of public affairs, but the purpose of which

解釋文：法律規定之內容非僅屬授予國家機關推行公共事務之權限，而其目的係為保護人民生命、身體及財產等法益，且法律對主管機關應執行職

* Translated by BAKER & McKENZIE.

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

is to protect the life, body health, property and other interests of the citizen as well. In addition, specific provisions are stipulated with respect to matters which are executed by the responsible authorities in the exercise of their public authorities. Where, pursuant to the said provision, the public servant of a responsible authority cannot exercise any discretionary power for inaction with respect to any obligations to identifiable persons, and the failure to discharge his/her duties by reason of deliberateness or negligence has resulted in harm to the liberty or rights of the identifiable persons, the victim thereunder may claim compensatory damages in accordance with Article 2, the latter part of Paragraph 2, of the State Compensation Act. Precedent T.S.T.No. 704 (Sup Ct., 1983) states that, "pursuant to Article 2, the second sentence of Paragraph 2, of the State Compensation Act, the so-called 'negligence in the discharge of duties by a public servant' refers to the situation where the public servant is obligated to discharge certain duties to the victim but fails to do so. In other words, the victim has the right of claim under the public law

務行使公權力之事項規定明確，該管機關公務員依此規定對可得特定之人所負作為義務已無不作為之裁量餘地，猶因故意或過失怠於執行職務，致特定人之自由或權利遭受損害，被害人得依國家賠償法第二條第二項後段，向國家請求損害賠償。最高法院七十二年台上字第七〇四號判例謂：「國家賠償法第二條第二項後段所謂公務員怠於執行職務，係指公務員對於被害人有應執行之職務而怠於執行者而言。換言之，被害人對於公務員為特定職務行為，有公法上請求權存在，經請求其執行而怠於執行，致自由或權利遭受損害者，始得依上開規定，請求國家負損害賠償責任。若公務員對於職務之執行，雖可使一般人民享有反射利益，人民對於公務員仍不得請求為該職務之行為者，縱公務員怠於執行該職務，人民尚無公法上請求權可資行使，以資保護其利益，自不得依上開規定請求國家賠償損害。」對於符合一定要件，而有公法上請求權，經由法定程序請求公務員作為而怠於執行職務者，自有其適用，惟與首開意旨不符部分，則係對人民請求國家賠償增列法律所無之限制，有違憲法保障人民權利之意旨，應不予援用。

with respect to certain duties of the public servant. After the request for execution, if, as a result of the failure to discharge the duties, harm is caused to the liberty or rights of the victim, the victim can thus claim that the state should be responsible for compensatory damages based on the aforesaid provision. Where the people can enjoy the interest of reflection as a result of the discharge of duties by the public servant, but where the people cannot request the discharge thereof, in this instance, even if the public servant fails to discharge his/her duties, the people cannot exercise any right of request under public law to seek to safeguard their interests, and as such they cannot claim state compensation based on the above provision." Such Precedent shall be applicable in the situation where the prerequisites are satisfied, and if the identifiable persons have the right of claim under public law and have made a request for action by the public servant in accordance with legal procedures where the latter fails to discharge his/her duties. However, the portion of said Precedent which contravenes the aforesaid intent of the interpretation

would be imposing limits on the rights of the public to request state compensation where the law does not so impose, and it would be contradictory to the constitutional purpose of protecting the rights of the public and therefore such portion should no longer be applicable.

REASONING: Article 24 of the Constitution prescribes that where a public servant is in violation of the liberty or rights of the people, the people can request state compensation based on the law. This elucidates in principle the obligations for state compensation. The legislative authority enacts appropriate laws with respect to state responsibilities based on this principle. In addition, on the premise of legal stipulations, the administrative authority may, because of an expansion in its scope of duties and in response to the hazards created to the environment or sanitation as a result of intense industrialization and overdevelopment as well as hazards triggered by the technical facilities, adopt measures to prevent or minimize dangers so as to en hance the protection of public safety. If the constituent

解釋理由書：憲法第二十四條規定公務員違法侵害人民之自由或權利，人民得依法律向國家請求賠償，係對國家損害賠償義務所作原則性之揭示，立法機關應本此意旨對國家責任制定適當之法律，且在法律規範之前提下，行政機關並得因職能擴大，為因應伴隨高度工業化或過度開發而產生對環境或衛生等之危害，以及科技設施所引發之危險，而採取危險防止或危險管理之措施，以增進國民生活之安全保障。倘國家責任成立之要件，從法律規定中已堪認定，則適用法律時不應限縮解釋，以免人民依法應享有之權利無從實現。國家賠償法第二條第二項規定：「公務員於執行職務行使公權力時，因故意或過失不法侵害人民自由或權利者，國家應負凡公務員職務上之行為符損害賠償責任。公務員怠於執行職務，致人民自由或權利遭受損害者亦同」，

elements for national responsibilities are found to be adequately present as prescribed in the legal stipulations, then a strict interpretation cannot be adopted when applying the applicable law so as not to hinder the exercise of rights to which the people are legally entitled. Article 2, Paragraph 2, of the State Compensation Act provides that "where the exercise of public authorities in the performance of duties by a public servant results in illegal violation of the liberty or rights of the people by reason of deliberateness or negligence, the state shall be responsible for compensation. The same shall apply where harm is caused to the liberty or rights of the people by reason of failure of a public servant to discharge his/her duties." As long as the official conduct of a public servant satisfies the following: exercise of public authorities (either intentional or negligent), illegal conduct, sufficient causal link between the harm to the liberty or rights of the identifiable persons and the illegal con duct, and the harm is not caused by natural disasters or force majeure events, the victim may base his/her case on either active action or

合：行使公權力、有故意或過失、行為違法、特定人自由或權利所受損害與違法行為間具相當因果關係之要件，而非純屬天然災害或其他不可抗力所致者，被害人即得分就積極作為或消極不作為，依上開法條前段或後段請求國家賠償，該條規定之意旨甚為明顯，並不以被害人對於公務員怠於執行之職務行為有公法上請求權存在，經請求其執行而怠於執行為必要。惟法律之種類繁多，其規範之目的亦各有不同，有僅屬賦予主管機關推行公共事務之權限者，亦有賦予主管機關作為或不作為之裁量權限者，對於上述各類法律之規定，該管機關之公務員縱有怠於執行職務之行為，或尚難認為人民之權利因而遭受直接之損害，或性質上仍屬適當與否之行政裁量問題，既未達違法之程度，亦無在個別事件中因各種情況之考量，例如：斟酌人民權益所受侵害之危險迫切程度、公務員對於損害之發生是否可得預見、侵害之防止是否須仰賴公權力之行使始可達成目的而非個人之努力可能避免等因素，已致無可裁量之情事者，自無成立國家賠償之餘地。倘法律規範之目的係為保障人民生命、身體及財產等法此規定對可得特定之人負有作為義務已無不作為之裁量空間，猶因故意或過失

passive inaction and, in accordance with the former or the latter clause of the aforesaid article, request state compensation. The essence of that stipulation is evident and is not dependent on the victim's having a right of claim under the public law with respect to the public servant's failure to discharge duties and the subsequent actual failure thereof after the claim. However, because of the different laws and the different purposes of prescription, there are those which stipulate the limits on the powers exercisable by the responsible authority in the execution of public affairs, and those which grant discretion to the responsible authority for action or inaction. As regards the above legal provisions, even if a public servant of the said responsible government authority fails to discharge his/her duties, if it is difficult to determine whether the rights of the citizens have been directly affected as a result thereof, or if by nature it is a matter of whether it is an issue appropriate for administrative determination, there is no ground to institute a claim for state compensation if it is to no extent in violation of any laws. The various factors for

益，且對主管機關應執行職務行使公權力之事項規定明確，該管機關公務員依怠於執行職務或拒不為職務上應為之行為，致特定人之自由或權利遭受損害，被害人自得向國家請求損害賠償。至前開法律規範保障目的之探求，應就具體個案而定，如法律明確規定特定人得享有權利，或對符合法定條件而可得特定之人，授予向行政主體或國家機關為一定作為之請求權者，其規範目的在於保障個人權益，固無疑義；如法律雖係為公共利益或一般國民福祉而設之規定，但就法律之整體結構、適用對象、所欲產生之規範效果及社會發展因素等綜合判斷，可得知亦有保障特定人之意旨時，則個人主張其權益因公務員怠於執行職務而受損害者，即應許其依法請求救濟。

consideration (for example, the imminence of harm to the interests of the citizens, the foreseeability of the occurrence of the harm by the public servant, whether the prevention of harm is reliant on the exercise of public authorities in order to achieve the purpose and harm can not be avoided by reason of personal efforts), are not matters which are beyond determination. If the purposes of the laws are to protect the life, health, property and other interests of the citizen, and there are clear provisions in regard to the exercise of public authorities by the relevant authorities, by virtue of this provision, the public servant of the responsible authority does not have the discretion for inaction with regard to the identifiable persons to whom he/she has a responsibility to act. Therefore, where harm is caused to the liberty or rights of an identifiable person as a result of an intentional or negligent failure to discharge official duties or a refusal to discharge duties where so obligated, then the victim can claim compensatory damages from the state. The determination of the purpose of protection under the aforesaid legal provision depends on each indi-

vidual case. If the law clearly stipulates that the identified person shall enjoy certain rights or if it grants the identifiable person who satisfies the legal requirements the right of request of certain action vis-a-vis the administrative body or government authorities, undoubtedly the purpose of the regulation whereof lies in protecting the interests of the individual. However, although the laws are enacted for the public welfare or the benefits to the general public, and judging from the overall structure of the law, the applicable party, the intended regulatory effects and factors of social developments, the laws also intend to protect the identified persons, then the person who claims that his/her interests have been harmed as a result of the public servant's failure to discharge his/her duties shall have a recourse in law.

Precedent T.S.T. No. 704 (Sup. Ct., 1983) states that, "pursuant to Article 2, the second sentence of Paragraph 2, of the State Compensation Act, the so-called 'negligence in the discharge of duties by a public servant' refers to the situation

最高法院七十二年台上字第七〇四號判例：「國家賠償法第二條第二項後段所謂公務員怠於執行職務，係指公務員對於被害人有應執行之職務而怠於執行者而言。換言之，被害人對於公務員為特定職務行為，有公法上請求權存

where the public servant is obligated to discharge certain duties to the victim but fails to do so. In other words, the victim has the right of claim under the public law with respect to certain duties of the public servant. After the request for execution, if, as a result of the failure to discharge the duties, harm is caused to the liberty or rights of the victim, the victim can claim the nation to be responsible for compensatory damages based on the aforesaid provision. Where the people can thus enjoy the interest of reflection [point is unclear] as a result of the discharge of duties by public servant, but where the people cannot make a request for the discharge thereof, in this instance, even if the public servant fails to discharge his/her duties, the people cannot exercise any right of request under public law to seek to safeguard their interests, and as such they cannot claim state compensation based on the above provision." Such Precedent shall be applicable in the situation where the prerequisites are satisfied, and if the identifiable persons have the right of claim under public law and have made a request for action by the public servant in

在，經請求其執行而怠於執行，致自由或權利遭受損害者，始得依上開規定，請求國家負損害賠償責任。若公務員對於職務之執行，雖可使一般人民享有反射利益，人民對於公務員仍不得請求為該職務之行為者，縱公務員怠於執行該職務，人民尚無公法上請求權可資行使，以資保護其利益，自不得依上開規定請求國家賠償損害。」對於符合一定要件，而有公法上請求權，經由法定程序請求公務員作為而怠於執行職務者，自有其適用，惟與前開意旨不符部分，則係對人民請求國家賠償增列法律所無之限制，有違憲法保障人民權利之意旨，應不予援用。

accordance with legal procedures where the latter fails to discharge his/her duties. However, the portion of such Precedent which contravenes the aforesaid intent of the interpretation would be imposing limits on the rights of the public to request state compensation where the law does not so impose, and it would be contradictory to the constitutional purpose of protecting the rights of the public; and, therefore, such portion should no longer be applicable.

Where the authority is responsible for compensation by virtue of the above purpose, and the public servant was intentionally wrong or grossly negligent, the responsible authority can exercise the right of indemnification against such public servant pursuant to Article 2, Paragraph 3, of the State Compensation Act. Undoubtedly, where there is a person responsible for the compensatory damages, then the authority obligated for compensation is entitled to a right of compensation against the said person.

Justice Sen-Yen Sun filed dissenting opinion.

依上述意旨應負賠償義務之機關，對故意或重大過失之公務員，自得依國家賠償法第二條第三項行使求償權，如就損害賠償有應負責任之人時，賠償義務機關對之亦有求償權，乃屬當然。

本號解釋孫大法官森焱提出不同意見書。

J. Y. Interpretation No.470（November 27, 1998）*

ISSUE: Is the ROC President empowered to nominate and appoint the President, Vice President or Justices of the Constitutional Court, Judicial Yuan, whenever a vacancy arises before the year 2003 even though the Constitution, when amended in 1997, failed to make specific provision therefor?

RELEVANT LAWS:

Article 79 of the Constitution（憲法第七十九條）; Articles 4 and 5 of the Amended Constitution（憲法增修條文第四條、第五條）.

KEYWORDS:

Judicial Yuan（司法院）, ROC President（中華民國總統）, nomination（提名）, appointment（任用）, Control Yuan（監察院）.**

HOLDING: The Constitution as amended on May 28, 1992, provides in Article 13, Paragraph 1, that where vacancies of the office of the President, Vice President or the positions of the Justices of the Constitutional Court, Judicial Yuan, arise, the ROC President shall submit the

解釋文：中華民國八十一年五月二十八日修正公布之憲法增修條文第十三條第一項規定司法院設院長、副院長各一人，大法官若干人，由總統提名，經國民大會同意任命之，不適用憲法第七十九條之有關規定，自此監察院已無行使同意之權。總統並分別於八十

* Translated by BAKER & McKENZIE.

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

names of nominees and, upon approval by the National Assembly, such nominees shall be appointed. Further, Article 79 of the Constitution and related regulations do not apply to such nominations and appointments, therefore, the Control Yuan has no right of approval. The ROC President, in accordance with the amended constitutional provision, nominated the President, Vice President and Justices of the Constitutional Court, Judicial Yuan, on separate occasions on April 2, 1993, and July 30, 1994, and these nominations were approved by the National Assembly. On August 1, 1994, the abovementioned provision was amended to Article 4, Paragraph 1. On July 21, 1997, the provision was further amended and became Article 5, Paragraph 1, specifically providing that the law shall be effective from 2003. Therefore, prior to 2003, there are no mechanisms available for the nominations of the President, Vice President and Justices of the Constitutional Court, Judicial Yuan. Where inability to fill vacancies arises in respect of the offices of the President, Vice President and Justices of the Constitutional Court, prior to 2003,

二年四月二日及八十三年七月三十日依前開增修條文規定，提名司法院院長、副院長、大法官，經國民大會同意任命。八十三年八月一日修正公布之憲法增修條文將上開同條文條次變更為第四條第一項。八十六年七月二十一日修正公布之憲法增修條文雖針對前開增修條文加以修正，改列為第五條第一項而異其內容，但明定自九十二年起實施。是在此之前所提名之司法院院長、副院長及大法官，自無從適用。未屆九十二年以前，司法院院長、副院長及本屆大法官出缺致影響司法院職權之正常運作時，其任命之程序如何，現行憲法增修條文漏未規定，要屬修憲之疏失，總統如行使提名權，應適用八十三年八月一日修正公布之憲法增修條文第四條規定程序為之。

which will affect the normal operations of the Judicial Yuan, what are the procedures to be taken? As the current Constitution does not specifically provide, due to omissions when amending the Constitution, the nomination by the ROC President of these positions shall be carried out in accordance with Article 4 of the Constitution as amended on August 1, 1994.

REASONING: The Second National Assembly on May 28, 1992, announced amendments to the Constitution, in particular, Article 13, Paragraph 1, dealing with the nomination of the President, Vice President and Justices of the Constitutional Court, Judicial Yuan, during the Third National Assembly on July 21, 1997. The provision was further revised and became Article 5, Paragraph 1, providing that the Judicial Yuan shall have 15 Justices with 1 President and 1 Vice President, all of whom shall be nominated by the ROC President and approval by the National Assembly, but was not subject to the restrictions of Article 79 of the Constitution. In the amendment to the Constitution announced on August 1,

解釋理由書：中華民國八十一年五月二十八日第二屆國民大會修正公布之憲法增修條文第十三條第一項規定司法院設院長、副院長各一人，大法官若干人，由總統提名，經國民大會同意任命之，不適用憲法第七十九條之規定。嗣於八十三年八月一日將該條調整條次為第四條第一項。第三屆國民大會又於八十六年七月二十一日將該條修正其內容，並變動條次為第五條第一項：「司法院設大法官十五人，並以其中一人為院長、一人為副院長，由總統提名，經國民大會同意任命之，自中華民國九十二年起實施，不適用憲法第七十九條之有關規定。」由此可知，該條係對司法院院長、副院長資格及大法官人數、任期之重大變更，且明定自民國九十二年起實施，在此之前所提名之司法

1994, the relevant provision became Article 4, Paragraph 1, "nominated by the ROC President and approved by the National Assembly." The amendment shall take effect from 2003 and shall not be subject to the applicability of Article 79 of the Constitution. It is clear from the amendment that the content of the provision has been altered significantly, in particular, in the number of Justices and the effective year of 2003. Prior to 2003, the amended provision has no applicability in relation to the selections of the President, Vice President and Justices of the Judicial Yuan. The current President of the Judicial Yuan, and the nominee for the currently vacant position of Vice President of the Judicial Yuan were respectively nominated by the ROC President on July 30, 1994, and April 2, 1993, pursuant to Article 13, Paragraph 1, of the Constitution as amended and in effect at the time and approved by the National Assembly. Therefore, the President and Vice President of the Judicial Yuan are not required to hold the position of Justice. The term of the Sixth Justices, according to the Organic Act of the Judicial Yuan, Article 5, Para-

院院長、副院長及大法官自無從適用。現任司法院院長、大法官及目前出缺之副院長，係總統分別於八十三年七月三十日及八十二年四月二日，依據八十一年憲法增修條文第十三條第一項規定提名，咨請國民大會同意所任命。因此院長、副院長不必具有大法官身分，而第六屆大法官之任期，依據司法院組織法第五條第二項之規定為九年，至民國九十二年十月始行屆滿。於此憲法增修條文新舊交替期間，遇有院長、副院長或大法官出缺時，其任命之程序如何，八十六年憲法增修條文第五條並無明文規定。憲法第七十九條雖規定，監察院對總統提名之司法院院長、副院長及大法官有同意之權，惟自民國八十一年公布之憲法增修條文第十三條實施後，監察院已無此項權限，現行憲法增修條文第七條第一項規定亦同。司法院院長、副院長及大法官之提名自無再循憲法第七十九條規定同意任命之餘地。現行憲法增修條文第五條之修憲意旨原係於現任大法官之任期至九十二年十月屆滿時，由繼任之大法官銜接，在此期間，司法院院長、副院長及大法官出缺致影響司法院職權之正常運作時，其任命之程序，本應以過渡條款規定，援用八十三年憲法增修條文第四條。然八十六年憲

graph 2, shall be 9 years, expiring in October 2003. During the transition period, if vacancies arise in the offices of the President, Vice President or the positions of the Justices, what are the mechanisms for their selection? The Constitution as amended in 1997 does not expressly provide an answer in Article 5, although Article 79 expressly provides that the Control Yuan has the right to approve the ROC President's nominations of the President, Vice President or Justices, following the promulgation of the amendments to the Constitution in 1992, in particular, Article 13. The Control Yuan no longer holds such right, as with the rights provided in Article 7, Paragraph 1, of the Constitution, which are no longer applicable. Further, Article 79 has no applicability in relation to the nominations of the President, Vice President or Justices of the Judicial Yuan. The original legislative intent of the current Article 5 of the Constitution was that the newly appointed Justices shall succeed the current Justices following the expiration of the current term in October 2003. However, if vacancies do arise during this interim period,

法增修條文第五條就此漏未規定，要屬修憲之疏失，總統如行使提名權，應適用八十三年八月一日公布之憲法增修條文第四條規定程序為之。

hindering the regular duties of the Judicial Yuan, the process of the nominations to fill the vacancies should follow Article 4 of the 1994 amended Constitution. The failure to provide specifically for such contingency in the current Constitution in Article 5 is a legislative omission and therefore, the nominations of the President, Vice President or Justices, Judicial Yuan, by the ROC President should be carried out pursuant to Article 4 of the Constitution as amended on August 1, 1994.

Justice Chi-Nan Chen filed dissenting opinion, in which Justice Vincent Sze joined.

本號解釋陳大法官計男、施大法官文森共同提出不同意見書。

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

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

RELEVANT LAWS:

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

KEYWORDS:

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

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* Translated by Jaw-Perng Wang.

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

HOLDING: Article 8 of the Constitution provides that physical freedom shall be guaranteed to the people. Contents of statutes restraining physical freedom must comply with the conditions set forth in Article 23 of the Constitution. Rehabilitative measures are supplemental to the criminal punishment, and aim at rehabilitation and treatment of the person with criminal propensity by restraining his movement and liberty. Based on the principles established in the rule of law which protect human rights, as well as the protection function of the Criminal Code, rehabilitative measures under the statutes must be governed by the principle of proportionality. The measures imposed must be proportionate to the seriousness of the act, the person's criminal propensity, and the future expectation of such person. Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife [hereinafter "the Act"] provides: "If convicted under Articles 7, 8, 10, 11, Paragraphs 1 to 3 of Article 12, and Paragraphs 1 to 3 of Article 13 and sentenced to imprisonment, a prisoner shall be sent to a place of

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

labor, and be compelled to labor for three years after he has served his sentence or has been pardoned." The provision imposes a mandatory measure of three-year compulsory labor without considering the necessity of prevention or treatment of the person's propensity to endanger the society. Thus, it may restrain the movement and liberty of those without such propensity, making it disproportionate to its purpose under Article 23 of the Constitution. The mandatory measure of three-year compulsory labor for those convicted under Article 19 of the Act, without considering the necessity of prevention or treatment of the person's propensity to endanger the society, is inconsistent with this Interpretation and shall be null and void from the date of this Interpretation. The measures of the Act may still be imposed on those convicted under Article 19, Paragraph 1, of the Act as long as they are proportionate under the circumstances. If the measures of the Act are disproportionate, a trial judge may, at his discretion, apply Article 90, Paragraph 1, of the Criminal Code and impose other measures if he believes it is necessary to do so. In

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

the latter case, Article 2, Paragraph 2, of the Criminal Code shall not apply. That is, the principle of applying the newer or the more lenient law shall still govern.

REASONING: Article 8, Paragraph 1, of the Constitution provides that "Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment not carried out in accordance with the procedure prescribed by law may be resisted." This indicates that any measures restraining the people's liberty shall be prescribed by statutes, and their enforcement shall be conducted by the judiciary, the police, or the court in accordance with the procedure prescribed by statutes. Statutes enacted by the legislative body must comply with the conditions set forth in Article 23 of the Consti-

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

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

Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife provides: "If convicted under Articles 7, 8, 10, 11, Paragraphs 1 to 3 of Article 12, and Paragraphs 1 to 3 of Article 13, and sentenced to imprisonment, a prisoner shall be sent to a place of labor, and be compelled to labor for three years after he has served his sentence or he has been pardoned." Its purpose is to maintain the social order, and to protect people's lives and

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

property. However, rehabilitative measures are supplemental to the criminal punishment, and aim at rehabilitation and treatment of the person with criminal propensity by restraining his movement and liberty. The reasons for adopting the dual systems of criminal punishment and rehabilitative measures under the current Criminal Code are to keep the principle of no criminal liability without actus reus, to help persons to return to society and to rid them of their criminal propensity, in order to eliminate the roots of criminality and to prevent future crimes. In restraining people's rights, the rehabilitative measures are no different from punishment in that they isolate the persons from society and restrict their liberty. Based on the principles established in the rule of law which protect human rights, as well as the protection function of the Criminal Code, rehabilitative measures under the statutes must be governed by the principle of proportionality (Verhältnismäßigkeitsprinzip). The measures imposed must be proportionate to the seriousness of the act, the person's criminal propensity, and the future expectation of the person. The labor program of the

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

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

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

upon the above principles, both Articles provide that a court, in considering a person's criminal propensity, shall have the discretion to send him to the compulsory labor program for the purpose of detention. Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife imposes a mandatory measure of three-year compulsory labor without considering the necessity of prevention or treatment of the person's propensity to endanger society. Thus, it may restrain the movement and liberty of those without such propensity, making it disproportionate to its purpose under Article 23 of the Constitution. The mandatory measure of three years of compulsory labor for those convicted under Article 19 of the Act, without considering the necessity of prevention or treatment of the person's propensity to endanger the society, is inconsistent with this Interpretation and shall be null and void from the date of this Interpretation. The measures of the Act may still be imposed on those convicted under Article 19, Paragraph 1, of the Act as long as they are proportionate under the cir-

cumstances. If the measures of the Act are disproportionate, a trial judge may, at his discretion, apply Article 90, Paragraph 1, of the Criminal Code and impose other measures if he believes it is necessary to do so. In the latter case, Article 2, Paragraph 2, of the Criminal Code shall not apply. That is, the principle of applying the newer or the more lenient law shall still govern. Based on the essence of this Interpretation, the relevant authorities shall thoroughly re-examine and amend the relevant provisions of rehabilitative measures in the Act. We need to point out that after the promulgation of the amendment to the Act, trial courts shall not apply this Interpretation, as a matter of course.

Justice Tze-Chien Wang filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion in part.

本號解釋王大法官澤鑑提出部分不同意見書；劉大法官鐵錚提出一部不同意見書。

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

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

RELEVANT LAWS:

Articles 23, 155 and 157 of the Constitution（憲法第二十三條、第一百五十五條、第一百五十七條）; Article 10, Paragraph 5, of the Amendments to the Constitution（憲法增修條文第十條第五項）; Articles 11-1, 30, 69-1, 85 and 87 of the National Health Insurance Act（全民健康保險法第十一條之一、第三十條、第六十九條之一、第八十五條、第八十七條）.

KEYWORDS:

national health insurance（全民健康保險）, compulsory insurance（強制保險）, overdue charge（滯納金）.**

HOLDING: 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

解釋文：國家為謀社會福利，應實施社會保險制度；國家為增進民族健康，應普遍推行衛生保健事業及公醫制度，憲法第一百五十五條及第一百五十七條分別定有明文。又國家應推行全民健康保險，復為憲法增修條文第十條第五項所明定。中華民國八十三年八

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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for sanitation and health protection, and a system of public medical service." Furthermore, Article 10, Paragraph 5, of the Amendments to 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 premium payment. The aforesaid Article of the Act does not contradict Article 23 of the Constitution. However, to those who cannot afford to pay the premium, the State shall give appropriate assistance and relief and shall not refuse to pay benefits, in order to fulfill the con-

月九日公布、八十四年三月一日施行之全民健康保險法即為實現上開憲法規定而制定。該法第十一條之一、第六十九條之一及第八十七條有關強制納保、繳納保費，係基於社會互助、危險分攤及公共利益之考量，符合憲法推行全民健康保險之意旨；同法第三十條有關加徵滯納金之規定，則係促使投保單位或被保險人履行其繳納保費義務之必要手段。全民健康保險法上開條文與憲法第二十三條亦無牴觸。惟對於無力繳納保費者，國家應給予適當之救助，不得逕行拒絕給付，以符憲法推行全民健康保險，保障老弱殘廢、無力生活人民之旨趣。

stitutional purposes of promoting national health insurance, protecting senior citizens, the infirm and the financially disadvantaged.

Including 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 Judicial Yuan Interpretation No. 472, conduct at an appropriate time a full-range evaluation and implement improvement measures in aspects of the insurance operations (including diversification of the insurers), categories of the insured, the insured amount, premium rates, medical care benefits, austerity measures and the appropriateness of temporary suspension of insurance benefits.

已依法參加公、勞、農保之人員亦須強制其加入全民健康保險，係增進公共利益所必要，難謂有違信賴保護原則。惟有關機關仍應本於全民健康保險法施行時，該法第八十五條限期提出改制方案之考量，依本解釋意旨，並就保險之營運（包括承保機構之多元化）、保險對象之類別、投保金額、保險費率、醫療給付、撙節開支及暫行拒絕保險給付之當否等，適時通盤檢討改進，併此指明。

REASONING: The Legislative Yuan is responsible for the promulgation and amendment of the 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.

解釋理由書：法律之制定與修正，為立法院之職權，行政院依憲法規定，僅得對立法院提出法律案。全民健康保險法第八十九條規定：「本法實施滿二年後，行政院應於半年內修正本法，逾期本法失效」，係指行政院應於本法實施二年後，重新檢討本法實施所面臨問題，並向立法院提出修正案而言。行政院已依同條規定於八十六年七月二十三日向立法院提出全民健康保險法修正草案，尚不發生本法效力存否之問題，合先敘明。

"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

「國家為謀社會福利，應實現社會保險制度」、「國家為增進民族健康，應普遍推行衛生保健事業及公醫制度」及「國家應推行全民健康保險」，既為憲法第一百五十五條、第一百五十七條及憲法增修條文第十條第五項明定之基本國策，立法機關自得制定符合上

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 Amendments to 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

開憲法意旨之相關法律。至全民健康保險制度應如何設計，則屬立法裁量之範圍。八十三年八月九日公布、八十四年三月一日施行之全民健康保險法即為實現上開憲法規定而制定。該法第十一條之一、第六十九條之一及第八十七條關於強制全民參加全民健康保險之規定，係國家為達成全民納入健康保險，以履行對全體國民提供健康照護之責任所必要，符合憲法推行全民健康保險之意旨。同法第三十條有關加徵滯納金之規定，係為促使投保單位或被保險人履行公法上金錢給付之義務，與前述強制納保均係實現全民健康保險之合理手段，應無逾越憲法第二十三條規定之必要程度。惟對於無力繳納保費者，國家應給予適當之救助，不得逕行拒絕給付，以符憲法推行全民健康保險，保障老弱殘廢、無力生活人民之旨趣。

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 shall be no overstepping of Article 23 of the Constitution. However, to 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, protecting senior citizens, the infirm and the financially disadvantaged.

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 care benefits under the respective insurance plans for government employees, laborers and farmers, and establishing a single and fair

公務人員、勞工、農民已依公務人員保險法、勞工保險條例及農民健康保險條例規定分別參加公務人員保險、勞工保險、農民保險，復依全民健康保險法規定，須參加全民健康保險，係基於整合公勞農保之醫療給付，建立全國單一、公平之健康保險體系之目的，具有促使醫療資源合理分配，發揮社會保險之功能。此種強制性之社會保險，其保險之條件係由法律規定，一體實施，與依個人意願參加之保險契約有間，立法機關盱衡社會發展之需要，制定或修

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 it 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 the 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 Yuan Interpretation No. 472, conduct at an appropriate time a full-range evaluation and implement improvement measures in aspects of the insurance operations (including diversification of the insurers), categories of the insured, the insured amount, premium rates, medical care

改法律，變更各項社會保險之規定，建立符合憲法意旨之社會安全制度，不生違背信賴保護利益之問題。惟有關機關仍應本於全民健康保險法施行時，該法第八十五條限期提出改制方案之考量，依本解釋意旨，並就保險之營運（包括承保機構之多元化）、保險對象之類別、投保金額、保險費率、醫療給付、撙節開支及暫行拒絕保險給付之當否等，適時通盤檢討改進。又農民健康保險條例於全民健康保險法施行後，關於其醫療保險部分，係以行政院函釋為權宜措施之依據，有欠允當，有關機關尤應注意及之，併此指明。

benefits, 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 expedient measures based on the letter issued by the Executive Yuan. Therefore, the authorities concerned shall pay special attention in this regard.

Justice Geng Wu filed concurring opinion.

Justice Sen-Yen Sun filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Vincent Sze filed dissenting opinion in part.

本號解釋吳大法官庚、孫大法官森焱與蘇大法官俊雄分別提出協同意見書；施大法官文森提出部分不同意見書。

J. Y. Interpretation No.473（January 29, 1999）*

ISSUE: Is it unconstitutional to calculate premiums payable under the National Health Insurance program according to an insured amount table prescribed by the authority in charge?

RELEVANT LAWS:

Articles 8, 18, 21, Paragraph 1, and 22, Paragraph 1, Subparagraph 3 and Paragraph 3 of the National Health Insurance Act（全民健康保險法第八條、第十八條、第二十一條第一項、第二十二條第一項第三款、第三項）; Article 41, Paragraph 1, Subparagraph 4, of the Enforcement Rules of the National Health Insurance Act（全民健康保險法施行細則第四十一條第一項第四款）.

KEYWORDS:

national health insurance（全民健康保險）, the insured payroll-related amount（被保險人之量能負擔）, Insured Salary Grading Table of Labor Insurance（勞工保險投保薪資分級表）.**

HOLDING: According to Article 18 of the National Health Insurance Act, the premium payable by the insured and their dependents in Categories 1

解釋文：全民健康保險法第十八條規定同法第八條所定第一類至第四類被保險人及其眷屬之保險費，依被保險人之投保金額及其保險費率計算

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through 4 referred to in Article 8 of the same Act shall be calculated according to the insured payroll-related amount and the premium rate of the insured. This premium is compulsory, in order to ensure smooth operation of the National Health Insurance system, and therefore is one type of monetary payment under public laws. The rate for the said premium, being shared-payment by nature, is reviewed and determined after actuarial study based on expected loss ratio. In principle, in considering the said premium rate the amount should be sufficient to make up for all expenditures regarding benefits payment by the State. To attain fairness in terms of financial capability-based cost-bearing, the premium for the National Health Insurance, which is a type of social insurance, differs according to the income of the insured. For the purpose of simplification, the insured payroll-related amount applicable is also reasonably calculated according to the category of the insured. Hence Article 21, Paragraph 1, of the National Health Insurance Act authorizes the competent authority to set a grading table for the insured payroll-related

之。此項保險費係為確保全民健康保險制度之運作而向被保險人強制收取之費用，屬於公法上金錢給付之一種，具分擔金之性質，保險費率係依預期損失率，經精算予以核計。其衡酌之原則以填補國家提供保險給付支出之一切費用為度，鑑於全民健康保險為社會保險，對於不同所得者，收取不同保險費，以符量能負擔之公平性，並以類型化方式合理計算投保金額，俾收簡化之功能，全民健康保險法第二十一條第一項乃規定授權主管機關訂定被保險人投保金額之分級表，為計算被保險人應負擔保險費之依據。依同法第二十二條第一項第三款及第三項規定專門職業及技術人員自行執業而無固定所得者，其投保金額由該被保險人依投保金額分級表所定數額自行申報。準此，全民健康保險法施行細則第四十一條第一項第四款規定，專門職業及技術人員自行執業者，其投保金額以分級表最高一級為上限，以勞工保險投保薪資分級表最高一級為下限，係基於法律規定衡量被保險人從事職業之性質，符合母法授權之意旨，與憲法保障財產權之旨趣，並不違背。

amount applicable, as a calculation base of the premium to be contributed by the insured. Article 22, Paragraph 1, Subparagraph 3, and Paragraph 3 of the same Act provide that, to join the National Health Insurance program, independently practicing professionals and technicians with no stable income shall select the insured payroll-related amount applicable from the Grading Table. Accordingly, Article 41, Paragraph 1, Subparagraph 4, of the Enforcement Rules of the National Health Insurance Act sets, for the insured payroll-related amount applicable to independently practicing professionals and technicians, the maximum equal to the highest level prescribed in the Grading Table, and the minimum equal to the highest level of the Insured Salary Grading Table of Labor Insurance. This enforcement rule takes into consideration the occupation type of the insured, as prescribed by laws, and therefore conforms to the intention of authorization by the parent law and does not contradict the Constitution regarding the purpose of property right protection.

REASONING: To ensure the smooth operation of the National Health Insurance system, the premium for the National Health Insurance is a compulsory one, making it a type of monetary payment under public laws, and it therefore is shared-payment by nature. According to Article 18 of the National Health Insurance Act, the premium payable by the insured and their dependents in Categories 1 through 4 referred to in Article 8 of the same Act shall be calculated according to the insured payroll-related amount and the premium rate of the insured. For the purpose of public interest, a State establishes various institutions and, to maintain functions thereof, requests payments from and to be shared by the beneficiaries. Beneficiaries contribute and share such payment to obtain the opportunity of receiving benefits payment from the State; they are not receivers who have already realized such benefits payment. Therefore, the principle behind receipt of the shared-payments by the State is for the purpose of attaining a balance between benefit and burden. As it is impossible to determine exactly the opportunity to re-

解釋理由書：全民健康保險之保險費係為確保全民健康保險制度之運作而向被保險人強制收取之費用，屬於公法上金錢給付之一種，具分擔金之性質。依全民健康保險法第十八條規定，同法第八條所定第一類至第四類被保險人及其眷屬之保險費，依被保險人之投保金額及其保險費率計算之。國家因公共利益之目的而設立機構，為維持其功能而向受益者收取分擔金，由於負擔分擔金之受益者，並非事實上已受領國家之給付，僅以取得受領給付之機會為已足，是收取分擔金之原則，係以平衡受益與負擔為目的，復因受益者受領給付之機會及其價值如何，無從具體詳細確定，故唯有採用預估方式予以認定。全民健康保險之被保險人繳交保險費，係以受領國家保險給付為標的，由國家用以支應維持全民健康制度必要之費用，此項保險費率自應依預期損失率，經精算予以核計。其斟酌之原則首重損益之衡平，亦即全民健康保險給付與被保險人負擔之保險費額必須相當，以填補國家提供保險給付支出之一切費用為度。因為保險費額之確定並非與被保險人將來受領給付之多寡按比例計算，鑑於全民健康保險為社會保險，對於不同所得者，收取不同保險費，以符量能負擔之

ceive the said benefits payment and its amount, the only way is by resorting to projected estimation. The premium paid by the insured to National Health Insurance is for potential receipt of benefits payment from the State, and is used for expenses to sustain operation of the National Health Insurance system. The premium rate for the National Health Insurance, therefore, should naturally be determined by actuarial study based on expected loss ratio. In principle, the balance between revenue and expenditure takes priority in considering the said premium rate. As benefits payment under the National Health Insurance shall be equal to the premium payable by the insured, making up for all expenditures regarding benefits payment by the State shall be fundamental. The said premium is not determined in proportion to potential benefits payments for the insured. The National Health Insurance is social insurance, and prescribes payroll-related premiums to achieve fairness in terms of cost-bearing capability. Given the vast dissimilarity between income and affordable premium among the insured sub-

公平性，並顧及被保險人相互間之收入及負擔能力差距甚大，決定保險費時不可能精確考量各被保險人不同的資力，爰以類型化方式合理計算投保金額，俾收簡化之功能。全民健康保險法第二十一條第一項乃規定授權主管機關訂定被保險人投保金額之分級表，為計算被保險人應負擔保險費之基礎。依同法第二十二條第一項第三款規定，專門職業及技術人員自行執業之被保險人以其執行業務所得為投保金額。同條第三項復規定上開被保險人為無固定所得者，其投保金額，由該被保險人依投保金額分級表所定數額自行申報，並由保險人查核；如申報不實，保險人得逕予調整。準此，全民健康保險法施行細則第四十一條第一項第四款規定：「僱用被保險人數二十人以上之事業負責人及會計師、律師、建築師、醫師、牙醫師、中醫師自行執業者，按投保金額分級表最高一級申報。但其所得未達投保金額分級表最高一級者，得自行舉證申報其投保金額，最低不得低於勞工保險投保薪資分級表最高一級。」其立法意旨係依全民健康保險制度之功能，經預估有關費用之需求，精算保險費率，核計各該被保險人之投保金額，乃基於法律規定衡量被保險人從事職業之性質而為，符

scribing to National Health Insurance, it is impossible to take into consideration the precise financial capability of all the insured. For the purpose of simplification, therefore, the insured payroll-related amount applicable is reasonably calculated according to the category of the insured. Accordingly, Article 21, Paragraph 1, of the National Health Insurance Act authorizes the competent authority to set, as a calculation base of premium to be contributed by the insured, a grading table for the insured payroll-related amount applicable. Article 22, Paragraph 1, Subparagraph 3, and Paragraph 3 of the same Act provide that, for independently practicing professionals and technicians to subscribe to the said insurance, the insured payroll-related amount applicable shall be determined by income from professional practices and subject to examination by the insurer, which may make adjustment at its own discretion if the insured payroll-related amount is found inappropriate. Accordingly, Article 41, Paragraph 1, Subparagraph 4, of the Enforcement Rules of the National Health Insurance Act stipulates: “The person in

合母法授權之意旨，與憲法保障財產權之旨趣，並不違背。

charge of a business employing more than twenty insured, and accountants, lawyers, architects, doctors, dentists, and Chinese herbal doctors who are practicing independently may subscribe to coverage according to the highest level of the Insured Amount Grading Table; provided those whose income does not reach the highest level of the Table may subscribe according to the amount claimed with proof but not be lower than the highest level of the Insured Salary Grading Table of Labor Insurance." The legislative intention is to estimate the relevant expenditure requirement according to functions of the National Health Insurance, actualize premium rates, and set various insured payroll-related amounts applicable. The aforesaid is based on the statute and takes into consideration the occupation type of the insured, and therefore conforms to the intention of the parent law authorization and does not contradict the Constitution regarding the purpose of property right protection.

J. Y. Interpretation No.474（January 29, 1999）*

ISSUE: Article 70 of the Enforcement Rules of the Public Functionaries Insurance Act provides that the insured's right to claim for proceeds is limited to a period of 2 years from the date this right may be exercised. Does this Article contravene Article 23 of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 5 and 6 of the Standard Act for the Laws and Rules（中央法規標準法第五條、第六條）; Article 14 of the Public Functionaries Insurance Act（公務人員保險法第十四條）; Articles 47 of the Enforcement Rules of the Public Functionaries Insurance Act（公務人員保險法施行細則第四十七條）.

KEYWORDS:

government employee insurance （公務人員保險）, limitation（消滅時效）.

HOLDING: Government employees who have enrolled in the Public Functionaries Insurance program have the right to make a request for the insured amount pursuant to the law when the in-

解釋文：公務人員參加公務人員保險，於保險事故發生時，有依法請求保險金之權利，該請求權之消滅時效，應以法律定之，屬於憲法上法律保留事項。中華民國四十七年八月八日考

* Translated by David T. Liou.

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surance peril takes place. The statute of limitations of such right of claim shall be prescribed by law and categorized as provisos under the Constitution. The statute of limitations prescribed under Article 70 of the Enforcement Rules of the Public Functionaries Insurance Act promulgated by the Examination Yuan on August 8, 1958, (The Examination Yuan and the Executive Yuan amended and promulgated Article 47 of the same Rules on June 9, 1995) does not apply since the said statute of limitations conflicts with the above principle. Statute of limitations relating to the right to pensions and surviving dependents compensation prescribed under the Public Functionaries Retirement Act and the Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries shall be applied by analogy where no clear laws have been stipulated. With respect to suspended or unexpired statute of limitations, the applicable provisions in the Civil Code shall apply where no provisions are made in the related laws.

試院訂定發布之公務人員保險法施行細則第七十條（八十四年六月九日考試院、行政院令修正發布之同施行細則第四十七條），逕行規定時效期間，與上開意旨不符，應不予適用。在法律未明定前，應類推適用公務人員退休法、公務人員撫卹法等關於退休金或撫卹金請求權消滅時效期間之規定。至於時效中斷及不完成，於相關法律未有規定前，亦應類推適用民法之規定，併此指明。

REASONING: According to

解釋理由書：有關人民自由權

Article 23 of the Constitution and Articles 5 and 6 of the Standard Act for the Laws and Rules, any restrictions on the rights of freedom of the people shall be regulated by law and shall not exceed the threshold of necessity, and matters which shall be prescribed by law shall not be regulated by an order. Where restrictions on the people's rights of freedom are authorized by law, the law shall clearly identify the intent for such authorization and the scope thereof; moreover, the content thereof shall comply with the prerequisite of specificity. The competent authority shall comply with the aforesaid principles in formulating the enforcement rules as authorized, and shall not surpass the extent prescribed by the parent law or impose restrictions not prescribed by law.

憲法第二十三條、中央法規標準法第五條、第六條均有明定。若以法律授權限制人民自由權利者，須法有明示其授權之目的、範圍及內容並符合具體明確之要件，主管機關根據授權訂定施行細則，自應遵守上述原則，不得逾越母法規定之限度或增加法律所無之限制。

Article 14 of the Public Functionaries Insurance Act states that "payment shall be made in cash when such payment is made to public servants enrolled in the Public Functionaries Insurance Program where any of the following four insurance perils occurs during the effective period of the insurance coverage: handicap, retire-

公務人員保險法第十四條規定，公務人員參加公務人員保險，在保險有效期間，發生殘廢、養老、死亡、眷屬喪葬四項保險事故時，予以現金給付。惟同法對保險金請求權未設消滅時效期間，主管機關遂於施行細則中加以規定。時效制度不僅與人民權利義務有重大關係，且其目的在於尊重既存之事實

ment, death, and bereavement of dependants. However, where the said Act does not stipulate a statute of limitations with respect to the right of claim for the insured amount, the competent authority then prescribes a statute of limitations under the Enforcement Rules. The statute of limitations mechanism not only has an important bearing on the people's rights of freedom, but also aims to recognize the existing facts, to maintain the stability of the legal order, and is conducive to public welfare, the stipulation of which cannot be effected by an order made by an administrative authority pursuant to an authorization or by an order so made ex officio. The first paragraph of Article 70 of the Enforcement Rules of the Public Functionaries Insurance Act promulgated by the Examination Yuan on August 8, 1958, states that "The right of claim for cash payment under the insurance shall be extinguished if not exercised within two (2) years commencing from the day the right may be exercised." This provision, which stipulates that the statute of limitations for the insured's right of claim is two (2) years, (Article 47 of the current

狀態，及維持法律秩序之安定，與公益有關，須逕由法律明定，自不得授權行政機關衡情以命令訂定或由行政機關依職權以命令訂之。四十七年八月八日考試院訂定發布之公務人員保險法施行細則第七十條前段：「本保險之現金給付請領權利，自得為請領之日起，經過二年不行使而消滅」，規定被保險人請求權時效為二年（現行施行細則第四十七條則改為五年），與上開意旨不符，應不予適用。在法律未明定前，應類推適用公務人員退休法、公務人員撫卹法等關於退休金或撫卹金請求權消滅時效期間之規定。至於時效中斷及不完成，於相關法律未有規定前，亦應類推適用民法之相關條文，併此指明。

Enforcement Rules makes it five (5) years) shall not be enforced on the ground that it conflicts with the aforesaid principle. Statute of limitations relating to the right to pensions and surviving dependents compensation prescribed under the Public Functionaries Retirement Act and the Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries shall be applied by analogy where no clear laws have been stipulated. With respect to suspended or unexpired statute of limitations, the applicable provisions in the Civil Code shall apply where no provisions are made in the related laws.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

本號解釋蘇大法官俊雄提出部分不同意見書。

J. Y. Interpretation No.475（January 29, 1999）*

ISSUE: Article 63, Paragraph 3 of the Act Governing the Relations between People of the Taiwan Area and Mainland Area provides that the payment of all the national bonds issued before 1949 should be deferred until national reunification. Does the provision of said Article violate Article 23 of the Constitution, thus infringing upon the bond holders' property rights protected by the Constitution?

RELEVANT LAWS:

Articles 23, 27, Paragraph 1, Subparagraph 3, and 174, Subparagraph 1 of the Constitution（憲法第二十三條、第二十七條第一項第三款、第一百七十四條第一款）; Article 11 of the Amendments of the Constitution（憲法增修條文第十一條）; Article 63, Paragraph 3, of the Act Governing Relations between People of the Taiwan Area and Mainland Area（臺灣地區與大陸地區人民關係條例第六十三條第三項）.

KEYWORDS:

treasure bond（國庫債券）, principle of fairness（平等原則）, debt（債務）.**

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* Translated by Dr. Tze-Shiou Chien, Associate Research Fellow, Sun Yat-Sen Institute for Social Sciences and Philosophy, Academia Sinica.

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HOLDING: The National Assembly, responding to necessity before national reunification, enacted amendments to the Constitution, Article 11 of which provides that "For managing affairs and relations of rights and obligations between people living in the free area and the mainland area, relevant laws may be specifically enacted."

解釋文：國民大會為因應國家統一前之需要，制定憲法增修條文，其第十一條規定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定」。

The government's treasury bonds issued before 1949 in the mainland area had been issued on the basis of meeting the then nation's financial needs and guaranteed by the then nation's (including the mainland area) tax revenue and other assets. It was a huge sum. Thereafter, due to national convulsions, the government retreated to Taiwan. Thus, the guarantee basis of those bonds has changed. Apparently, it would be against the principle of equality if the current government were to pay those debts immediately because this would put a heavy burden on the people in the Taiwan area. Accordingly, the legislature, based on the delegation provided in Article 11 of the Amendments, enacted the Act Governing Relations between

政府於中華民國三十八年以前在大陸地區發行之國庫債券，係基於當時國家籌措財源之需要，且以包括當時大陸地區之稅收及國家資產為清償之擔保，其金額至鉅。嗣因國家發生重大變故，政府遷台，此一債券擔保之基礎今已變更，目前由政府立即清償，勢必造成臺灣地區人民稅負之沈重負擔，顯違公平原則。立法機關乃依憲法增修條文第十一條之授權制定「臺灣地區與大陸地區人民關係條例」，於第六十三條第三項規定：一、民國三十八年以前在大陸發行尚未清償之外幣債券及民國三十八年黃金短期公債；二、國家行局及收受存款之金融機構在大陸撤退前所有各項債務，於國家統一前不予處理，其延緩債權人對國家債權之行使，符合上開憲法增修條文之意旨，與憲法第二十三

People of the Taiwan Area and Mainland Area, Article 63, Paragraph 3, of which provides that those unpaid foreign currencies or gold-based bonds issued before 1949 in the mainland area and those debts owed by national banks and financial institutions receiving deposits incurred before the government's retreat to Taiwan would not be paid before national reunification. This deferral imposed on creditors' rights to the government is consistent with the abovementioned amendments to the Constitution. It is furthermore not in conflict with Article 23 of Constitution, which specifies the criteria under which the people's freedoms and rights may be restrained.

條限制人民自由權利應遵守之要件亦無牴觸。

REASONING: The National Assembly, responding to necessity before national reunification, according to Article 27 Paragraph 1, Subparagraph 3, and Article 174, Subparagraph 1, enacted amendments to the Constitution, Article 11 of which provides that "For managing affairs and relations of rights and obligations between people living in the free area and the mainland area, relevant laws

解釋理由書：國民大會為因應國家統一前之需要，依據憲法第二十七條第一項第三款及第一百七十四條第一款之規定，制定憲法增修條文。其第十一條規定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別規定」。

may be specifically enacted."

The government's treasury bonds issued before 1949 in the mainland area had been issued on the basis of consolidating the then nation's financial needs and guaranteed by the then nation's (including the mainland area) tax revenue and other assets. It was a huge sum. Thereafter, due to national convulsions, the government retreated to Taiwan. Thus, the guarantee basis of those bonds has changed. Apparently, it would be against the principle of equality if the current government were to pay those debts immediately because this would put a heavy burden on people in the Taiwan area.

政府於中華民國三十八年以前在大陸地區發行之國庫債券，係基於當時國家籌措財源之需要，且以包括當時大陸地區之稅收及國家資產為清償之擔保，其金額至鉅。嗣因國家發生重大變故，政府遷台，此一債券擔保之基礎今已變更，目前由政府立即清償，勢必造成臺灣地區人民稅負之沈重負擔，顯違公平原則。

Although the people's freedoms and rights are protected by the Constitution, the legislature, balancing the public interests gained and private interests lost and meeting the criteria provided in Article 23 of Constitution, may enact laws to restrain them. Furthermore, they will not be in conflict with the Constitution when, under certain circumstances, the Constitution explicitly delegates the legislature to enact

人民之自由權利固受憲法之保障，惟基於公共利益之考量及權衡個人私益所受影響，於符合憲法第二十三條之要件者，立法機關得以法律為適當之限制；又憲法於一定條件下明確授權立法機關制定法律為特別規定時，法律於符合上開條件範圍內，亦不生牴觸憲法問題。八十一年七月三十一日公布施行「臺灣地區與大陸地區人民關係條例」，即係依據憲法增修條文第十一條

those specific laws. The Act Governing Relations between People of the Taiwan Area and Mainland Area, as promulgated on July 31, 1992, has been enacted on the basis of the delegation provided in Article 11 of Amendments. Article 63, Paragraph 3, of that Act provides that those unpaid foreign currencies or gold-based bonds issued before 1949 in the mainland area and those debts owed by national banks and financial institutions receiving deposits incurred before the government's retreat to Taiwan would not be paid before national reunification. Being a necessity under the changed circumstances, this deferral imposed on creditors' rights to the government is not in conflict with the abovementioned purpose of the Constitution and its Amendments and, hence, is not unconstitutional.

授權而制定，該條例第六十三條第三項規定：一、民國三十八年以前在大陸發行尚未清償之外幣債券及民國三十八年黃金短期公債；二、國家行局及收受存款之金融機構在大陸撤退前所有各項債務，於國家統一前不予處理，其延緩債權人對國家債權之行使，係因情事變更，權衡國家情勢所為必要之手段，無違上開憲法及憲法增修條文之意旨，與憲法尚無牴觸。

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

ISSUE: If some special criminal laws enacted for certain crimes have the due purposes, necessary means, and proper restrictions required by Article 23 of the Constitution, are those special criminal laws unconstitutional merely because they may infringe upon the people's lives and physical freedom, thus violating the people's right to life and physical freedom?

RELEVANT LAWS:

Articles 8, 15 and 23 of the Constitution（憲法第八條、第十五條、第二十三條）; Article 5, Paragraph 1 of the Narcotics Elimination Act（肅清煙毒條例第五條第一項）; Articles 4, Paragraph 1 of the Drug Control Act（毒品危害防制條例第四條第一項）.

KEYWORDS:

physical liberty（人身自由）, survival rights（生存權）, the proportional principle（比例原則）, narcotic addiction（毒癮）, death sentence（死刑）, life imprisonment（無期徒刑）, judiciary interpretation（司法解釋）, constitutionality（合憲）.**

HOLDING: The physical freedom and right to life are expressly guaran-

解釋文：人民身體之自由與生存權應予保障，固為憲法第八條、第十

* Translated by Li-Chih Lin, Esq., J.D.

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teed by Articles 8 and 15 of the Constitution. However, to execute criminal sanctions, some special criminal laws enacted for certain crimes do not violate the principle of proportionality if they have the due purposes, necessary means, and proper restrictions required by Article 23 of the Constitution. They will not be deemed inconsistent with the regulations set forth in the general criminal laws and thus be held unconstitutional merely because they may infringe upon people's lives and physical freedom.

五條所明定；惟國家刑罰權之實現，對於特定事項而以特別刑法規定特別之罪刑所為之規範，倘與憲法第二十三條所要求之目的正當性、手段必要性、限制妥當性符合，即無乖於比例原則，要不得僅以其關乎人民生命、身體之自由，遂執兩不相侔之普通刑法規定事項，而謂其係有違於前開憲法之意旨。

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 those Acts are to protect the physical and mental health of the people, to maintain the social order and to safeguard against a national crisis by preventing narcotics addiction and eliminating narcotics. Their primary task is to cut off the supply of narcotics in order to totally eliminate the damage done by narcotics. The manufacture, transportation, and sales of narcotics are the sources of

中華民國八十一年七月二十七日修正公布之「肅清煙毒條例」、八十七年五月二十日修正公布之「毒品危害防制條例」，其立法目的，乃特別為肅清煙毒、防制毒品危害，藉以維護國民身心健康，進而維持社會秩序，俾免國家安全之陷於危殆。因是拔其貽害之本，首予杜絕流入之途，即著重煙毒來源之截堵，以求禍害之根絕；而製造、運輸、販賣行為乃煙毒禍害之源，其源不斷，則流毒所及，非僅多數人之生命、身體受其侵害，并社會、國家之法益亦不能免，為害之鉅，當非個人一己之生命、身體法益所可比擬。對於此等行為

narcotic damage. If the sources of narcotics cannot be found and eliminated, the damage caused by narcotics will spread and endanger the people's lives and well-being as well as affect the society and the entire nation. The significance of the damage caused to the society and the entire nation outweighs the legal interests of an individual. Special criminal laws with strict regulations enacted to eliminate the manufacture, transportation, and sales of narcotics therefore ought to conform to the principle of proportionality. In addition, such activities can generate considerable profit, which will attract a lot of people who want to make easy money by engaging in them. To deter and prohibit 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 engages in the sales, transportation, and manufacture of narcotics, opium or marijuana, should be sentenced to death or life imprisonment. Article 4, Paragraph 1, of the Drug Control Act provides that anyone who engages in the manufacture,

之以特別立法嚴厲規範，當已符合比例原則；抑且製造、運輸、販賣煙毒之行為，除有上述高度不法之內涵外，更具有暴利之特質，利之所在，不免群趨僥倖，若僅藉由長期自由刑措置，而欲達成肅清、防制之目的，非但成效難期，要亦有悖於公平與正義。肅清煙毒條例第五條第一項：「販賣、運輸、製造毒品、鴉片或麻煙者，處死刑或無期徒刑。」毒品危害防制條例第四條第一項：「製造、運輸、販賣第一級毒品者，處死刑或無期徒刑；處無期徒刑者，得併科新臺幣一千萬元以下罰金。」其中關於死刑、無期徒刑之法定刑規定，係本於特別法嚴禁毒害之目的而為之處罰，乃維護國家安全、社會秩序及增進公共利益所必要，無違憲法第二十三條之規定，與憲法第十五條亦無牴觸。

transportation, and sales of first-grade narcotics, should be sentenced to death or life imprisonment. Additionally, a fine not to exceed the amount of NT 10 million dollars may be imposed on those who are sentenced to life imprisonment. These statutory regulations which impose the death penalty and life imprisonment on anyone who engages in such activities are sanctions for the purpose of strictly prohibiting these activities under the special criminal laws and are necessary to maintain national security, the social order and to promote the public welfare, and thus are consistent with the regulations set forth in Article 23 of the Constitution, and are also in accordance with Article 15 of the Constitution.

REASONING: The people's physical freedom and right to life are expressly guaranteed by Articles 8 and 15 of the Constitution. However, to execute criminal sanctions, some special criminal laws for certain crimes are enacted by the legislature with designated purposes in order to distinguish them from the general criminal laws. In view of national history,

解釋理由書：憲法第八條、第十五條固明定人民身體之自由與生存權應予保障；惟國家刑罰權之實現，立法機關本於一定目的，對於特定事項而以特別刑法規定特別之罪刑，以別普通刑法於犯罪及刑罰為一般性規定者，倘該目的就歷史淵源、文化背景、社會現況予以觀察，尚無違於國民之期待，且與國民法的感情亦相契合，自難謂其非屬

culture, and current social conditions, these special criminal laws should not be deemed improper if their purposes aim to conform to the nationals' expectations and the affection of the laws. In addition, these special criminal laws should be deemed consistent with the principle of proportionality (*Verhältnismäßigkeitsprinzip*) under Article 23 of the Constitution if the methods used to achieve such purposes are necessary to correct and prevent mistakes and are also reasonable actions to take even though they restrict the people's fundamental rights. The balance between the means and ends is prescribed in these special criminal laws. In consideration of protecting legal interests, special criminal laws contrary to the regulations set forth in the general criminal laws should not be deprived of their legal value solely based on personal judgment. In addition, those special criminal laws will not be held unconstitutional for the reason that they may infringe upon people's lives and physical freedom and thus violate the peoples' right to life and physical freedom guaranteed by the Constitution.

正當；而其為此所採取之手段，即對於人民基本權利為必要之限制，乃補偏救弊所需，亦理所當為者，即應認係符合憲法第二十三條之比例原則。至於其依循上述目的與手段間之均衡，就此等特定犯罪之評價所為之法定刑規定，在法益保護之考量上，普通刑法之其他犯罪與之並不相侔者，尤不得單以個人之價值判斷，執以否定立法之價值體系，而以其關乎人民生命、身體自由之乙端，即謂係有違於前開憲法規定之保護意旨。

From the end of the Ching Dynasty to the founding of the Republic of China, a period of nearly a hundred years, narcotics had a profound and negative impact on our nation. Anyone who once uses narcotics will become addicted for the rest of his/her life. Many people have lost their jobs and families because of their narcotic addiction and people who commit crimes due to such addiction are also numerous. The manufacture, transportation and sales of narcotics provide the source of narcotics for the public. Those who engage in such activities can generate greater profits if more people become addicted; thus, they may invite friends and/or acquaintances to join their illegal activities in order to help them produce and supply more narcotics to the public. As a result, many young and talented nationals have become addicted and thus are unable to defend the nation because their physical and mental health have been seriously damaged by narcotics. The damage caused by narcotics will spread and endanger the society and the entire nation. Therefore, those who engage in the manufacture, transportation and sales of narcotics should be

煙毒之遺害我國，計自清末以迄民國，垂百餘年，一經吸染，萎痺終身，其因此失業亡家者，觸目皆是，由此肆無忌憚，滋生其他犯罪者，俯首即得；而製造、運輸、販賣無非在於使人吸食，其吸食者愈眾，則獲利愈豐，因是呼朋引類，源源接濟，以誘人上癮為能事。萃全國有用之國民，日沈湎於鴆毒之鄉而不悔，其戕害國計民生，已堪髮指；更且流毒所及，國民精神日衰，身體日弱，欲以鳩形鵠面之徒，為執銳披堅之旅，殊不可得，是其非一身一家之害，直社會、國家之鉅蠹，自不得不嚴其於法；而欲湔除毒害，杜漸防萌，當應特別以治本截流為急務，蓋伐木不自其本，必復生；塞水不自其源，必復流，本源一經斷絕，其餘則不戢自消也。

severely punished by laws. To eliminate the damage done by narcotics and to prevent narcotic addiction, the sources of narcotics should be cut off immediately by prohibiting the manufacture, transportation and sales of narcotics.

In response to the spread of damage caused by narcotics and mass international sales of narcotics, 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 being illegally imported from other countries, find the sources of narcotics, and to prevent crimes involving narcotics. In other words, these Acts are enacted to protect the physical and mental health of the nationals, further maintain the social order and to safeguard against a national crisis by eliminating the sources of narcotics and preventing addiction to narcotics. Because these two Acts are enacted to eliminate the sources of narcotics, thus their primary purpose is to cut off the supply of narcotics in order to totally eliminate the

八十一年七月二十七日修正公布之「肅清煙毒條例」、八十七年五月二十日修正公布之「毒品危害防制條例」係鑒於煙毒之禍害蔓延，跨國販賣活動頻繁，而對之有所因應。故其立法目的在防止來自世界各國毒害，查緝流入毒品，預防及制裁與毒品有關之犯罪，亦即肅清煙毒，防制毒品危害，藉以維護國民身心健康，進而維持社會秩序，俾免國家安全之陷於危殆。因是拔其貽害之本，首予杜絕煙毒流入之途，即重煙毒來源之截堵，俾能清其源而遏其流，以求根絕。茲製造、運輸、販賣乃煙毒之禍源，若任令因循瞻顧，則吸食者日眾，漸染日深，流毒所及，非僅多數人之身體法益受其侵害，并社會國家之法益亦不能免，此殷鑒非遠。是對於此等特定之行為嚴予非難，並特別立法加重其刑責，自係本於現實之考量，其僅以兩不相侔之侵害個人法益之殺人罪相比擬，殊屬不倫；抑且製造、運輸、販賣

damage done by narcotics. The manufacture, transportation, and sales of narcotics are the sources of narcotic damage. If the sources of narcotics cannot be found and eliminated, the damage caused by narcotics will spread and endanger the individuals' lives as well as the society and the entire nation. Therefore, these two Acts are properly enacted by the legislature under some practical considerations, and illegal activities involving the manufacture, transportation, and sales of narcotics sanctioned under said Acts should be treated differently from general criminal acts. In addition, such activities can generate considerable profit, which will attract a lot of people who want to make easy money by engaging in them. To deter and prevent such activities merely with a sanction of long-term imprisonment will not only be ineffective but also be unfair and unjust. Article 5, Paragraph 1, of the Narcotics Elimination Act provides that anyone who engages in the sales, transportation, and manufacture of narcotics, opium or marijuana, should be sentenced to death or life imprisonment. Article 4, Paragraph 1, of the Drug Control Act pro-

煙毒之行為，除具備前述高度不法內涵外，更具有暴利之特質，利之所在，不免群趨僥倖，倘僅藉由長期自由刑之措置，而欲達成肅清防制之目的，非但成效難期，要亦有悖於公平與正義。肅清煙毒條例第五條第一項：「販賣、運輸、製造毒品、鴉片或麻煙者，處死刑或無期徒刑。」毒品危害防制條例第四條第一項：「製造、運輸、販賣第一級毒品者，處死刑或無期徒刑；處無期徒刑者，得併科新臺幣一千萬元以下罰金。」其中關於死刑、無期徒刑之法定刑規定，係本於特別法嚴禁毒害之目的而為之處罰，乃維護國家安全、社會秩序及增進公共利益所必要，無違憲法第二十三條之規定，與憲法第十五條亦無牴觸。

vides that anyone who engages in the manufacture, transportation, and sales of first-grade narcotics, should be sentenced to death or life imprisonment. Additionally, a fine not to exceed the amount of NT 10 million dollars may be imposed on those who are sentenced to life imprisonment. These statutory regulations which impose the death penalty and life imprisonment on anyone who engages in the sales, transportation, and manufacture of narcotics are sanctions for the purpose of strictly prohibiting such activities under the special criminal laws and these regulations are necessary to maintain national security, the social order and to promote the public welfare; thus, they are consistent with the regulations set forth in Article 23 of the Constitution, and are also in accordance with Article 15 of the Constitution.

The petitioners have filed two motions for judiciary interpretation: one is on Article 7, Paragraph 1, of the Narcotics Elimination Act governing the criminal offense of possessing narcotics with intent to sell and the other one is on the term

關於意圖販賣而持有毒品罪之肅清煙毒條例第七條第一項、毒品危害防制條例第五條第一項暨「販賣」之司實務見解聲請解釋部分，前者為起訴事實所未記載，此有在卷之起訴書正本可法稽，既不在起訴之列，當不屬審判之範

"sales" in Article 4, Paragraph 1, of the Drug Control Act governing the sales of narcotics. The former was not alleged in the facts of the indictment and this is evident by the original copy of the indictment on record. Since the criminal offense in possessing narcotics with intent to sell was not alleged in the indictment, it is therefore not an issue for trial. In addition, the petitioners have failed to provide an explanation as to the applicability of Article 7, Paragraph 1, of the Narcotics Elimination Act to the petitioners' case; hence, it is therefore not subject matter for judiciary interpretation. With regard to the interpretation of the term "sales" in Article 4, Paragraph 1, of the Drug Control Act, opinion varies on this point; it is therefore not an issue of the constitutionality of the applicable law. Since neither of the petitioners' motions is in compliance with the holding of J.Y. Interpretation No.371, both motions for judiciary interpretation are therefore dismissed accordingly.

圍，聲請人復未說明其如何係屬於審理該等案件所應適用之法律，自非得以之為聲請解釋之對象；至於後者販賣一詞，概念上究應為如何之闡釋，乃見解之問題，非屬法律本身適用牴觸憲法之疑義，均不符合本院釋字第三七一號解釋之意旨，應不予受理，附此敘明。

J. Y. Interpretation No.477（February 12, 1999）*

ISSUE: Article 6 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law limits its application to "those who had been detained or subjected to execution of sentences but affirmatively found innocent." Without extending its application to other similar victims, does this provision contradict the principle of equal protection under Article 7 of the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 6 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law（戒嚴時期人民受損權利回復條例第六條）; Article 11 of the Act of Compensation for Wrongful Detentions and Executions（冤獄賠償法第十一條).

KEYWORDS:

military tribunals（軍事審判機關）, period of Martial Law（戒嚴時期）, offenses against internal and external security（內亂、外患罪）, national tort claim（國家賠償）.**

HOLDING: For criminal cases in the Taiwan Area that fell within the

解釋文：台灣地區在戒嚴時期刑事案件之審判權由軍事審判機關行使

* Translated and edited by Professor Andy Y. Sun.

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

jurisdiction of the military tribunals during the period of martial law, the applicable procedure was different from general criminal cases and its remedial function was insufficient. As a result, the legislature enacted the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law (hereinafter "The Act") to restore rights or to offer comparable damages for those who were convicted under the charges of offenses against the internal or external security of the state and qualified under the Act [1]. The reason that the application [of this Act] is expressly limited to cases involving the offenses against the internal or external security of the state is that these types of criminal offenses involve politi-

者，其適用之程序與一般刑事案件有別，救濟功能亦有所不足，立法機關乃制定戒嚴時期人民受損權利回復條例，對犯內亂罪及外患罪，符合該條例所定要件之人民，回復其權利或給予相當賠償，而明定限於犯外患罪、內亂罪之案件，係基於此類犯罪涉及政治因素之考量，在國家處於非常狀態，實施戒嚴之情況下，軍事審判機關所為認事用法容有不當之處。至於其他刑事案件不在上開權利回復條例適用之列，要屬立法裁量範圍，與憲法尚無牴觸。

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[1] See Articles 100-115, Criminal Law. During the Period of Martial Law（戒嚴時期，from December 10, 1948 to November 6, 1992, applicable to most of Mainland China, which is separated from but related to the Period of National Mobilization in Suppression of Communist Rebellion, 動員戡亂時期，from January 1, 1947 to May 1, 1991）, many "special" laws were enacted, in theory as a tentative substitute, to "freeze" the related provisions in the general laws. For example, a Statute for the Punishment of Treasons（懲治叛亂條例）was promulgated on June 21, 1949 to tentatively and completely "preempt" related provisions under the Criminal Law. Violations of this Statute are subject to harsher penalties and all cases were to be reviewed by the military tribunals. This Statute was repelled on May 22, 1991. See also Judicial Yuan Interpretation No. 80, on the military tribunal's jurisdiction over cases under this statute. Note that the Presidential decree that put Taiwan under Marshal Law came a bit later than Mainland China and the island of Taiwan got out of it a bit earlier than other areas, on July 14, 1987. See infra REASONING.

cal consideration and under the extraordinary circumstances where martial law was imposed, military tribunals could have improperly ascertained the facts or applied the law. That other criminal offenses are not included in the application of the Act is a matter of legislative discretion and is not in violation of the Constitution.

The applicability of Article 6 of the Act is limited to "those who have been detained or received execution of sentences but have been affirmatively found innocent." It does not include people being detained or not being released in accordance with the law before or after the non-prosecutorial disposition,[2] or those arrested but released by the police department on its own initiative for lack of evidence, after the non-guilty judgment has been affirmed, or those having completed the sentences of a guilty judgment (including rehabilitation). This loophole clearly constitutes a gross legislative flaw by failing to provide any regulation to those whose rights suffered equivalent

戒嚴時期人民受損權利回復條例第六條適用對象，以「受無罪之判決確定前曾受羈押或刑之執行者」為限，未能包括不起訴處分確定前或後、經治安機關逮捕以罪嫌不足逕行釋放前、無罪判決確定後、有罪判決（包括感化、感訓處分）執行完畢後，受羈押或未經依法釋放之人民，係對權利遭受同等損害，應享有回復利益者，漏未規定，顯屬立法上之重大瑕疵，若仍適用該條例上開規定，僅對受無罪判決確定前喪失人身自由者予以賠償，反足以形成人民在法律上之不平等，就此而言，自與憲法第七條有所牴觸。是凡屬上開漏未規定之情形，均得於本解釋公布之日起二年內，依該條例第六條規定請求國家賠償。

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[2] See Articles 252 and 253, Code of Criminal Procedure.

damages and deserved to have their benefits restored. If the application of this Act continues, then only those who lost their physical freedom before the final non-guilty judgment [was rendered] may be compensated and, ironically, an inequality would be created for people who stand before the law. As far as this is concerned, it naturally conflicts with Article 7 of the Constitution.[3] Thus, for all the cases that belong to the circumstances described above and have not been regulated, they may nevertheless petition for state compensation in accordance with Article 6 of this Act within two years from the date of this Interpretation.

REASONING: In the event this Yuan accepts a petition for constitutional interpretation and that petition is filed by any of the lower courts in accordance with Interpretation No. 371, if we should rule that the related law in question is delay in resolving the pending case at hand and recognizing that it may be diffi incon-

解釋理由書：本院受理憲法解釋案件，如係各級法院法官依本院釋字第三七一號解釋提出聲請，而經本院解釋之相關法律與憲法意旨不符時，為避免繫屬中案件久懸不決，且釋示有關機關於短期間內完成修法程序，既有事實上之困難，本院得諭知符合憲法之解釋內容，俾審判上得及時援用，此有本院

[3] "All people of the Republic of China, irrespective of sex, religion, race, class or political party affiliation, shall be equal before the law."

sistent with the meaning or purpose of the Constitution, to avoid a prolonged cult, as a matter of fact, for the related governmental body to complete the legislative process in a short period of time, this Yuan may [first] decree that the certain content of the Interpretation is deemed constitutional so that lower courts may apply the [constitutional] rules in time (See J.Y. Interpretation No. 471).

釋字第四七一號解釋意旨可供參考，合先說明。

Between May 20, 1949, and July 14, 1987, the Taiwan Area was declared under martial law. For the Kinmen, Matsu, Tungsha (Pratas Island) and Nansha (Spratly Islands) districts, martial law was declared between December 10, 1949, and November 6, 1992. During this period, criminal cases tried by military tribunals applied different procedural rules from general criminal cases; hence, there was insufficient remedial function and less comprehensive protection of the people's physical freedom than under the judicial due process under normal circumstances (See J.Y. Interpretation No. 436). Now that the period of martial law has been rescinded, the Legislature has enacted the

台灣地區自中華民國三十八年五月二十日起至七十六年七月十四日止，宣告戒嚴，金門、馬祖、東沙及南沙地區則自三十七年十二月十日起至八十一年十一月六日止宣告戒嚴。在此期間，軍事審判機關審理之刑事案件，其適用之程序與一般刑事案件所適用者有別，救濟功能不足，保障人民身體自由，未若正常狀態下司法程序之周全（參照本院釋字第四三六號解釋）。立法機關於解除戒嚴後，乃制定戒嚴時期人民受損權利回復條例，對人民犯內亂罪、外患罪，符合該條例所定要件者，回復其權利或給予相當賠償。上開條例適用對象明定為犯外患罪、內亂罪人民，係基於此類犯罪涉及政治因素之考量，在國家處於非常狀態，實施戒嚴之情況下，軍

Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law (hereinafter "The Act") to restore rights or to offer comparable damages for those who were convicted under the charges of offenses against the internal or external security of the state and who are qualified under the Act. The reason that the application [of this Act] is expressly limited to cases involving the offenses against the internal or external security of the state is because these types of criminal offenses involve political consideration and under the extraordinary circumstances where martial law was imposed, military tribunals could have improperly ascertained the facts or applied the law. That other criminal offenses are not included in the application of the Act is a matter of legislative discretion and is not a violation of the Constitution.

事審判機關所為認事用法容有不當之處。至於其他刑事案件不在上開權利回復條例適用之列，要屬立法裁量範圍，與憲法尚無牴觸。

Article 6 of the aforementioned Act provides, "[d]uring the period of martial law, any individual who has been detained or received execution of sentences for the offenses against the internal or external security of the state before being affirma-

前述戒嚴時期人民受損權利回復條例第六條規定：「人民於戒嚴時期因犯內亂、外患罪，於受無罪之判決確定前曾受羈押或刑之執行者，得聲請所屬地方法院比照冤獄賠償法相關規定，請求國家賠償。」未能包括不起訴處分確

tively found innocent may petition the district court for national [tort] claims by applying the related provisions, mutatis mutandis, of the Act of Compensation for Wrongful Detentions and Executions." It does not include people being detained or not being released in accordance with the law before or after the non-prosecutorial disposition, or arrested but released by the police department on its own initiative for lack of evidence, after the non-guilty judgment has been affirmed, or those having completed the sentences of a guilty judgment (including rehabilitation). Taking into consideration the nature of all elements, if there is no cause or justification for any differential treatment, this clearly constitutes a loophole and a gross legislative flaw for failing to provide any regulation to those whose rights suffered equivalent damages and deserved to have their benefits restored. If the application of this Act continues, then only those who lost their physical freedom before the final non-guilty judgment [was rendered] may be compensated and, ironically, an inequality would be created for people who stand before the law. As far as this is con-

定前或後、經治安機關逮捕以罪嫌不足逕行釋放前、無罪判決確定後、有罪判決（包括感化、感訓處分）執行完畢後，受羈押或未經依法釋放之人民，係對權利遭受同等損害，應享有回復利益者，漏未規定，衡諸事物之本質，並無作此差別處理之理由，顯屬立法上重大瑕疵。若仍適用該條例上開規定，僅對受無罪判決確定前喪失人身自由之人民予以賠償，反足以形成人民在法律上之不平等，就此而言，自與憲法第七條有所牴觸。是凡在不起訴處分前或後、經治安機關逮捕以罪嫌不足逕行釋放前、無罪判決確定後、有罪判決（包括感化、感訓處分）執行完畢後，仍受羈押或刑之執行確屬有據者，均得與無罪判決確定前受羈押或刑之執行者，同依該條例第六條比照冤獄賠償法相關規定，請求國家賠償。

cerned, it naturally conflicts with Article 7 of the Constitution. Thus, any individual still being detained or not being released in accordance with the law before or after the non-prosecutorial disposition, or arrested but released by the police department in its own initiative for lack of evidence, after the non-guilty judgment has been affirmed, or those having completed the sentences of a guilty judgment (including rehabilitation), shall be equally qualified to petition for state compensation, like those who have been detained or received execution of sentences but have been affirmatively found innocent, by applying the related provisions, mutatis mutandis, of the Act of Compensation for Wrongful Detentions and Executions.

In accordance with Article 11 of the Act of Compensation for Wrongful Detentions and Executions, the statute of limitation is two years beginning from the date the petitioner received non-prosecutorial disposition or a final not guilty judgment. Given the fact that the period of martial law lasted more than thirty years and most of the cases were

依冤獄賠償法第十一條規定，賠償聲請期間，為自賠償聲請人受不起訴處分或無罪判決確定之日起算二年，而戒嚴期間先後長達三十餘年，絕大多數之案件均已確定多年，前述二年之聲請期間自應從上開權利回復條例公布日起算，審議冤獄賠償事件之終審機關，關於賠償聲請期間之起算，亦持相同見解，不生牴觸憲法問題。至於依本解釋

finalized or closed many years ago, this two-year period should begin as of the date the Act was announced (or promulgated). The authority having the final adjudicative power over wrongful detention or execution cases also holds the same ruling over the beginning of the statute of limitation for [this type of] petition, and there is no violation of the Constitution. As to petitions filed based upon this Interpretation, it is necessary to point out that their two-year period begins from the date of this Interpretation.

意旨聲請賠償者，其二年期間則自本解釋公布之日起算，併此指明。

Justice Chi-Nan Chen filed dissenting opinion in part.

本號解釋陳大法官計男提出部分不同意見書。

J. Y. Interpretation No.478（March 19, 1999）*

ISSUE: Is the Ministry of Finance directive unconstitutional in making "approval of the tax collection agency for payment of land value tax at the rate applicable to residential land for the owner's use" a requirement for refund of the land value increment tax?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 35 of the Land Tax Act（土地稅法第三十五條）.

KEYWORDS:

residential land for own use（自用住宅用地）, tax rate applicable to residential land for own use（自用住宅用地稅率）, land value tax（土地增值稅）, tax refund（退稅）.**

HOLDING: The term "residential land for the owner's use" referred to in Article 35, Paragraph 1, Subparagraph 1, of the Land Tax Act means, according to Article 9 of the same Act, "the land for residential use on which household registration has been completed by the land owner or his/her spouse or lineal relative

解釋文：土地稅法第三十五條第一項第一款所定「自用住宅用地」，依同法第九條規定，係指「為土地所有權人或其配偶、直系親屬於該地辦竣戶籍登記，且無出租或供營業用之住宅用地」，並未以須經稽徵機關核准按自用住宅用地稅率課徵地價稅為認定之標準。財政部中華民國七十三年十二月二

* Translated by Dr. C.Y.Huang of Tsar & Tsai Law Firm.

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

and which is not for rent or for business use," and the Act does not provide the approval of the tax collection agency for imposing the land value tax at the rate applicable to residential land for the owner's use as a criterion for the determination of such land as residential land for said owner's use. The Directive T.T.S.T. No. 65634 dated December 27, 1984, of the Ministry of Finance states: "The land owner who sold the residential land for his/her own use and repurchased the land within two years shall not provide such land for rent or for business use from the date on which transfer registration is completed. In addition, the tax collection agency must grant approval to impose the land value tax at the rate applicable to residential land for the owner's use before the land value increment tax can be refunded in accordance with Article 35, Paragraph 1, Subparagraph 1, of the Land Tax Act. "The tax refund requirement that "the tax collection agency must grant approval to impose the land value tax at the rate applicable to residential land for the owner's use" is an additional restriction not existing in Article 35, Paragraph 1,

十七日台財稅第六五六三四號函謂：「土地所有權人出售自用住宅用地，於二年內重購土地者，除自完成移轉登記之日起，不得有出租或營業情事外，並須經稽徵機關核准按自用住宅用地稅率課徵地價稅者，始准依土地稅法第三十五條第一項第一款規定，退還已納土地增值稅」，其以「須經稽徵機關核准按自用住宅用地稅率課徵地價稅」為申請退稅之要件部分，係增加土地稅法第三十五條第一項第一款所無之限制，有違憲法第十九條租稅法律主義，應不予援用。

Subparagraph 1, of the Land Tax Act, and such restriction is in conflict with the principle of taxation by law under Article 19 of the Constitution and shall not be applicable.

REASONING: Under Article 35, Paragraph 1, Subparagraph 1 of Land Tax Act, after an owner has sold his/her residential land for his/her own use or after such land has been requisitioned, if he/she purchases another piece of urban land of less than 300 square meters or non-urban land of less than 700 square meters for residential use within two years after transfer registration or receipt of the compensation for the requisitioned land, and if the value of the newly purchased land exceeds the balance of the value of the land sold or the amount of compensation of the land requisitioned is less than the land value increment tax, the land owner may, to the extent of the land value increment tax paid by him/her, apply to the authority in charge of tax collection for return of the amount overpaid for the newly purchased land value. Paragraph 2 of the same Article provides: "The provi-

解釋理由書：依土地稅法第三十五條第一項第一款規定，土地所有權人於其自用住宅用地出售或被徵收後，自完成移轉登記或領取補償地價之日起，二年內另行購買都市土地未超過三公畝部分或非都市土地未超過七公畝部分，仍作自用住宅用地者，其新購土地地價超過原出售土地地價或補償地價，扣除繳納土地增值稅後之餘額，得向主管稽徵機關申請就其已納土地增值稅額內，退還其不足支付新購土地地價之數額。又同條第二項規定：「前項規定土地所有權人於先購買土地後，自完成移轉登記之日起二年內，始行出售土地或土地始被徵收者，準用之。」第三項規定：「第一項第一款及第二項規定，於土地出售前一年內，曾供營業使用或出租者，不適用之。」明定納稅義務人於符合上述法定要件下，得依法申請退還土地增值稅。

sion of the preceding Subparagraph shall apply mutatis mutandis if the land owner purchases (new) land first, and the (old) land is sold or requisitioned within two years after the date of transfer registration of the newly purchased land." Paragraph 3 provides: "The provisions of Paragraph 1, Subparagraph 1, and Paragraph 2 shall not apply if the land was provided for business use or for rent within one year before the land was sold." The said provisions expressly provide that the tax payer is entitled to apply for a refund of land value increment tax when meeting the above-mentioned statutory requirements.

The Directive T.T.S.T. No. 65634 dated December 27, 1984, of the Ministry of Finance states: "The land owner who sold the residential land for his/her own use and repurchased land within two years shall not have provided such land for rent or for business use from the date on which transfer registration is completed. In addition, the tax collection agency must grant approval to impose the land value tax at the rate applicable to residential land for the owner's use before the land value in-

財政部七十三年十二月二十七日台財稅第六五六三四號函謂：「土地所有權人出售自用住宅用地，於二年內重購自用住宅用地，除自完成移轉登記之日起，不得有出租或營業情事外；並須經稽徵機關核准按自用住宅用地稅率課徵地價稅者，始准依土地稅法第三十五條第一項第一款規定，退還其已納之土地增值稅。」將土地所有權人重購之土地，是否業經核准依自用住宅用地稅率課徵地價稅，作為准否退還土地增值稅要件之一。惟按土地稅法第三十五條第

crement tax can be refunded in accordance with Article 35, Paragraph 1, Subparagraph 1, of the Land Tax Act." The said Directive makes the approval for payment of land value tax on the repurchased land at the rate applicable to residential land for the owner's use a condition for return of the land value increment tax. However, the term "residential land for the owner's use" referred to in Article 35, Paragraph 1, Subparagraph 1, of the Land Tax Act means, according to Article 9 of the same Act, "the land for residential use on which household registration has been completed by the land owner or his/her spouse or lineal relative and which is not for rent or for business use." Whether the land owner applies for payment of land value tax on the repurchased land at the privileged rate applicable to residential land for the owner's use concerns the right to be exercised by the land owner. The tax collection agency's approval for payment of the land value tax at the rate applicable to residential land for the owner's use for the residential land for the owner's use repurchased by the land owner can be used as a reference to decide

一項第一款所稱「自用住宅用地」，依同法第九條規定，係指「為土地所有權人或其配偶、直系親屬於該地辦竣戶籍登記，且無出租或供營業用之住宅用地」而言。土地所有權人就重購土地是否依法申請按自用住宅用地優惠稅率繳納地價稅，乃土地所有權人可得行使之權利，土地所有權人重購自用住宅用地，已經稽徵機關核准按自用住宅用地稅率課徵地價稅，固可於土地所有權人申請退還土地增值稅時，作為稽徵機關審核是否屬於自用住宅用地之參考依據。對於應否退稅發生疑義時，稽徵機關仍應查明實際有無出租或營業情形，土地所有權人亦得證明該土地確供自用住宅之用，尚不能因未依法申請准按自用住宅用地優惠稅率繳納地價稅，遽認該土地有出租或供營業使用之情事。是上開財政部函，以「須經稽徵機關核准按自用住宅用地稅率課徵地價稅」為申請退稅之要件部分，增加土地稅法第三十五條第一項第一款所無之限制，有違憲法第十九條租稅法律主義，其與上開解釋意旨不符部分，應不予援用。至本件據以聲請之案件，是否符合退稅要件，有關機關仍應斟酌全部相關資料及調查證據之結果，予以判斷，併此指明。

whether such land falls into the category of residential land for the owner's use when the land owner applies for refund of the land value increment tax. However, when there is doubt as to whether the tax should be refunded, the tax collection agency should still find out whether the land is for rent or for business use. The land owner may also prove that the land is used as a residence for his/her own use. It cannot be decided that such land is for rent or for business purposes simply because the land owner has not applied to pay the land value tax at the preferential rate applicable to residential land for the owner's use. The requirement for tax refund that "the tax collection agency must grant approval to impose the land value tax at the rate applicable to residential land for the owner's use" under the said Directive of the Ministry of Finance is an additional restriction not existing in Article 35, Paragraph 1, Subparagraph 1, of the Land Tax Act, and such restriction is in conflict with the principle of taxation by law under Article 19 of the Constitution and shall not apply. As to whether the case under application meets the require-

ments for tax refund, the relevant agency shall make a decision based on all the relevant information and the result of investigation of evidence.

J. Y. Interpretation No.479（April 1, 1999）*

ISSUE: Section 4 of the Regulation for Registration of Social Entities promulgated by the Ministry of the Interior requires that any social organization must be named in accordance with the administrative district where it is located. Does the said Regulation surpass the permissible bounds of the relevant Law's details and technicalities, thus constituting an infringement on the people's freedom of association guaranteed by the Constitution and being null and void?

RELEVANT LAWS:

Articles 14 and 23 of the Constitution（憲法第十四條、第二十三條）; Articles 3, 5 and 12 of the Civil Organizations Act（人民團體法第三條、第五條、第十二條）; Section 4 of the Regulation for Registration of Social Entities（社會團體許可立案作業規定第四點）; J. Y. Interpretation Nos.367, 390, 443 and 454（司法院釋字第三六七號、第三九〇號、第四四三號、第四五四號解釋）.

KEYWORDS:

freedom of association（結社自由）, people's association（人民團體）, administrative areas（行政區域）.**

HOLDING: Article 14 of the Constitution prescribes that the people

解釋文：憲法第十四條規定人民有結社自由，旨在保障人民為特定目

* Translated by Jiunn-rong Yeh.

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

shall have the freedom of association. The original intent of the Article is to protect the people's freedom to form any organizations they wish and to participate freely in their activities. Hence, a free choice of organizational name is at the very core of the protection of freedom of association since naming an organization is crucial to the purpose, nature, and identity of members in one's organization, and to its own distinctiveness from those of others. The infringement of the associations' right to their own names, hence, shall not be permitted unless under the circumstances specified by Article 23 of the Constitution and by laws or specifically delegated rules.

的，以共同之意思組成團體並參與其活動之自由。就中關於團體名稱之選定，攸關其存立之目的、性質、成員之認同及與其他團體之識別，自屬結社自由保障之範圍。對團體名稱選用之限制，亦須符合憲法第二十三條所定之要件，以法律或法律明確授權之命令始得為之。

Article 5 of the Civil Organizations Act prescribes that organizational areas of civil associations shall be limited to administrative areas. Article 12 of the same Act, however, does not specify ways that people's organizations shall be named. Rather, it only requires that names and organizational areas of associations be specified in their own charters. In accordance with the prior Interpretations of this

人民團體法第五條規定人民團體以行政區域為組織區域；而第十二條僅列人民團體名稱、組織區域為章程應分別記載之事項，對於人民團體名稱究應如何訂定則未有規定。行政機關依其職權執行法律，雖得訂定命令對法律為必要之補充，惟其僅能就執行母法之細節性、技術性事項加以規定，不得逾越母法之限度，迭經本院解釋釋示在案。內政部訂定之「社會團體許可立案作業規

Yuan, administrative agencies, based on the mandate of executing laws, may make necessary rules to supplement laws. The administrative rules, however, shall not go beyond the mandate of delegating laws and shall be limited to details and technicalities concerning the executions of laws. Section 4 of the Regulation for Registration of Social Entities, promulgated by the Ministry of the Interior, requiring that civil associations be named in accordance with their administrative areas, goes far beyond the mandate intended by the delegating Act. As a result, this section infringes upon the peoples' freedom of association guaranteed by the Constitution and shall be declared null and void.

定」第四點關於人民團體應冠以所屬行政區域名稱之規定，逾越母法意旨，侵害人民依憲法應享之結社自由，應即失其效力。

REASONING: Article 14 of the Constitution that guarantees freedom of association as one of the people's fundamental rights is to empower people by way of freely forming associations to formulate their common wills, pursue their common beliefs, and ultimately realize their common goals. Freedom of association not only includes the people's right to freely determine the purposes and

解釋理由書：憲法第十四條結社自由之規定，乃在使人民利用結社之形式以形成共同意志，追求共同理念，進而實現共同目標，為人民應享之基本權利。結社自由不僅保障人民得自由選定結社目的以集結成社、參與或不參與結社團體之組成與相關事務，並保障由個別人民集合而成之結社團體就其本身之形成、存續、命名及與結社相關活動之推展免於受不法之限制。結社團體於

forms of their associations, but also the right to join or not join any associations and related activities. It also guarantees any associations that individuals form and join, along with their creation, maintenance, naming, and promotion of their related activities from any unlawful infringement. With such a protection, associations may freely, in accordance with common consensus reached by a majority principle, decide their own business affairs related to associations including naming and openly express ideas consistent with the purpose of associations. By choosing their own names, associations express their existence as associations and show their own distinctiveness from that of others. Using their own names, associations will be able to, internally, strengthen the identity of their members, and externally, further their business relations as well as promote their activities under said names. Should associations have been deprived of the freedom to choose their own names, the nature of free association, being able to freely determine their own business affairs, would not have been incarnated, and that recruitment and maintenance

此保障下得依多數決之整體意志，自主決定包括名稱選用在內之各種結社相關之事務，並以有組織之形式，表達符合其團體組成目的之理念。就中人民團體之名稱，乃在表彰該團體之存在，作為與其他團體區別之標識，並得以其名稱顯現該團體之性質及成立目的，使其對內得以凝聚成員之認同，對外以團體之名義經營其關係、推展其活動。人民團體若對其名稱無自主決定之自由，其自主決定事務之特性固將無從貫徹，而其對成員之招募與維持及對外自我表現之發揮，尤將因而受不利之影響。故人民團體之命名權，無論其為成立時之自主決定權或嗣後之更名權，均為憲法第十四條結社自由所保障之範疇。對團體名稱選用之限制亦須符合憲法第二十三條所定之要件，以法律或法律明確授權之命令始得為之。

tenance of their members as well as external expressions of their own wills would have been disadvantaged. Hence, associations' right to choose their own names, at the time of their creation, or the right to change their names afterwards, shall be protected under the right of freedom of association that Article 14 of the Constitution guarantees. The infringement of the associations' right to choose their own names shall not be permitted unless under the circumstances specified by Article 23 of the Constitution and by laws or specifically delegated rules.

Article 3 of the Civil Organizations Act assigns agencies to regulate civil associations at the national, provincial, and county levels. Article 5 of the same Act prescribes that organizational areas of civil associations shall be limited to the abovementioned administrative areas. Although Article 12 of the Act requires that names and organizational areas of associations be specified in their own charters, it does not intend to limit associations' internal or external activities to such administrative areas specified in their own char-

人民團體法第三條規定人民團體在全國、省、縣之主管機關，第五條規定人民團體以行政區域為組織區域。至於人民團體名稱應如何訂定，同法並無明文規定。雖同法第十二條將人民團體之名稱、組織區域等，分別列為章程應記載之事項，惟探其立法意旨，關於人民團體組織區域之規定，無非在確立人民團體之主管機關及辦理法人登記之管轄法院，不在限制以章程上所記載之組織區域為人民團體實際對內或對外活動之範圍。人民團體之組織區域與名稱分別代表不同之意義，其間並無必然之關

ters. According to the original intent of the Article, the purpose of specifying organizational areas of associations is to assign agencies to regulate the civil associations as well as to determine which courts have jurisdiction with regard to registering matters on their legal person. Names and organizational areas of associations manifest differently such that between them there are no necessary relations. While administrative agencies, based on their mandate of executing laws, may make necessary rules to supplement laws, the administrative rules shall not go beyond the mandate of delegating laws and shall be limited to details and technicalities concerning the execution of related laws. This fundamental principle has been previously upheld in Interpretations Nos. 367, 390, 443 and 454. Hence, Section 4 of the Regulation for Registration of Social Entities, made by the Ministry of the Interior, requiring that civil associations be named in accordance with their administrative areas, infringes upon the peoples' freedom of association guaranteed by Article 14 of the Constitution and shall be declared null and void. Likewise,

連。行政機關依其職權執行法律，雖得訂定命令對法律為必要之補充，惟其僅能就執行母法之細節性、技術性事項加以規定，不得逾越母法之限度，此業經本院釋字第三六七號、第三九〇號、第四四三號及第四五四號解釋釋示在案。內政部訂定之「社會團體許可立案作業規定」第四點關於人民團體應冠以所屬行政區域名稱之規定，侵害人民依憲法第十四條所保障之結社自由，應即失其效力。上開作業規定之其他內容，主管機關亦應依照本解釋意旨檢討修正，以符憲法保障結社之權，併此指明。

based on this Interpretation, the competent authority shall closely examine other sections of the same Regulation and, if necessary, make correspondent revisions in order to be consistent with the rights of associations guaranteed by the Constitution.

Justice Hsiang-Fei Tung filed dissenting opinion, in which Justice Tieh-Cheng Liu and Justice Yueh-Chin Hwang joined.

本號解釋董大法官翔飛、劉大法官鐵錚與黃大法官越欽共同提出不同意見書。

J. Y. Interpretation No.480（April 16, 1999）*

ISSUE: Does the 6-month period for application for a completion certificate under Article 32-1, Paragraph 2, Subparagraph 8, of the Enforcement Rules of the Act for Upgrading Industries exceed the scope of the enabling statute, thus violating Articles 19 and 23 of the Constitution?

RELEVANT LAWS:

Articles 19 and 23 of the Constitution（憲法第十九條、第二十三條）; Article 16 of the Act for Upgrading Industries（促進產業升級條例第十六條）; Article 21 of the Tax Levy Act (稅捐稽徵法第二十一條); Article 38 of the Business Accounting Act（商業會計法第三十八條）; Articles 32-1 and 34 of the Enforcement Rules of the Act for Upgrading Industries（促進產業升級條例施行細則第三十二條之一、第三十四條）.

KEYWORDS:

undistributed earnings（未分配盈餘）, capital increase（增資）, income tax（所得稅）, application period（申請期間）, extension period（延展期間）.**

HOLDING: Article 16, Subparagraph 2, of the Act for Upgrading

解釋文：促進產業升級條例第十六條第二款規定，公司以其未分配盈

* Translated by Dr. C.Y.Huang of Tsar & Tsai Law Firm.

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

Industries (hereinafter the "Act") provides that, where a company has re-invested its undistributed earnings to repay the loan borrowed or account payable for addition or updating of machinery and equipment or transportation facilities as referred to in Subparagraph 1 of the same Article, the registered stocks newly issued to and acquired by its shareholders shall not be included in the taxable consolidated income earned in the then current year by an individual shareholder, or in the taxable profit-seeking enterprise income earned in the then current year by a corporate shareholder. The company satisfying the said provision shall complete repayment within the approved term of the capital increase to repay the loan or account payable, and shall, within six months after completion of repayment, submit a photocopy of the repayment certificate or the document certifying the repayment duly audited and certified by a certified public accountant to the government authority approving and recording the original expansion plan for issuance of a completion certificate in accordance with Article 32-1, Paragraph 2, Subparagraph 8, of the

餘增資償還因增置或更新同條第一款所定之機器、設備或運輸設備之貸款或未付款者，其股東因而取得之新發行記名股票，免予計入該股東當年度綜合所得額；其股東為營利事業者，免予計入當年度營利事業所得額課稅。適用上開條文之公司應依中華民國八十二年十月二十七日修正發布之同條例施行細則第三十二條之一第二項第八款（現行細則第三十八條第二項第八款）規定，於核定本次增資償還計畫之期限內完成償還貸款或未付款，並於完成後六個月內檢具清償證明影本或經會計師查核簽證之清償證明文件，向原核備機關申請核發完成證明。如因實際需要得依同細則第三十四條第二項（現行細則第四十四條第二項）規定，於原核備完成期限前向原計畫核備機關申請展延至四年。上開施行細則有關六個月申請期間之規定，對納稅義務人而言，雖屬較短之期限，惟原計畫已准其有一定完成之期限，茲復有四年延展期間之設，如無一定申請期間之限制，稅捐核課之目的即難以落實。而此等期間之規定，除已斟酌適用本條例之公司之實際需要外，並係兼顧稅捐稽徵法第二十一條租稅核課期間及商業會計法第三十八條會計憑證保存期限而設，為執行母法及相關法律所必

Enforcement Rules of the Act (hereinafter the "Enforcement Rules") (Article 38, Paragraph 2, Subparagraph 8, of the current Enforcement Rules). However, if there is actual need, the company may apply, prior to the originally approved completion date, for an extension of the term for completion of the expansion plan with the authority originally granting the approval in accordance with Article 34, Paragraph 2, of the Enforcement Rules (Article 44, Paragraph 2, of the current Enforcement Rules). The said 6-month period requirement referred to in the said Enforcement Rules is shorter for the taxpayer. However, as a specified completion period has been granted for the original plan, and as there is a 4-year extension period, if no restriction on the application period is imposed, the tax purpose cannot be satisfied. In addition to the actual needs of the company to which the Act is applicable, the provision of the said period also takes into account the taxation period under Article 21 of the Tax Levy Act and the period for keeping accounting documents under Article 38 of the Business Accounting Act, and such provision is

要。是上開細則有關六個月之規定，符合立法意旨且未逾越母法之限度，與憲法第十九條及第二十三條並無牴觸。

required for the enforcement of the mother law and relevant laws. Therefore, the provision of a six-month period under the Enforcement Rules meets the legislative intent and does not exceed the scope of the mother law, and it does not contradict Articles 19 and 23 of the Constitution.

REASONING: It is expressly provided in Article 23 of the Constitution that the restriction on the people's freedom and rights shall be imposed by law to the extent necessary. However, the contents of law cannot be comprehensive enough to govern everything. The law may authorize the competent authority to prescribe the details and technical matters through orders to facilitate the enforcement of the law. The enforcement rules or orders meeting the legislative intent without exceeding the scope of the mother law promulgated by the administrative agency based on the said authorization is permitted by the Constitution, and such intent has been repeatedly interpreted by this Yuan. Under the general authorization of the mother law, whether the enforcement

解釋理由書：國家對人民自由權利之限制，應以法律定之且不得逾必要程度，憲法第二十三條定有明文。但法律內容不能鉅細靡遺，一律加以規定，其屬細節性、技術性之事項，法律自得授權主管機關以命令定之，俾利法律之實施。行政機關基於此種授權，在符合立法意旨且未逾越母法規定之限度內所發布之施行細則或命令，自為憲法之所許，此項意旨迭經本院解釋在案。惟在母法概括授權情形下，行政機關所發布之施行細則或命令究竟是否已超越法律授權，不應拘泥於法條所用之文字，而應就該法律本身之立法目的，及其整體規定之關聯意義為綜合判斷。

rules or orders promulgated by an administrative agency exceed the authorization of law should be judged based on the legislative intent, rather than the letter, of the law and the related meaning of the overall provision.

Article 16, Subparagraph 2, of the Act provides that, where a company has re-invested its undistributed earnings to repay the loan borrowed or account payable for addition or updating of machinery and equipment or transportation facilities as referred to in Subparagraph 1 of the same Article, the registered stocks newly issued to and acquired by its shareholders shall not be included in the taxable consolidated income earned in the then current year by an individual shareholder, or in the taxable profit-seeking enterprise income earned in the then current year by a corporate shareholder. To enforce the said provision of law, it is expressly provided in Article 32-1, Paragraph 2, Subparagraph 8, of the Enforcement Rules (Article 38, Paragraph 2, Subparagraph 8, of the current Enforcement Rules) amended and promulgated by the compe-

促進產業升級條例第十六條第二款規定，公司以其未分配盈餘增資償還因增置或更新同條第一款所定之機器、設備或運輸設備之貸款或未付款者，其股東因而取得之新發行記名股票，免予計入該股東當年度綜合所得額；其股東為營利事業者，免予計入當年度營利事業所得額課稅。為執行上開條文之規定，主管機關於八十二年十月二十七日修正發布之同條例施行細則第三十二條之一第二項第八款（現行細則第三十八條第二項第八款）明定，適用該條例之公司於核定本次增資償還計畫之期限內完成償還貸款或未付款，並於完成後六個月內檢具清償證明影本或經會計師查核簽證之清償證明文件，向原核備機關申請核發完成證明。如因實際需要得依同細則第三十四條第二項（現行細則第四十四條第二項）規定於原核備完成期限前向原計畫核備機關申請展延至四年。上開施行細則有關六個月申請期間

tent authority on October 27, 1993, that the company satisfying the said provision shall complete repayment within the approved term of the capital increase to repay the loan or account payable, and shall, within six months after completion of repayment, submit a photocopy of the repayment certificate or the document certifying the repayment duly audited and certified by a certified public accountant to the government authority approving and recording the original expansion plan for issuance of a completion certificate. However, if there is actual need, the company may apply, prior to the originally approved completion date, for an extension of the term for completion of the expansion plan with the authority originally granting the approval in accordance with Article 34, Paragraph 2, of the Enforcement Rules (Article 44, Paragraph 2, of the current Enforcement Rules). The said 6-month period requirement referred to in the said Enforcement Rules is shorter for the taxpayer. However, as a specified completion period has been granted for the original plan, and as there is a 4-year extension period, if no restriction on the

之規定，對納稅義務人而言，雖屬較短之期限，惟原計畫已准其有一定完成之期限，茲復有四年延展期間之設，如無一定申請期間之限制，稅捐核課之目的即難以落實。而此等期間之規定，除已斟酌適用本條例之公司之實際需要外，並係兼顧稅捐稽徵法第二十一條租稅核課期間及商業會計法第三十八條會計憑證保存期限而設，為執行母法及相關法律所必要。是上開細則有關六個月期間之規定，符合立法意旨且未逾越母法之限度，與憲法第十九條及第二十三條並無牴觸。

application period is imposed, the tax purpose cannot be satisfied. In addition to the actual needs of the company to which the Act is applicable, the provision of the said period also takes into account the taxation period under Article 21 of the Tax Levy Act and the period for keeping accounting documents under Article 38 of the Business Accounting Act, and such provision is required for the enforcement of the mother law and relevant laws. Therefore, the provision of a six-month period under the Enforcement Rules meets the legislative intent and does not exceed the scope of the mother law, and it does not contradict Articles 19 and 23 of the Constitution.

J. Y. Interpretation No.481（April 16, 1999）*

ISSUE: Shall Fukien Province hold gubernatorial and representative body elections as Taiwan province does?

RELEVANT LAWS:

Articles 7 and 121 of the Constitution（憲法第七條、第一百二十一條）; Article 17 of the 1992 Amendments to the Constitution（八十一年憲法增修條文第十七條）; Article 64 of the Self-Governance Act for Provinces and Counties（省縣自治法第六十四條）.

KEYWORDS:

local self-government（地方自治）, governor（省長）, Fukien Province（福建省）.**

HOLDING: Article 17 of the 1992 Amendments to the Constitution authorized the Legislative Yuan to enact a unified law on local self-government. A province shall have a council and the governor shall be elected by the people of said province. This is designed for those provinces that were, in fact, able to exercise self-government. Article 64 of the

解釋文：中華民國八十一年五月二十八日修正公布之中華民國憲法增修條文第十七條，授權以法律訂定省縣地方制度，同條第一款、第三款規定，省設省議會及省政府，省置省長一人，省議員與省長分別由省民選舉之，係指事實上能實施自治之省，應受上述法律規範，不受憲法相關條文之限制。省縣自治法遂經憲法授權而制定，該法第

* Translated by Professor Jyh-Pin Fa.

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

Self-Governance Act for Provinces and Counties provided that the organization of the local council and government where territorial jurisdiction was incomplete should be directly regulated by the Executive Yuan. Elections of members of the council and the governor were denied according to the Regulation of Organization of the Fukien Provincial Government issued by the Executive Yuan. It is warranted by the existing facts and was in accordance with the spirit and purpose of the statutory delegation. It was also in harmony with the equal protection of law provided in Article 7 of the Constitution.

六十四條規定，轄區不完整之省，其議會與政府之組織，由行政院另定之。行政院據此所訂定之福建省政府組織規程，未規定由人民選舉省長及省議會議員，乃斟酌福建省之特殊情況所為之規定，為事實上所必需，符合母法授權之意旨，與憲法第七條人民在法律上平等之原則亦無違背。

REASONING: Article 17 of the 1992 Amendments to the Constitution authorized the Legislative Yuan to enact a unified law on local self-government. Members of the provincial council and the governor of a province shall thus be elected by the people of the province. However, this may be applied only to those provinces that are, in fact, able to exercise self-government. In other words, without enacting the General Principles of Provincial and County Self-Government

解釋理由書：八十一年五月二十八日修正公布之中華民國憲法增修條文第十七條（八十三年八月一日修正公布之中華民國憲法增修條文第八條），授權以法律訂定省縣地方制度，同條第一款、第三款規定，省設省議會及省政府，省置省長一人，省議員與省長分別由省民選舉之，係指事實上能實施自治之省，應依上述法律規範，不受憲法相關條文之限制。亦即無須制定適用於全國之省縣自治通則，而得以特別法針對各地方之實際情況，實施地方自治。省

(which were originally required by the Constitution), an alternative statute was proposed to deal with the special case of Taiwan. Accordingly, a unified law based on a constitutional delegation on local self-government was enacted. Article 64 of this law further provided that the Executive Yuan should be authorized to issue a regulation on these provinces whose territory is incomplete. The Regulation of Organization of the Fukien Provincial Government issued by the Executive Yuan thus provided for a provincial government composed of seven to eleven members, one of whom shall be the chairman. All members shall be nominated by the Premier and appointed by the President. The council of the province was totally abolished. These laws and regulations had taken into account the special case of Fukien Province and are thus in harmony with the spirit and purpose of the authorizing statute.

縣自治法遂經憲法授權而制定，該法第六十四條規定，轄區不完整之省，其議會與政府之組織，由行政院另定之。將轄區特殊之省組織授權行政院以行政命令方式訂定之，係因考量其轄區之事實情況，尚無依憲法實施省自治之必要。行政院據此所訂定之福建省政府組織規程，規定福建省政府設置委員七至十一人，其中一人為主席，由行政院院長提請總統任命之，而不設省議會，乃斟酌福建省之事實特殊情況，符合母法授權之意旨。

Local self-government at the county level is explicitly provided for in the Constitution. As for local self-government at the provincial level, however, the Consti-

依憲法第一百二十一條規定，縣實行縣自治，至省之自治，憲法則授權以法律定之。而憲法上之平等原則，係為保障人民在法律上地位之實質平等，

tution has adopted a different approach by authorizing the Legislative Yuan to enact legislation. In terms of the constitutional principle of equality, it is well-established that substantial equality under the law is of the essence. It requires reasonably different treatments of factual differences based on the nature of the subject. The current territory and population actually under control of Fukien Province are totally different from those of the original. In view of the degree of complexity of public affairs, the case of Fukien is also obviously different from the Taiwan case. Therefore, the organization of Fukien Province shall be simplified for the furtherance of administrative efficiency. Based on these factual differences, the preclusion of popular election of members of the council and the governor is reasonable and does not conflict with the Constitution.

並不禁止法律依事物之性質，就事實狀況之差異而為合理之不同規範。福建省目前管轄之範圍及人口數目，與其原有者，已相去甚遠，且其公共事務之繁簡程度，與台灣省之狀況，亦難相提並論。處此情況，更宜精簡組織，以增進行政效率。現行福建省政府組織規程，不由人民選舉省長及省議會議員，乃考量事實上差異所為之合理規定，對福建省人民而言，與憲法上開原則亦無違背。

Although the 1997 Amendments to the Constitution made significant changes in provincial organization, the unified law was also later amended; hence, the different organization and arrangement provided in this Interpretation for the province with special territory are still valid.

八十六年七月二十一日修正公布之中華民國憲法增修條文，有關省級機關組織雖有重大變革，且省縣自治法已因地方制度法之實施而廢止，然轄區特殊之省，其省級組織之調整，依照本解釋意旨，仍得為不同之規定，併此指明。

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.482（April 30, 1999）*

ISSUE: Is the precedent of the Supreme Court stating that "pertinent to the peremptory period of a retrial prescribed by the Code of Civil Procedure the court in conducting inquiry may take into account the specific circumstances of the case and order the party to produce the required evidence" in conformity with the provision of the Code of Civil Procedure and constitutional protection of the right of instituting legal proceedings?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 121, Paragraph 1, and 501, Paragraph 1, Subparagraph 4 of the Code of Civil Procedure（民事訴訟法第一百二十一條第一項、第五百零一條第一項第四款）.

KEYWORDS:

proceeding for re-trial（再審程序）, peremptory period（不變期間）, right of action（訴訟權）, power of inquiry（闡明權）, amendment（補正）.**

HOLDING: The Code of Civil Procedure provides in Article 501, Paragraph 1, Subparagraph 4 that a party instituting the proceeding for a retrial shall

解釋文：民事訴訟法第五百零一條第一項第四款規定，提起再審之訴，應表明再審理由及關於再審理由並遵守不變期間之證據。其中關於遵守不

* Translated by Raymond T. Chu.

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

state clearly in his/her petition the cause for such trial and the evidence pertinent to such cause and to the fact that the peremptory period of limitation has been observed. The evidence required in relation to the peremptory period includes documents and materials to be presented in addition to and in company with the petition or written statement filed with the court, and must be distinguished from the petition or statement referred to in Article 121, Paragraph 1, of the Code as being made inconsistent with the proper form required. Thus, it gives rise to no question of the necessity of amendment by reason of procedural defects. If, however, the party has stated the cause for a retrial and the evidence pertinent to his/her cause for a retrial, but has failed to produce evidence to prove his/her compliance with the peremptory period requirement, we see no reason that the court, in the exercise of its power of inquiry and taking into account the specific circumstances of the case, should be denied the power to order the production of the required evidence. The Supreme Court Precedent Tai-Kang No. 538 of 1971, being in agreement with

變期間之證據，係屬提出書狀時，應添具之文書物件，與同法第一百二十一條第一項規定之書狀不合程式之情形不同，自不生程式欠缺補正之問題。惟當事人於再審書狀中已表明再審理由並提出再審理由之證據，而漏未表明其遵守不變期間之證據時，法院為行使闡明權，非不得依具體個案之情形，裁定命其提出證據。最高法院六十年台抗字第五三八號判例，符合上開意旨，與憲法保障人民訴訟權之規定並無牴觸。

our opinion given above, does not violate the Constitution in protecting the people's right to bring action.

REASONING: It must be noted that the people shall have the right to petition and to bring administrative appeals and the right of instituting legal proceedings under Article 16 of the Constitution. The so-called "right of instituting legal proceedings" denotes the people's right to enjoy judicial benefit, namely, the right to entreat the court to hold timely trial in case one's right is encroached upon, and this right of instituting legal proceedings includes the right to apply for a hearing, due process, an open trial, and equality in procedures. The retrial proceeding provided in the Code of Civil Procedure is a special remedial system, making it possible for a case determined by an irrevocable final judgment to be put under trial once again. In order to ensure that the lawsuit will proceed in an equal and fair procedure for both parties and to maintain the stability of an irrevocable final judgment, the Code of Civil Procedure imposes relatively strict restrictions on the

解釋理由書：憲法第十六條規定，人民有請願、訴願及訴訟之權。所謂訴訟權，乃人民司法上之受益權，即人民於其權利受侵害時，依法享有向法院提起適時審判之請求權，且包含聽審、公正程序、公開審判請求權及程序上之平等權等。民事訴訟法中再審程序為特別救濟程序，係對於確定終局判決重新再次審理，為確保兩造當事人能立於平等、公正之程序下進行訴訟及對已確定終局判決之穩定性，故對民事再審之提起有較嚴格之限制，並不違背憲法保障人民訴訟權利之意旨。

institution of the retrial proceeding, and such restrictions do not contradict the intent of the Constitution in protecting the people's right of instituting legal proceedings.

While the form of the motion for a retrial is set forth in Article 501, Paragraph 1, of the Code of Civil Procedure, the clause "evidence pertinent to the cause and to the fact that the peremptory period of limitation has been observed" contained in Subparagraph 4 thereof, which requires that the party shall "state clearly the cause for a retrial and the evidence pertinent to the cause and to the fact that the peremptory period of limitation has been observed," refers to the documents and materials to be presented in addition to and in company with the petition or written statement filed with the court rather than the form of the petition or written statement itself, and thus is not a matter subject to amendment. Failure to produce such evidence will merely give rise to the question of whether there are grounds for making the judgment, and must be distinguished from the situation

民事訴訟法第五百零一條第一項之規定，固為提起再審之訴之書狀程式。然同條項第四款之規定「應表明再審理由及關於再審理由並遵守不變期間之證據」，其中關於「再審理由並遵守不變期間之證據」，係屬其提出書狀時，所應添具之文書物件，非書狀程式本身，不屬於應補正事項，其未提出之效果，僅係可否據為判決之基礎，與同法第一百二十一條第一項規定所指之書狀不合程式，及第五百零一條第一項前三款書狀程式之欠缺有間。

specified in Article 121, Paragraph 1, of the Code where the petition or written statement is not made in the proper form required and the situation mentioned in Article 501, Paragraph 1, Subparagraphs 1 through 3, inclusive, with respect to defects in the form of the petition or statement.

The retrial system is so designed and provided in the Code of Civil Procedure that the possibility for the party to make his/her own independent decision is taken into consideration and substantial fairness between the parties is maintained. Thus, it does not give rise to the problem of amendment by reason of formality defects. If, however, the statement presented by the party is not clearly understandable or is incomplete, the presiding judge must exercise his power of inquiry and order the party to make clarification or supplementary statement. It follows therefore that the Supreme Court Precedent Tai-Kang No. 538 of 1971, in holding that "while a party instituting the proceeding for a retrial shall state clearly in his/her petition the cause for such trial and the

民事訴訟法就此項程序之設計，已顧及當事人自主之可能性，並維持當事人間之實質公平，自不生程式欠缺補正之問題。惟如其表明之事項不明瞭或不完足者，審判長應行使闡明權，令其敘明或補充之。是以最高法院六十年台抗字第五三八號判例：「提起再審之訴，應表明再審理由，及關於再審理由並遵守不變期間之證據（民事訴訟法第五百零一條第一項第四款），其未表明者無庸命其補正。」符合上開意旨，與憲法保障人民訴訟權之規定並無牴觸。

evidence pertinent to such cause and to the fact that the peremptory period of limitation has been observed (the Code of Civil Procedure, Article 501, Paragraph 1, Subparagraph 4), no order for amendment is necessary if no such statement has been made" is in agreement with our opinion given above and does not violate the Constitution in protecting the people's right to bring action.

J. Y. Interpretation No.483（May 14, 1999）*

ISSUE: Are the provisions of Article 18, Paragraph 1, Subparagraph 3, of the Public Functionaries Appointment Act, which allows the transfer of a legally appointed official to a lower rank or lower grade position, and Article 13, Paragraph 2, of the Public Functionaries Remuneration Act and Article 7 of the Enforcement Rules of said Act, which have the effect of capping the annual salary increase of the transferred official once he/she reaches the cap in his/her new position, consistent with Article 18 of the Constitution, which protects the people's right to hold public office?

RELEVANT LAWS:

Article 18 of the Constitution（憲法第十八條）; Article 1 of the Public Functionaries Discipline Act（公務員懲戒法第一條）; Article 16 of the Public Functionaries Protection Act（公務人員保障法第十六條）; Article 18, Paragraph 1, Subparagraph 3, of the Public Functionaries Appointment Act（公務人員任用法第十八條第一項第三款）; Articles 13, Paragraph 2, and 16 of the Public Functionaries Remuneration Act（公務人員俸給法第十三條第二項、第十六條）; Article 7 of the Enforcement Rules of the Public Functionaries Remuneration Act（公務人員俸給法施行細則第七條）.

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* Translated by Professor S. M. Yu.

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

KEYWORDS:

transfer to lower rank or lower grade（降級或減俸）, merit evaluation（晉級）, capped annual increase（年功俸）.**

HOLDING: A public official once appointed to a rank and grade with pertinent salary level should not be downgraded or have his/her salary reduced without review by the competent authority charged with the discipline of public functionaries according to legal procedure. Such is the institutional protection afforded by the Constitution for the right of holding public office and the source of Article 1 of the Public Functionaries Discipline Act, Article 16 of the Public Functionaries Protection Act and Article 16 of the Public Functionaries Remuneration Act.

解釋文：公務人員依法銓敘取得之官等俸級，非經公務員懲戒機關依法定程序之審議決定，不得降級或減俸，此乃憲法上服公職權利所受之制度性保障，亦為公務員懲戒法第一條、公務人員保障法第十六條及公務人員俸給法第十六條之所由設。

The first sentence of Article 18, Paragraph 1, Subparagraph 3, of the Public Functionaries Appointment Act provides "A legally appointed official, unless he/she consents of his/her own free will, should not be transferred to a lower rank

公務人員任用法第十八條第一項第三款前段規定：「經依法任用人員，除自願者外，不得調任低一官等之職務；在同官等內調任低職等職務者，仍以原職等任用」，有任免權之長官固得據此將高職等之公務人員調任為較低官

position; if transferred to a lower grade position within the same rank, he/she shall be deemed appointed to the original grade." The supervisor with power of appointment and dismissal may accordingly transfer a higher rank or grade official to a position of lower rank or grade. However, once transferred, according to Article 13, Paragraph 2, of the Public Functionaries Remuneration Act and Article 7 of the Enforcement Rules of the said Act, if such official's salary level has already reached the annual salary level cap of the new position, he/she will not be promoted during merit evaluation. The result of such high to low transfer is that, no matter how meritorious his/her performance, or whether he/she has reached such cap in his/her original grade, there is no opportunity for promotion. Then the transfer becomes, in fact if not in name, something similar to disciplinary demotion or salary reduction. This is not in accordance with the purpose of constitutional protection of the people's right to hold public office. Therefore, the competent authority should promptly review and amend the above-mentioned Public Functionaries Appoint-

等或職等之職務；惟一經調任，依公務人員俸給法第十三條第二項及同法施行細則第七條之規定，此等人員其所敘俸級已達調任職等年功俸最高級者，考績時不再晉敘，致高資低用人員縱於調任後如何戮力奉公，成績卓著，又不論其原敘職等是否已達年功俸最高級，亦無晉敘之機會，則調任雖無降級或減俸之名，但實際上則生類似降級或減俸之懲戒效果，與首開憲法保障人民服公職權利之意旨未盡相符，主管機關應對上開公務人員任用法、公務人員俸給法及附屬法規從速檢討修正。

ment Act, Public Functionaries Remuneration Act and related rules.

REASONING: Under Article 18 of the Constitution, people have the right to hold public office. Article 1 of the Public Functionaries Discipline Act provides, "Except as otherwise provided by law, public functionaries should only be disciplined in accordance with this law." Article 16 of the Public Functionaries Protection Act provides, "The salary level of public functionaries affirmed after proper review should be protected and no downgrading or salary reduction should be allowed except in accordance with law." The Public Functionaries Remuneration Act promulgated on July 16, 1986, provides in Article 16, "The rank and grade affirmed by the Civil Service Authority should not be downgraded unless in accordance with the Public Functionaries Discipline Act and other relevant laws." Thus, the legally acquired rank, grade and salary level of public functionaries should not be downgraded or reduced except through a decision, after proper review, according to legal procedure by the au-

解釋理由書：人民有服公職之權，此為憲法第十八條所明定。公務員懲戒法第一條：「公務員非依本法不受懲戒。但法律另有規定者，從其規定。」公務人員保障法第十六條：「公務人員經銓敘審定之俸級應予保障，非依法律不得降級或減俸。」中華民國七十五年七月十六日公布之公務人員俸給法第十六條：「經銓敘機關敘定之等級，非依公務員懲戒法及其他法律之規定，不得降敘。」是公務人員依法銓敘取得之官等俸級，非經公務員懲戒機關依法定程序之審議決定，不得降級或減俸，乃憲法上服公職權利所受之制度性保障，亦為公務員懲戒法第一條、公務人員保障法第十六條及公務人員俸給法第十六條之所由設。

thority charged with the discipline of public functionaries. Such is the institutional protection for holding public office under the Constitution, and the source of Article 1 of the Public Functionaries Discipline Act, Article 16 of the Public Functionaries Protection Act and Article 16 of the Public Functionaries Remuneration Act.

The first sentence of Article 18, Paragraph 1, Subparagraph 3, of the Public Functionaries Appointment Act promulgated on April 21, 1986, provides, "A legally appointed official, unless he/she consents of his/her own free will, should not be transferred to a lower rank position; if transferred to a lower grade position within the same rank, he/she should be deemed appointed to the original grade." The supervisor with power of appointment and dismissal may accordingly transfer a high rank or grade official to a position of lower rank or grade. However, according to Article 13, Paragraph 2, of the Public Functionaries Remuneration Act, "Officials transferred from a higher grade to a lower grade within the same rank with the original salary level shall

七十五年四月二十一日公布之公務人員任用法第十八條第一項第三款前段規定：「經依法任用人員，除自願者外，不得調任低一官等之職務；在同官等內調任低職等職務者，仍以原職等任用」，有任免權之長官固得據此將高職等之公務人員調任為較低官等或職等之職務；惟一經調任，依公務人員俸給法第十三條第二項：「在同官等內高資低用，仍敘原俸級人員，考績時不再晉敘。」及七十六年一月十四日發布之公務人員俸給法施行細則第七條第一項：「本法第十三條第二項所稱『在同官等內高資低用，仍敘原俸級人員，考績時不再晉級』，指同官等內高職等調任低職等仍以原職等任用人員，原敘俸級已達所調任職等年功俸最高級者，考績時不再晉敘。」此等人員其所敘俸級已達調任職等年功俸最高級者，考績時不再

not be promoted during merit evaluation." Article 7, Paragraph 1, of the Enforcement Rules of the Public Functionaries Remuneration Act promulgated on January 14, 1985, provides, "the sentence 'officials transferred from a higher grade to a lower grade within the same rank with the original salary level shall not be promoted during merit evaluation' in Article 13, Paragraph 2, of this Act refers to the rule that an official who is transferred from a higher grade to a lower grade position within the same rank, but retains his/her original grade, once his/her original salary level has reached the annual salary level cap of the new position, shall not be promoted during merit evaluation." Officials whose salary level has reached such cap shall not be promoted, with the result that, such a high-low transferee, no matter how meritorious his/her performance, or whether he/she has reached such cap under his/her original position, has no opportunity for promotion. Then the transfer becomes, in fact if not in name, something similar to disciplinary demotion or salary reduction. This is not in accordance with the purpose of the constitutional protect-

晉敘，致高資低用人員縱於調任後如何戮力奉公，成績卓著，又不論其原敘職等是否已達年功俸最高級，亦無晉敘之機會，則調任雖無降級或減俸之名，但實際上則生類似降級或減俸之懲戒效果，與首開憲法保障人民服公職權利之意旨未盡相符，主管機關應對上開公務人員任用法、公務人員俸給法及附屬法規從速檢討修正。

tion of the people's right to hold public office. Therefore, the competent authority should promptly review and amend the abovementioned Public Functionaries Appointment Act, Public Functionaries Remuneration Act and related rules.

J. Y. Interpretation No.484（May 14, 1999）*

ISSUE: Does the Directive T.T.S.T. No. 36889 of the Ministry of Finance exceed the legislative intent of Article 2 of the Deed Tax Act, and is it thus unconstitutional?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 2, Paragraph 1, 18, Paragraph 1, and 23 of the Deed Tax Act（契稅條例第二條第一項、第十八條第一項、第二十三條）.

KEYWORDS:

payment of deed tax（繳納契稅）, amendment registration of right to real estate（不動產權利變更登記）, equality of claim（債權平等）, suspension of issuing notice of tax payment（暫緩核發納稅通知書）.**

HOLDING: Article 2, Paragraph 1, of the Deed Tax Act (hereinafter the "Act") provides: "Any purchaser and acceptor of a pledge, exchange, donation or partition of immovable property, and any acquirer of ownership thereof by virtue of possession shall procure and use official deed forms and pay deed taxes." Article

解釋文：契稅條例第二條第一項規定：「不動產之買賣、承典、交換、贈與、分割或因占有而取得所有權者，均應購用公定契紙，申報繳納契稅。」同條例第十八條第一項規定：「主管稽徵機關收到納稅義務人契稅申報案件，應於十五日內審查完竣，查定應納稅額，發單通知納稅義務人依限繳

* Translated by Dr. C.Y.Huang of Tsar & Tsai Law Firm.

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

18, Paragraph 1, of the Act provides: "Upon receipt of the deed tax declaration submitted by the taxpayer, the collection authority-in-charge shall, within 15 days therefrom, complete the examination thereof, assess the amount of the deed tax payable, and give a notice to the taxpayer requiring him/her to pay the tax within the prescribed time limit." Article 23 of the Act further provides: "Where the registration of ownership is to be effected as a result of sale, pledge, exchange, donation, partition or possession of immovable property, the land office shall effect the registration of the change in rights against the tax payment receipt." Therefore, declaration and payment of deed tax concerns the exercise and acquisition of the people's property rights. The Directive T.T.S.T. No. 36889 of the Ministry of Finance dated August 19, 1981, states: "If several persons submit declarations for the same building or land and if all of them have a legal basis, to avoid any subsequent dispute, the tax collection authority-in-charge may notify all the parties concerned to coordinate by themselves. Before the parties reach an agreement or

納。」又同條例第二十三條規定：「凡因不動產之買賣、承典、交換、贈與、分割及占有而辦理所有權登記者，地政機關應憑繳納契稅收據辦理權利變更登記。」是申報繳納契稅關係人民財產權之行使及取得。財政部中華民國七十年八月十九日台財稅字第三六八八九號關於「同一建物、土地先後有數人申報，且各有其合法依據時，為避免日後可能發生糾紛起見，稅捐稽徵機關得通知各有關當事人自行協調，在當事人未達成協議或訴請司法機關確認所有權移轉登記權利前，稅捐稽徵機關得暫緩就申報案件核發納稅通知書」之函示，逾越上開法律規定之意旨，指示稅捐稽徵機關得暫緩就申報案件核發納稅通知書，致人民無從完成納稅手續憑以辦理所有權移轉登記，妨害人民行使財產上之權利，與憲法第十五條保障人民財產權之意旨不符，應不再援用。

institute an action to the court for confirmation of the right to register the transfer of ownership, the collection authority-in-charge may suspend the issuance of the notice of tax payment related to the declaration." The said directive exceeds the legislative intent of the abovementioned law by instructing that the tax collection authority-in-charge may suspend the issuance of tax payment notice for the declaration, which renders the people unable to complete the tax payment procedures for the purpose of ownership transfer registration and impedes the people's exercise of their property rights. As the said directive is inconsistent with Article 15 of the Constitution intended to protect the people's property rights, it shall no longer be applied.

REASONING: Article 2, Paragraph 1, of the Act provides: "Any purchaser and acceptor of a pledge, exchange, donation or partition of immovable property, and any acquirer of ownership thereof by virtue of possession shall procure and use official deed forms and pay deed taxes." Article 23 of the Act

解釋理由書：契稅條例第二條第一項規定：「不動產之買賣、承典、交換、贈與、分割或因占有而取得所有權者，均應購用公定契紙，申報繳納契稅。」同條例第二十三條規定：「凡因不動產之買賣、承典、交換、贈與、分割及占有而辦理所有權登記者，地政機關應憑繳納契稅收據辦理權利變更

provides: “Where the registration of ownership is to be effected as a result of sale, pledge, exchange, donation, partition or possession of immovable property, the land office shall effect the registration of the change in rights against the tax payment receipt.” Therefore, declaration and payment of deed tax concerns the exercise and acquisition of the people’s property rights. Article 18, Paragraph 1, of the Act provides further: “Upon receipt of the deed tax declaration submitted by the taxpayer, the collection authority-in-charge shall, within 15 days therefrom, complete the examination thereof, assess the amount of the deed tax payable, and give a notice to the taxpayer requiring him/her to pay the tax within the prescribed time limit.” Where several persons apply for payment of deed tax for the same building or land, the tax collection agency shall issue a notice of tax payment to each of the applicants to allow them to register the change of real estate property right after payment of deed tax. In addition, a civil dispute involves the people’s rights and obligations and should be resolved by the parties concerned in accordance with legal

登記。」是申報繳納契稅關係人民財產權之行使及取得。同條例第十八條第一項規定：「主管稽徵機關收到納稅義務人契稅申報案件，應於十五日內審查完竣，查定應納稅額，發單通知納稅義務人依限繳納。」在同一建築物、土地先後有數人申報繳納契稅時，依法應即由稅捐稽徵機關核發納稅通知書與各申請人，使其得於繳納契稅後，辦理不動產權利變更登記。且民事糾紛，涉及人民之權利義務關係，應由當事人依法律程序，尋求解決，行政機關不宜加以介入，要求當事人自行協調，達成協議。又在一物數賣之情形，其買賣契約均屬有效成立，數買受人對出賣人不妨有同一內容之債權，本諸債權平等原則，其相互間並無排他之效力，均有請求所有權移轉登記之權利。財政部七十年八月十九日台財稅字第三六八八九號關於「同一建物、土地先後有數人申報，且各有其合法依據時，為避免日後可能發生糾紛起見，稅捐稽徵機關得通知各有關當事人自行協調，在當事人未達成協議或訴請司法機關確認所有權移轉登記權利前，稅捐稽徵機關得暫緩就申報案件核發納稅通知書」之函示，逾越上開法律規定之意旨，指示稅捐稽徵機關得暫緩就申報案件核發納稅通知書，致人

procedures, and the administrative agency should not intervene by requesting the parties concerned to coordinate by themselves and reach an agreement. Where a thing is sold to several persons, each of the sales contracts is valid. The buyers have the same claim against the seller. Based on the principle of equal claims, none of the creditors can validly exclude any other creditors, and each of them has the right to make a request for ownership transfer registration. The Directive T.T. S.T. No. 36889 of the Ministry of Finance dated August 19, 1981, states: "If several persons submit declarations for the same building or land and if all of them have legal basis, to avoid any subsequent dispute, the tax collection authority-in-charge may notify all the parties concerned to coordinate by themselves. Before the parties reach an agreement or institute an action to the court for confirmation of the right to register the transfer of ownership, the collection authority-in-charge may suspend the issuance of the notice of tax payment related to the declaration." The said directive exceeds the legislative intent of the abovementioned

民無從完成納稅手續憑以辦理所有權移轉登記，妨害人民行使財產上之權利，與憲法第十五條保障人民財產權之意旨不符，應不再援用。

law by instructing that the tax collection authority-in-charge may suspend the issuance of tax payment notice for the declaration, which renders the people unable to complete the tax payment procedures for the purpose of ownership transfer registration and impedes the people's exercise of their property rights. As the said directive is inconsistent with Article 15 of the Constitution intended to protect the people's property rights, it shall no longer be applied.

J. Y. Interpretation No.485（May 28, 1999）*

ISSUE: Do the public housing benefits for military personnel and their families provided according to the Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents and its Enforcement Rules violate Article 7 of the Constitution guaranteeing the principle of equality?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 10 of the Amendment of the Constitution（憲法增修條文第十條）; Articles 3, 5, 20 and 24 of the Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents（國軍老舊眷村改建條例第三條、第五條、第二十條及第二十四條）.

KEYWORDS:

social welfare（社會福利）, public housing community（眷村）, benefits for military personnel（軍人福利）.**

HOLDING: The principle of equality prescribed by Article 7 of the Constitution does not mean a formal equality in an absolute and mechanical sense. Rather, it aims to guarantee the

解釋文：憲法第七條平等原則並非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，立法機關基於憲法之價值體系及立法目的，自得斟酌規範事物性質之差異而為

* Translated by Su-Po Kao.

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

substantive equality of the people in the sense of equal protection under law. The legislative body, based on the value system of the Constitution and the purpose of enactment, could consider the differences of the addressed subject areas and reasonably treat them differently. The improvement of the people's welfare is one of the basic principles of the Constitution, which is self-evident in light of the Preamble, Article 1, the Fundamental National Policies in Chapter 13 and the 10th Amendment. The legislators, in consideration of social policy, have the authority to enact policies in order to make a restricted allocation of welfare resources. The Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents and its Enforcement Rules prescribed: "The families that resided in original housing have a prior option to buy a new residence unit built pursuant to the said Act as well as the right to receive government subsidy for housing; such families can also apply for a loan with special interest rate for the down payment; and the government should provide appropriate assistance for the needs of such families. The purpose of the enact-

合理之區別對待。促進民生福祉乃憲法基本原則之一，此觀憲法前言、第一條、基本國策及憲法增修條文第十條之規定自明。立法者基於社會政策考量，尚非不得制定法律，將福利資源為限定性之分配。國軍老舊眷村改建條例及其施行細則分別規定，原眷戶享有承購依同條例興建之住宅及領取由政府給與輔助購宅款之優惠，就自備款部分得辦理優惠利率貸款，對有照顧必要之原眷戶提供適當之扶助，其立法意旨與憲法第七條平等原則尚無牴觸。

ment of the Act does not violate the right of equality doctrine of Article 7.

However, in light of limited state resources, the legislations of social policies have to consider the following factors to make appropriate allocation of welfare resources: the economic and financial conditions of the state, the principle of resource utilization, and should also try to attend to the equity between beneficiaries and other people. The legislations should also consider the beneficiaries' finances, income, costs for family support as well as the need of welfare and then regulate accordingly. It is forbidden to base the consideration of special treatment only on the beneficiaries' specific position or status. The rules governing the ways and amount of provision should also seek to be consistent with the basic needs of beneficiaries, and not to exceed the extent necessary for welfare purposes and thus result in overprovision. The legislative body should therefore revise any part of the abovementioned Act not in accord with the intent of this Interpretation.

惟鑒於國家資源有限，有關社會政策之立法，必須考量國家之經濟及財政狀況，依資源有效利用之原則，注意與一般國民間之平等關係，就福利資源為妥善之分配，並應斟酌受益人之財力、收入、家計負擔及須照顧之必要性妥為規定，不得僅以受益人之特定職位或身分作為區別對待之唯一依據；關於給付方式及額度之規定，亦應力求與受益人之基本生活需求相當，不得超過達成目的所需必要限度而給予明顯過度之照顧。立法機關就上開條例與本解釋意旨未盡相符之部分，應通盤檢討改進。

REASONING: The principle of

解釋理由書：憲法第七條平等

equality prescribed by Article 7 of the Constitution does not mean a formal equality in an absolute and mechanical sense. Rather, it aims to guarantee the substantive equality of the people in the sense of equal protection under law. The legislative body, based on the value system of the Constitution and the purpose of enactment, could consider the differences of the addressed subject areas and reasonably treat them differently. The improvement of the people's welfare is one of the basic principles of the Constitution, which is self-evident in light of the Preamble, Article 1, the Fundamental National Policies in Chapter 13 and the 10th Amendment. Based on this principle, the state should provide various kinds of benefits, in order to guarantee the basic needs of people required by human dignity, to assist the economically disadvantaged, and to implement welfare measures such as social safety. Since the said benefits are related to the allocation of state resources, the legislative body has the full authority to make decisions on the issues of the priority of various kinds of benefits, the purposes of enactments, the scope of

原則並非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，立法機關基於憲法之價值體系及立法目的，自得斟酌規範事物性質之差異而為合理之區別對待。憲法係以促進民生福祉為一項基本原則，此觀憲法前言、第一條、基本國策章及憲法增修條文第十條之規定自明。本此原則國家應提供各種給付，以保障人民得維持合乎人性尊嚴之基本生活需求，扶助並照顧經濟上弱勢之人民，推行社會安全等民生福利措施。前述措施既涉及國家資源之分配，立法機關就各種社會給付之優先順序、規範目的、受益人範圍、給付方式及額度等項之有關規定，自享有充分之形成自由，斟酌對人民保護照顧之需求及國家財政等社會政策考量，制定法律，將福利資源為限定性之分配。中華民國八十五年二月五日公布之國軍老舊眷村改建條例第五條（八十六年十一月二十六日修正）、第二十條及八十五年七月二十三日發布之同條例施行細則第九條分別規定，原眷戶享有承購依該條例興建之住宅及領取由政府給與輔助購宅款之優惠，就自備款部分尚得辦理優惠利率貸款，其立法目的係在對有照顧必要之原眷戶提供適當之扶助，符合促進民生福祉之基本原則，與憲法第

beneficiaries, the ways and amount of provision, etc. The legislative body can consider relevant factors of social policies such as the necessity of benefit and public finance in the law-making process, and enact such policies to make a restricted allocation of welfare resources. Article 5 (revised on November 26, 1997) and Article 20 of the Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents, effective on February 5, 1996, as well as Article 9 of its Enforcement Rules effective on July 23, 1996, both prescribe that the families that resided in the original housing have a prior option to buy a new residence unit built pursuant to the said Act, the right to receive government subsidy for housing as well as the qualification to apply for a loan with a special interest rate for the down payment. The purpose of the enactment is to provide appropriate assistance to such families, which is consistent with the basic principle of improvement of welfare, and does not violate the intent of Article 7 of the Constitution.

七條之意旨尚無牴觸。

However, in light of the limited state resources, the legislations of social policies have to consider the following factors to make an appropriate allocation of welfare resources: the economic and financial conditions of the state, the principle of resource utilization, and should also try to ensure the equity between beneficiaries and other people. As regarding the scope of beneficiaries, the legislations should consider the beneficiaries' finances, income, costs for family support as well as the need of welfare and then regulate accordingly. It is forbidden to base the consideration of special treatment only on the beneficiaries' specific position or status. The rules governing the ways and amount of provision should also seek to be consistent with the basic needs of beneficiaries, and not to exceed the extent necessary for welfare purposes and thus result in over-provision. Article 3, Paragraph 1, of the said Act prescribes: "The term 'Old Villages for Military Personnel and Their Dependents' should mean such villages constructed before December 31, 1980, and which must also meet one of the following conditions: 1) constructed and

惟鑒於國家資源有限，有關社會政策之立法，必須考量國家之經濟及財政狀況，依資源有效利用之原則，並注意與一般國民間之平等關係，就福利資源為妥善之分配；對於受益人範圍之決定，應斟酌其財力、收入、家計負擔及須照顧之必要性妥為規定，不得僅以受益人之特定職位或身分作為區別對待之唯一依據；關於給付方式及額度之規定，亦應力求與受益人之基本生活需求相當，不得超過達成立法目的所需必要限度而給予明顯過度之照顧。上開條例第三條第一項規定：「本條例所稱國軍老舊眷村，係指於中華民國六十九年十二月三十一日以前興建完成之軍眷住宅，具有下列各款情形之一者：一、政府興建分配者。二、中華婦女反共聯合會捐款興建者。三、政府提供土地由眷戶自費興建者。四、其他經主管機關認定者。」然眷村是否為老舊而有改建之必要，應依眷舍之實際狀況並配合社區更新之需要而為決定，不得僅以眷村興建完成之日期為概括之認定，以免浪費國家資源。八十六年十一月二十六日修正之同條例第五條第一項後段「原眷戶死亡者，由配偶優先承受其權益；原眷戶與配偶均死亡者，由其子女承受其權益，餘均不得承受其權益」之規定，固

allocated by the government; 2) financed by donations from the Chinese Women's Anti-Communist Union; 3) constructed by the housing family on public land; and 4) other situations approved by the relevant authorities." However, whether the public housing is deemed old and in need of reconstruction should depend on the real condition of the house and the need of community renovation. In order to avoid wasting state resources, the decision must not be based solely on the date of the completion of construction. The second sentence of Article 5, Paragraph 1, prescribed: "On the occasion of the death of the title holder, his spouse has the priority option to this title of possession; in the case that the spouse also dies, their sons or daughters acquire the option; no others are entitled to possession." The purpose of this rule is surely to take care of the descendents of military personnel. However, the rule may result in overprovision as it disregards whether there is real need on the part of a son or daughter for the provision of public housing, and it also unconditionally entitles sons or daughters with the same right of the original holder to the

係以照顧遺眷為目的，但不問其子女是否確有由國家照顧以解決居住困難之必要，均賦與其承購房地並領取與原眷戶相同補助之權利，不無明顯過度照顧之處。又該條例第二十四條第一項規定：「由主管機關配售之住宅，除依法繼承者外，承購人自產權登記之日起未滿五年，不得自行將住宅及基地出售、出典、贈與或交換。」然其購屋款項既主要來自國家補助，與純以自費取得之不動產者有間，則立法機關自應考慮限制承購人之處分權，例如限制其轉售對象及轉售價格或採取其他適當措施，使有限資源得為有效之利用。上開條例規定與限定分配國家資源以實現實質平等之原則及資源有效利用之原則未盡相符，立法機關就其與本解釋意旨不符之部分，應通盤檢討改進。

priority option and the subsidy. And Article 24, Paragraph 1, of the same Act prescribes: "For a residence unit sold and distributed by the relevant authorities, except through inheritance according to law, the buyer is forbidden to sell, mortgage, gratuitously transfer or exchange the residence unit and the land occupied within five years of title registration." Since the money is primarily financed by the state and not the buyer, the legislative body should consider restricting the buyer's right to transfer in order to utilize the limited resources. The restrictions can include the parties to transfer, the price of transaction, or other appropriate measures. Some rules of the said Act thus do not accord with the restricted allocation of state resources, which aims to realize the principle of substantive equality and the principle of resource utilization. The legislative body should therefore revise any part of the abovementioned Act not in accord with the intent of this Interpretation.

Justice Chi-Nan Chen filed dissenting opinion.

本號解釋陳大法官計男提出不同意見書。

J. Y. Interpretation No.486（June 11, 1999）*

ISSUE: Is Article 37 of the Trademark Act, which provides that a trademark logo bearing the name of another group may not be registered unless such other group gives its consent, in violation of the Constitution?

RELEVANT LAWS:

Article 22 of the Constitution（憲法第二十二條）, Article 37, Paragraph 1, Subparagraph 11, and Article 38, Paragraph 1, of the Trademark Act（商標法第三十七條第一項第十一款及第三十八條第一項）

KEYWORDS:

fundamental rights of the people（人民基本權）, rights guaranteed by the Constitution（憲法上所保障之權利）, interests protected under the law（法律上之利益）, seek redress pursuant to the law（依法請求救濟）, other group（其他團體）, natural person（自然人）, legal person（法人）, legal capacity（權利能力）, personality rights（人格權）, property rights （財產權）, legal acts（法律行為）, autonomous entity（自主意思團體）, trademark infringement（商標侵害）, exclusive trademark rights（商標專用權）, registered trademark（註冊商標）.**

* Translated by Li-Chih Lin, Esq., J.D.

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

HOLDING: Any person or entity whose rights are guaranteed by the Constitution or whose interests are protected under the law may seek redress pursuant to the law. The term "other group" referred to in the first part of Article 37, Paragraph 1, Subparagraph 11, of the Revised Trademark Act (Article 37, Subparagraph 11, of the Current Trademark Act) promulgated on May 25, 1989, means a group, i.e., not a natural person or a legal person, which has no legal capacity under the law. The purpose of the abovementioned statute is to protect the personality rights and property interests of the group within certain limits. Being the primary subjects of rights and obligations, natural persons and legal persons are naturally protected by the Constitution. However, to adhere to the constitutional protection provided for personality rights and property interests, a group which is organized and operated independently under a specific name, which engages in commercial acts or other affairs in the name of the group for a long period of time with considerable publicity, is well-known to the general public and has certain interests to

解釋文：憲法上所保障之權利或法律上之利益受侵害者，其主體均得依法請求救濟。中華民國七十八年五月二十六日修正公布之商標法第三十七條第一項第十一款（現行法為第三十七條第十一款）前段所稱「其他團體」，係指自然人及法人以外其他無權利能力之團體而言，其立法目的係在一定限度內保護該團體之人格權及財產上利益。自然人及法人為權利義務之主體，固均為憲法保護之對象；惟為貫徹憲法對人格權及財產權之保障，非具有權利能力之「團體」，如有一定之名稱、組織而有自主意思，以其團體名稱對外為一定商業行為或從事事務有年，已有相當之知名度，為一般人所知悉或熟識，且有受保護之利益者，不論其是否從事公益，均為商標法保護之對象，而受憲法之保障。商標法上開規定，商標圖樣，有其他團體之名稱，未得其承諾者，不得申請註冊，目的在於保護各該團體之名稱不受侵害，並兼有保護消費者之作用，與憲法第二十二條規定之意旨尚無牴觸。

be protected, falls within the scope of protection under the Trademark Act regardless of whether it promotes public welfare and is therefore protected by the Constitution. The abovementioned Trademark Act provides that a trademark application shall be rejected if the proposed trademark comprises the name of another group without permission. The purpose of the abovementioned statute is to protect the name of the group against trademark infringement and to protect consumers from the likelihood of confusion. It is therefore consistent with the provisions set forth in Article 22 of the Constitution.

REASONING: The protection provided to the fundamental rights of the people is the primary responsibility of a modern rule-of-law nation. Any person or entity whose rights are guaranteed by the Constitution or whose interests are protected under the law may seek redress pursuant to the law. The term "other group" referred to in the first part of Article 37, Paragraph 1, Subparagraph 11, of the Revised Trademark Act (Article 37, Subparagraph 11, of the Current Trade-

解釋理由書：人民基本權利之保障乃現代法治國家之主要任務，凡憲法上所保障之權利或法律上之利益受侵害者，其主體均得依法請求救濟。商標法第三十七條第一項第十一款（現行法為第三十七條第十一款）前段所稱「其他團體」，係指於自然人及法人以外其他無權利能力之團體而言，其立法目的係在一定限度內保護該團體之人格權及財產上利益。按自然人及法人為權利義務之主體，當然為憲法保護之對象；惟為貫徹憲法對人格權及財產權之保障，

mark Act) promulgated on May 25, 1989, means a group, i.e., not a natural person or a legal person, which has no legal capacity under the law. The purpose of the abovementioned statute is to protect the personality rights and property interests of the group within certain limits. Being the primary subjects of rights and obligations, natural persons and legal persons are naturally protected by the Constitution. However, to adhere to the constitutional protection provided for personality rights and property interests, a group which has no legal capacity may still seek redress under the Trademark Act as "other group" if it meets the following requirements: A group must be organized by multiple persons for a particular purpose under a specific name, have firms or places of business with independently controlled assets and managers or representatives to carry out legal acts in the name of the group. Because such a group has the substance and organization identical to that of a legal person and is an autonomous entity existing independently from its constituents, it therefore falls into the category of "other group" referred to in the Trade-

非具有權利能力之「團體」，如係由多數人為特定之目的所組織，有一定之名稱、事務所或營業所及獨立支配之財產，且設有管理人或代表人，對外並以團體名義為法律行為，在性質上，具有與法人相同之實體與組織，並具有自主之意思能力而為實質之單一體，且脫離各該構成員而存在，固屬該法所稱之「其他團體」。至其他有一定之名稱、組織而有自主意思之團體，以其團體名稱對外為一定商業行為或從事事務有年，已有相當之知名度，為一般人所知悉或熟識，且有受保護之利益者，不論是否從事公益，均為商標法保護之對象，而受憲法之保障。商標法第三十七條第一項第十一款（現行法為第三十七條第十一款）前段規定：商標圖樣，有其他團體之名稱，未得其承諾者，不得申請註冊。旨在保護各該團體之名稱不受侵害，並兼有保護消費者之作用，與憲法第二十二條規定之意旨尚無牴觸。又申請註冊之商標，因尚未經核准註冊，固未取得商標專用權，然商標註冊申請所生之權利，得移轉於他人，為商標法第三十八條第一項所明定，是以該項權利，具有財產上之價值，應屬憲法保障之財產權，權利主體自得以該權利遭受不法侵害為由，依法請求救濟。至

mark Act. A group which is organized and operated independently under a specific name, which engages in commercial acts or other affairs in the name of the group for a long period of time with considerable publicity, is well-known to the general public and has certain interests to be protected, falls within the scope of protection under the Trademark Act regardless of whether it promotes public welfare and is therefore protected by the Constitution. The first part of Article 37, Paragraph 1, Subparagraph 11, of the Revised Trademark Act (Article 37, Subparagraph 11, of the Current Trademark Act) provides that a trademark application shall be rejected if the proposed trademark comprises the name of another group without permission. The purpose of the abovementioned statute is to protect the name of the group against trademark infringement and to protect consumers from the likelihood of confusion. It is therefore consistent with the provisions set forth in Article 22 of the Constitution. In addition, Article 38, Paragraph 2, of the Trademark Act provides that a trademark applicant will not acquire any exclusive trademark rights

公司籌備處是否屬於商標法第三十七條第一項第十一款（現行法為第三十七條第十一款）所稱之「其他團體」，則應依前開解釋意旨，視具體情形而定，併此指明。

without obtaining the approval of his or her trademark application. However, once his or her trademark application is approved, the rightful trademark owner may assign his or her trademark rights to others. These exclusive trademark rights accorded by the Trademark Act are property with a considerable value and therefore fall within the category of property rights protected by the Constitution. The rightful owner of a registered trademark may seek redress pursuant to the law based on the reason that his or her constitutionally protected property rights have been infringed. As for the preparatory office of a corporation, whether it falls within the category of "other group" referred to in Article 37, Paragraph 1, Subparagraph 11, of the Revised Trademark Act (Article 37, Subparagraph 11, of the Current Trademark Act) will depend upon the totality of the circumstances in accordance with the preceding opinion.

J. Y. Interpretation No.487（July 9, 1999）*

ISSUE: Is the first sentence of Article 2, Subparagraph 2, of the Act of Compensation for Wrongful Detentions and Executions inconsistent with the constitutional principle of proportionality in regard to its exclusion of the right of a wrongfully imprisoning person to claim state compensation, due to the mere fact that his or her was against the public order or morality, without differentiating the degree of gravity or considering whether the act was beyond the standards acceptable to the society in general?

RELEVANT LAWS:

Article 24 of the Constitution（憲法第二十四條）; Articles 2, Subparagraph 2, and 5 of the Act of Compensation for Wrongful Detentions and Executions（冤獄賠償法第二條第二款、第五條）; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

state compensation（國家賠償）, wrongful imprisonment（冤獄）, principle of proportionality（比例原則）, public order and good morals（公共秩序、善良風俗）.**

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* Translated by Pijan Wu.

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

HOLDING: The Act of Compensation for Wrongful Detentions and Executions (hereinafter the "Act") is a special law for state compensation liabilities. The legislature has the responsibility to enact laws governing state compensation under Article 24 of the Constitution, which provides that: "[a]ny public functionary who, in violation of the law, infringes upon the people's freedom or right shall, in addition to being subject to disciplinary measures under the law, be subject to criminal and civil liabilities"; and that "[t]he injured people may, in accordance with the law, claim compensation from the State for damages sustained." Furthermore, the requirements stipulated in such laws [governing state compensation] regarding the people's claims seeking different types of state compensation shall conform to the constitutional principle of proportionality (Verhältnismäßigkeitsprinzip). The detention of a criminal defendant is a compulsory disposition that, before the final and binding judgment becomes irrevocable, confines his/her physical freedom to a limited area in order to secure the progress of the criminal procedures. Since

解釋文：冤獄賠償法為國家賠償責任之特別立法，憲法第二十四條規定：「凡公務員違法侵害人民之自由或權利者，除依法律受懲戒外，應負刑事及民事責任。被害人民就其所受損害，並得依法律向國家請求賠償」，立法機關據此有制定有關國家賠償法律之義務，而此等法律對人民請求各類國家賠償要件之規定，並應符合憲法上之比例原則。刑事被告之羈押，係為確保訴訟程序順利進行，於被告受有罪判決確定前，拘束其身體自由於一定處所之強制處分，乃對人民身體自由所為之嚴重限制，故因羈押而生之冤獄賠償，尤須尊重憲法保障人身自由之精神。冤獄賠償法第二條第二款前段，僅以受害人之行為違反公共秩序或善良風俗為由，剝奪其請求賠償之權利，未能以其情節是否重大，有無逾越社會通常觀念所能容忍之程度為衡量標準，與前述憲法意旨未盡相符。上開法律第二條第二款與本解釋不合部分，應不予適用。

the detention is a grave deprivation of physical freedom, the constitutional protection of physical freedom shall be highly respected when determining the compensation for the wrongful imprisonment involved therein. The first sentence of Article 2, Subparagraph 2, of the Act is inconsistent with the abovementioned constitutional protection in regard to its exclusion of the right to claim compensation, due to the mere fact that the act of the person injured [the claimant] was against the public order or morality, without differentiating the degree of gravity or considering whether the act was beyond the standards acceptable to the society in general. Therefore, Article 2, Subparagraph 2, of the Act shall not be applied to the extent it is inconsistent with this Interpretation.

REASONING: Pursuant to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act, a person whose constitutional right is wrongfully infringed upon and who has brought a lawsuit according to the legal procedures may apply for an in-

解釋理由書：司法院大法官審理案件法第五條第一項第二款規定，人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法。司法院冤獄賠償覆議委員會依冤獄賠償

terpretation of the Constitution on the ground that the law or regulation applied in the final and irrevocable judgment is in conflict with the Constitution. The Review Committee on Compensation for Wrongful Detentions and Executions, the Judicial Yuan, is composed of the Chief-Justice and Justices of the Supreme Court pursuant to Article 5 of the Act and its review decisions on matters of wrongful imprisonment compensation, by their nature, are equivalent to final and irrevocable judgments. Therefore, on the issue of whether the laws or regulations applied in such decisions are in conflict with the Constitution, the private party should be permitted to apply for an interpretation by this [Judicial] Yuan pursuant to the above-cited provision [of the Constitutional Interpretation Procedure Act].

法第五條規定，由最高法院院長及法官組成，其就冤獄賠償覆議事件所為之決定，性質上相當於確定終局裁判，故其決定所適用之法律或命令發生有牴觸憲法之疑義時，應許人民依首開法律規定，聲請本院解釋，合先說明。

The Act is a special law for state compensation liabilities. The legislature has the responsibility to enact laws governing state compensation under Article 24 of the Constitution, which provides that: "[a] ny public functionary who, in violation of the law, infringes upon the

冤獄賠償法為國家賠償責任之特別立法，憲法第二十四條規定：「凡公務員違法侵害人民之自由或權利者，除依法律受懲戒外，應負刑事及民事責任。被害人民就其所受損害，並得依法律向國家請求賠償」，立法機關據此有制定有關國家賠償法律之義務，而

people's freedom or right shall, in addition to being subject to disciplinary measures under the law, be subject to criminal and civil liabilities"; and that "[t]he injured people may, in accordance with the law, claim compensation from the State for damages sustained." Furthermore, the requirements stipulated in such laws [governing state compensation] regarding people's claims seeking different types of state compensation shall conform to the constitutional principle of proportionality. The detention of a criminal defendant is a compulsory disposition that, before the final and binding judgment becomes irrevocable, confines his/her physical freedom to a limited area in order to secure the progress of the criminal procedures. Since the detention is a grave deprivation of physical freedom, the constitutional protection of physical freedom shall be highly respected when determining the compensation for the wrongful imprisonment involved therein.

此等法律對人民請求各類國家賠償要件之規定，並應符合憲法上之比例原則。刑事被告之羈押，係為確保訴訟程序順利進行，於被告受有罪判決確定前，拘束其身體自由於一定處所之強制處分，乃對人民身體自由所為之嚴重限制，故因羈押而生之冤獄賠償，尤須尊重憲法保障人身自由之精神。

Article 2 of the Act provides for certain limitations on the right to claim wrongful imprisonment, among which the first sentence of Article 2, Subparagraph 2,

冤獄賠償法第二條對冤獄賠償請求權之行使定有限制，其第二款前段規定，曾受羈押而受不起訴處分或無罪宣告者，若行為違反公共秩序或善良風

stipulates that a person, who had been detained and thereafter received a non-prosecutorial disposition or a not-guilty judgment, may not claim compensation if his/her act was in violation of the public order or morality. Although its legislative purpose is to maintain the social order and morality, it is inconsistent with the constitutional principle of proportionality for its exclusion of the right of the injured person, whose physical freedom was gravely restrained under the detention, to claim compensation on the general ground of violation of the public order or morality, without determining whether the gravity of the act is such that it is intolerable by the standards acceptable to the society in general. By contrast with the other criteria stipulated in the second sentence of Article 2, Subparagraph 2, and the other items, there is also a lack of proportionality. Therefore, the above-cited provision [Article 2, Subparagraph 2, of the Act] shall not be applied, from the date of this Interpretation, to the extent that it is inconsistent with this Interpretation.

俗，則不得請求賠償。其立法目的雖在維護社會秩序及公共道德，然泛以公序良俗之違反為理由，使身體自由因羈押遭受嚴重限制之受害人，其冤獄賠償請求權受到排除，而未能以其情節是否重大，致為社會通常觀念所不能容忍為衡量標準，與同款後段及同條其餘各款所定之其他事由相較，亦有輕重失衡之處，實與憲法上之比例原則未盡相符。上開法律規定與本解釋意旨不合部分，自本解釋公布之日起，應不予適用。

Justice Sen-Yen Sun filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋孫大法官森焱、劉大法官鐵錚分別提出不同意見書。

J. Y. Interpretation No.488（July 30, 1999）*

ISSUE: Do Articles 11 and 14 of the Regulation Governing the Supervision and Taking-Over of Financial Institutions concerning purchase and assumption exceed the scope of authority as delegated by the Credit Cooperatives Act and Banking Act, thus violating Article 15 of the Constitution for the protection of property right and being void?

RELEVANT LAWS:

Articles 15, 23 and 145 of the Constitution（憲法第十五條、第二十三條、第一百四十五條）; Article 27, Paragraph 1, of the Credit Cooperatives Act（信用合作社法第二十七第一項）; Article 62, Paragraph 1, of the Banking Act（銀行法第六十二條第一項）; Articles 11 and 14 of the Regulation Governing the Supervision and Taking-Over of Financial Institutions（金融機構監管接管辦法第十一條、第十四條）.

KEYWORDS:

property right（財產權）, Credit Cooperative（信用合作社）, conservator（存款人）, purchase and assumption（概括承受）, financial institution（金融機構）. **

HOLDING: According to Article 15 of the Constitution, the property right of the people should be protected.

解釋文：憲法第十五條規定，人民財產權應予保障。對人民財產權之限制，必須合於憲法第二十三條所定必

* Translated by Professor S. M. Yu.

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

Any restriction on the property right can be allowed only to the extent sanctioned by Article 23 of the Constitution, as enacted by law. Delegation by the legislative branch to the executive to implement the law by ordinance should be explicit, and the implementing ordinance should conform to the legislative purpose and be within the scope of the delegation. This is clear from our previous interpretations. Article 27, Paragraph 1, of the Credit Cooperatives Act and Article 62, Paragraph 1, of the Banking Act are enacted to protect the interests of depositors and to maintain the stability of the financial system. Although Article 11, Paragraph 1, Subparagraph 3, and Article 14, Subparagraph 4, of the Regulation Governing the Supervision and Taking-Over of Financial Institutions are authorized by Article 62, Paragraph 3, of the Banking Act, delegation per se is insufficient. In the interest of protection of the people's rights, not only should the subthe Constitution, but a reasonable provision on the implementing of procedures and timely judicial relief are also required. To implement the law appropriately, an ordinance of the execu-

要程度，並以法律定之，其由立法機關明確授權行政機關以命令訂定者，須據以發布之命令符合立法意旨且未逾越授權範圍時，始為憲法之所許，迭經本院解釋在案。信用合作社法第二十七條第一項及銀行法第六十二條第一項係為保障存款人權益，並兼顧金融秩序之安定而設，金融機構監管接管辦法第十一條第一項第三款及第十四條第四款雖亦有銀行法第六十二條第三項授權之依據，惟基於保障人民權利之考量，法律規定之實體內容固不得違背憲法，其為實施實體內容之程序及提供適時之司法救濟途徑，亦應有合理規定，方符憲法維護人民權利之意旨；法律授權行政機關訂定之命令，為適當執行法律之規定，尤須對採取影響人民權利之行政措施時，其應遵行之程序作必要之規範。前述銀行法、信用合作社法及金融機構監管接管辦法所定之各種措施，對銀行、信用合作社之股東（社員）、經營者及其他利害關係人，既皆有重大影響，該等法規僅就主管機關作成行政處分加以規定，未能對作成處分前，如何情形須聽取股東、社員、經營者或利害關係人陳述之意見或徵詢地方自治團體相關機關（涉及各該地方自治團體經營之金融機構）之意見設置明文。又上開辦法允許

tive branch delegated by law should prescribe appropriate procedures when the people's rights are affected by administrative measures. The various measures contained in the abovementioned Banking Act, Credit Cooperatives Act and the Regulation Governing the Supervision and Taking-Over of Financial Institutions all materially affect the shareholders (members) of banks and credit cooperatives, managers and other interested parties, yet such Acts and Regulation provide only the administrative measures of the competent authority and are totally silent on the circumstances under which the opinions of shareholders, members, managers or interested parties may be sought or the opinions of local government (where financial institutions managed by such government are involved), are solicited before administrative decisions are made. The abovementioned regulation also permits the direct appointment of organs (institutions) or personnel as supervisors or conservators by the competent authority, allows the conservators to assume the power of management and the right to manage and dispose of property, and further allows the competent authority to designate organs (institutions) or personnel as supervisors or conservators, to grant the conservators the power of management and the right to manage and dispose of property, and to allow the conservators to decide on the transfer of all or part of the business and assets and liabilities of the financial institutions under conservatorship or their merger with other financial institutions, without taking into consideration the feasibility of obtaining the approval of the shareholders' meeting or the members' meeting of the financial institutions under conservatorship, or considering whether the financial institutions can timely provide adequate funds, guarantees or other methods to settle the deficiency in their assets to pay off their debts. All of the above are inconsistent with the spirit of the protection of the people's property rights under the Constitution. The competent authority should review and amend the relevant laws and regulations in accordance with this Interpretation as soon as possible.

主管機關逕行指派機關（機構）或人員為監管人或接管人，並使接管人取得經營權及財產管理處分權，復由接管人及主管機關決定概括讓與全部或部分業務及資產負債，或與他金融機構合併，無須斟酌受接管之金融機構股東或社員大會決議之可行性，亦不考慮該金融機構能否適時提供相當資金、擔保或其他解決其資產不足清償債務之有效方法，皆與憲法保障人民財產權之意旨未盡相符。前述法規主管機關均應依本解釋儘速檢討修正。

erty; the conservators and the competent authority may also decide on the purchase and assumption, in whole or in part, the operations, assets and liabilities of the relevant financial institutions, or affect a merger with another financial institution, all without taking into account the feasibility of a resolution by the shareholders' (members) meeting, and without considering whether such financial institutions are in a position to provide appropriate funds, collateral or other effective means to meet their obligations in a timely manner. None of these is in accord with the purpose of the constitutional guarantee of the people's property rights. Therefore, the competent authority should promptly appraise and amend the abovementioned Acts and Regulation.

REASONING: Article 15 of the Constitution provides that the people's property right should be protected. Any restriction on the property right should be to the extent necessary as provided under Article 23 of the Constitution, and only by the enactment of laws. When explicitly delegated by the legislature, an ordinance

解釋理由書：憲法第十五條規定，人民財產權應予保障。對人民財產權之限制，必須合於憲法第二十三條所定必要程度，並以法律定之，其由立法機關明確授權行政機關以命令訂定者，須據以發布之命令符合立法意旨且未逾越授權範圍時，始為憲法之所許，迭經本院解釋在案（參照釋字第三一三號、

promulgated by the executive branch is constitutional only when in accordance with the legislative purposes and without exceeding the scope of delegation, which has been repeatedly interpreted by this Yuan (See Interpretations Nos. 313, 423 and 480). Article 27, Paragraph 1, of the Credit Cooperatives Act states: "When a credit cooperative violates laws, regulations, or its charter or cannot be operated soundly and tends to impair the interest of members or depositors, the competent authority may adopt the following measures: (1) annul various resolutions of legally required meetings, provided that, if the resolutions violate laws, regulations or the charter, they should be void ab initio; (2) remove managers and staff members, or order the credit cooperative to take measures against them; (3) restrict the distribution of compensation to directors or supervisors; (4) suspend or remove directors or supervisors; (5) suspend a part of the operations; (6) order the suspension of operation, taking of accounts, or a merger; (7) order the dissolution; or (8) other necessary measures." Article 62, Paragraph 1, of the Banking Act states:

第四二三號、第四八〇號等解釋）。信用合作社法第二十七條第一項：「信用合作社違反法令、章程或無法健全經營而有損及社員及存款人權益之虞時，主管機關得為左列處分：一、撤銷各類法定會議之決議。但其決議內容違反法令或章程者，當然無效。二、撤換經理人、職員，或命令信用合作社予以處分。三、限制發給理事、監事酬勞金。四、停止或解除理事、監事職務。五、停止部分業務。六、勒令停業清理或合併。七、命令解散。八、其他必要之處置。」銀行法第六十二條第一項：「銀行因業務或財務狀況顯著惡化，不能支付其債務或有損及存款人利益之虞時，中央主管機關得勒令停業並限期清理、停止其一部業務、派員監管或接管、或為其他必要之處置，並得洽請有關機關限制其負責人出境。」上開法律均係為保障存款人權益，並兼顧金融秩序之安定而設。金融機構監管接管辦法第十一條第一項第三款規定，監管人得協助受監管金融機構辦理概括讓與全部或部分業務及資產負債，同辦法第十四條第四款規定，接管人執行職務有辦理第十一條第一項第一款至第四款事項之行為時，應事先報經財政部核准，雖有銀行法第六十二條第三項授權之依據，惟基

"When a bank, due to significant deterioration of its operations or financial condition, cannot meet its obligations or tends to impair the interest of depositors, the competent authority of the central government may order the suspension of operations and set a period for the accounting of its affairs, suspend its operation in part, appoint personnel to supervise management or appoint a conservator, or adopt other necessary measures, and may request said relevant authority to restrict the responsible persons from leaving the country." All the abovementioned Acts are for the protection of the depositors and to maintain the stability of the financial system. Article 11, Paragraph 1, Subparagraph 3, of the Regulation Governing the Supervision and Taking-Over of Financial Institutions provides that the supervisor may assist the relevant financial institution to arrange the purchase and assumption, in whole or in part, of its operations, assets and liabilities. Article 14, Paragraph 4, of the Regulation provides that the conservator, when implementing his/her responsibility mentioned in Article 11, Paragraph 1, Subparagraphs 1 to 4 shall

於保障人民權利之考量，法律規定之實體內容固不得違背憲法，其為實施實體內容之程序及提供適時之司法救濟途徑，亦應有合理規定，方符憲法維護基本權利之意旨；法律授權行政機關訂定之命令，為適當執行法律之規定，尤須對採取影響人民權利之行政措施時，其應遵行之程序作必要之規範。

obtain the approval of the Ministry of Finance in advance. While based on the delegation of Articles 62, Paragraph 3, of the Banking Act, in the interest of the protection of the people's rights not only should the substance of the law conform with the Constitution, but it should also make appropriate provisions for implementing procedures and timely judicial relief. Only then will the constitutional purpose of safeguarding fundamental rights be fulfilled. An ordinance promulgated by the executive branch delegated by law, for the proper implementation of the provision of a law, in particular must provide for the procedures required in adopting administrative measures which may impact on people's rights.

The abovementioned measures provided for in the Banking Act, the Credit Cooperatives Act, and the Regulation Governing the Supervision and Taking-Over of Financial Institutions seriously impact on the shareholders (members), managers and other interested parties of banks and credit cooperatives. Yet these Acts and Regulation provide only for the

銀行法、信用合作社法及金融機構監管接管辦法所定之前開各種措施，對銀行、信用合作社之股東（社員）、經營者及其他利害關係人，既皆有重大影響，該等法規僅就主管機關作成行政處分加以規定，未能對作成處分前，如何情形須聽取股東、社員、經營者或利害關係人陳述之意見或徵詢地方自治團體相關機關（涉及各該地方自治團體經

administrative measures to be adopted by the relevant authority, are totally silent on the circumstances in which the opinions of shareholders, members, managers or interested parties may be sought or the opinion of local government (where financial institutions managed by such government are involved) is solicited before administrative decisions are made. The abovementioned Regulation also allow the competent authority to appoint an organ (institution) or personnel as supervisor or conservator, without consulting the appointees, and allow the conservator to assume the power of management and the disposition and management of property, thus letting the conservator and the competent authority decide the arrangement for the purchase and assumption, in whole or in part, of the operations, assets and liabilities of the relevant financial institution, or to merge with another financial institution, without taking into account the feasibility of a resolution by the shareholders' or members' meeting of the relevant financial institution, or whether such financial institution is in a position to provide timely funding, collateral or other effective means to meet

營之金融機構）之意見設置明文。前述金融機構監管接管辦法允許主管機關逕行指派機關（機構）或人員為監管人或接管人，而不問被指派機關（機構）或人員之意願，並使接管人取得經營權及財產管理處分權，復由接管人及主管機關決定概括讓與全部或部分業務及資產負債，或與他金融機構合併，無須斟酌受接管之金融機構股東或社員大會決議之可行性，亦不考慮該金融機構能否適時提供相當資金、擔保或其他解決其資產不足清償債務之有效方法，皆與憲法保障人民財產權之意旨未盡相符。前述銀行法、信用合作社法及金融機構監管接管辦法，主管機關均應依本解釋意旨儘速檢討修正。

its solvency problem. None of these is in conformity with the constitutional guarantee of the people's property rights. The abovementioned Banking Act, Credit Cooperatives Act and Regulation Governing the Supervision and Taking-Over of Financial Institutions should be promptly reviewed and amended in accordance with this Interpretation.

To avoid the repeated occurrence of unsound management or insolvencies of financial institutions, the competent authority should review the totality of the prevailing supervisory framework to prevent any potential crisis. Insofar as the regulation of credit cooperatives is concerned, due regard should be accorded the provision of Article 145 of the Constitution on the encouragement and support of cooperative enterprises.

Justice Vincent Sze filed dissenting opinion in part.

Justice Yueh-Chin Hwang filed dissenting opinion.

Justice Tong-Schung Tai filed dissenting opinion.

為避免金融機構一再發生經營不善或資產不足清償債務之事件，主管機關允宜通盤檢討現行金融管理機制，俾使危機消弭於未然。對信用合作社之管理，並應注意憲法第一百四十五條獎勵扶助合作事業之意旨，併此指明。

本號解釋施大法官文森提出部分不同意見書；黃大法官越欽、戴大法官東雄分別提出不同意見書。

J. Y. Interpretation No.489（July 30, 1999）*

ISSUE: What is the meaning of the term "other necessary actions" in Article 62-I and -II of the Banking Act and Article 27-I of the Credit Cooperatives Act?

RELEVANT LAWS:

Article 62 of the Banking Act（銀行法第六十二條）; Article 27-I of the Credit Cooperatives Act（信用合作社法第二十七條第一項）.

KEYWORDS:

necessary actions（必要處置）, universal acceptance（概括承受）, compel windup or merger（勒令停業清理或合併）, takeover of the bank（接管銀行）, the principle of proportionality（比例原則）.**

HOLDING: Under Article 62-I and -II of the Banking Act and Article 27-I of the Credit Cooperatives Act , in the event that any credit cooperative conducts its business operation in a manner contrary to its articles or any provisions of law, or is unable to carry out its business operation in a sound manner thus harming

解釋文：信用合作社法第二十七條第一項及銀行法第六十二條第一項、第二項所稱主管機關對違反法令、章程或無法健全經營而損及社員及存款人權益之合作社或因業務或財務狀況顯著惡化之銀行，得分別為撤銷決議、撤換職員、限制發給理、監事酬勞或停止、解除其職務，停止業務限期清理、

* Translated by Professor Wen-Yeu Wang.

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

the rights and interests of its members or depositors, or any bank's business or financial affairs have significantly deteriorated, the competent governing authorities shall impose the following sanctions: quash resolutions; recall or replace employees; restrict the amount of remunerations to directors and supervisors; discontinue or release their official title; compel such cooperative or bank to cease operation and windup business within a time limit; deploy personnel for administration, takeover or merger; issue a dissolution order; revoke their permit; or take other "necessary actions". These "necessary actions" refer to reasonable measures which are necessary in the emergency circumstances whereby even the adoption of the above stated measures stipulated in the legal provisions would not be able to achieve the expected results. These actions are necessarily conducted under the premise that the preconditions stated in Article 27-I of the Credit Cooperatives Act , "In the event the credit cooperative is unable to carry out its business operation in a sound manner thus possibly harming the rights and interests of its

派員監管、接管、合併、命令解散、撤銷許可及其他必要處置。其中必要處置係指在符合信用合作社法第二十七條第一項「無法健全經營而有損及社員及存款人權益之虞時」或銀行法第六十二條第一項「銀行因業務或財務狀況顯著惡化，不能支付其債務或有損及存款人利益之虞時」之前提下，因情況急迫，縱然採取上開法律所舉之措施，勢將不能實現預期效果時，所為不得已之合理手段而言。主管機關對財務狀況顯著惡化、無法健全經營之銀行或信用合作社促使其由其他金融機構概括承受，應合於前述要件外，尚須被概括承受之銀行或信用合作社未能適時提供相當資金、擔保或其他解決其資產不足清償債務之有效方法時，經依相關法令規定辦理概括承受之程序，始符合必要處置之意旨。

members or depositors…" and Article 62-I of the Banking Act , "In the event the bank is unable to satisfy its liabilities or could possibly compromise the interests of its depositors due to the significant deterioration of its financial and business affairs…" are satisfied. The measure of universal acceptance by other financial institutions is sometimes employed by the competent governing authorities on banks or credits cooperatives which have evidenced significant deterioration of their financial affairs or have shown an inability to conduct their business operation in a sound manner. In addition to the satisfaction of the abovementioned conditions, the measure of universal acceptance must be processed in accordance with the procedures stipulated in the relevant provisions. Further, the bank or credit cooperative which has the measure of universal acceptance imposed upon it must have failed to secure the equivalent fund or guarantee, or failed to employ other effective measures to resolve the deficiency of assets and pay off its debts in time. Only thus shall the measure of universal acceptance fall within the meaning of "neces-

sary actions".

REASONING: Article 27-I of the Credit Cooperatives Act states: "In the event that any credit cooperative conducts its business operation in a manner contrary to its articles or any provisions of law, or is unable to carry out its business operation in a sound manner thus possibly harming the rights and interests of its members or depositors, the competent governing authorities shall impose the following sanctions: a) quash resolutions passed in any types of statutory meetings; although any resolutions which are contrary to any law or articles are obviously invalid; b) recall or replace managers or employees, or order the credit cooperatives to impose the necessary sanctions; c) restrict the amount of remunerations to directors and supervisors; d) discontinue or release the official title of the directors and supervisors; e) suspend part of its business operation; f) compel windup or merger; g) order its dissolution; or h) any necessary actions. Article 27-II states: "Sanctions a) to d) shall be directly handled by the district (municipal) govern-

解釋理由書：信用合作社法第二十七條第一項：「信用合作社違反法令、章程或無法健全經營而有損及社員及存款人權益之虞時，主管機關得為左列處分：一、撤銷各類法定會議之決議。但其決議內容違反法令或章程者，當然無效。二、撤換經理人、職員，或命令信用合作社予以處分。三、限制發給理事、監事酬勞金。四、停止或解除理事、監事職務。五、停止部分業務。六、勒令停業清理或合併。七、命令解散。八、其他必要之處置。」第二項：「前項第一款至第四款由縣（市）政府或省（市）政府財政廳（局）逕行處理，並報中央主管機關備查，第五款至第八款應轉請中央主管機關處理。」銀行法第六十二條第一項：「銀行因業務或財務狀況顯著惡化，不能支付其債務或有損及存款人利益之虞時，中央主管機關得勒令停業並限期清理、停止其一部業務、派員監管或接管、或為其他必要之處置，並得洽請有關機關限制其負責人出境。」第二項：「中央主管機關於派員監管或接管時，得停止其股東會、董事或監察人全部或部分職權。」各該法條所定之諸多措施顯係分別授權

mentor the provincial (municipal) department of finance and shall be reported to the central governing authority. Sanctions e) to f) shall be handled by the central governing authority." Article 62-I of the Banking Act states: "In the event a bank is unable to satisfy its liabilities or could possibly compromise the interests of its depositors due to the significant deterioration of its financial and business affairs, the central governing authority shall compel the termination of its business and windup within a time limit, suspend parts of its business operation, deploy personnel for the administration or takeover of the bank, or any other necessary actions. The central governing authority shall also request the relevant authorities to restrict the persons responsible from leaving the country." Article 62-II states: "While in the process of administering or taking over the bank, the central governing authority shall suspend, completely or partially, the authority of the shareholders, directors or supervisors." The measures stipulated in these various provisions authorize the respective competent governing authorities to, after considering the

各級主管機關衡量實際情況，依照比例原則，選擇足以達成維持金融秩序之目的，而社會成本最低並兼顧保護人民財產權之手段。其中所謂必要處置係指在符合信用合作社法第二十七條第一項「無法健全經營而有損及社員及存款人權益之虞時」或銀行法第六十二條第一項「銀行因業務或財務狀況顯著惡化，不能支付其債務或有損及存款人利益之虞時」之前提下，因情況急迫，縱然採取上開法律所舉之措施，勢將不能實現預期效果時，所為不得已之合理手段而言。主管機關對財務狀況顯著惡化、無法健全經營之銀行或信用合作社促使其由其他金融機構概括承受，應合於前述要件外，尚須被概括承受之銀行、信用合作社未能適時提供相當資金、擔保或其他解決其資產不足清償債務之有效方法時，經依相關法令規定辦理概括承受之程序，始符合必要處置之意旨。

actual circumstances and in accordance with the principle of proportionality, select the measures sufficient to achieve the goal of maintaining the financial order while incurring the minimum social cost and safeguarding the people's property rights. The "necessary actions" refer to reasonable measures which are necessary in the emergency circumstances whereby even the adoption of the above stated measures stipulated in the legal provisions would not be able to achieve the expected results. These actions are necessarily conducted under the premise that the preconditions stated in Article 27-I of the Credit Cooperatives Act , "In the event the credit cooperative is unable to carry out its business operation in a sound manner thus possibly harming the rights and interests of its members or depositors…" or Article 62-I of the Banking Act , "In the event the bank is unable to satisfy its liabilities or could possibly compromise the interests of its depositors due to the significant deterioration of its financial and business affairs…" are satisfied. The measure of universal acceptance by other financial institutions is sometimes employed by the

competent governing authorities on banks or credits cooperatives whose financial affairs have significantly deteriorated or which are unable to conduct their business operation in a sound manner. In addition to the satisfaction of the abovementioned conditions, the measure of universal acceptance must be processed in accordance with the procedures stipulated in the relevant provisions. Further, the bank or credit cooperative which has the measure of universal acceptance imposed upon it must have failed to secure the equivalent fund or guarantee, or employ other effective measures to resolve the deficiency of assets and pay off its debts in time. Only thus shall the measure of universal acceptance fall within the meaning of "necessary actions".

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

ISSUE: Article 1 of the Conscription Act provides that all eligible males shall be drafted for military service, and Article 59, Paragraph 2, of the Enforcement Act of the Conscription Act further prescribes that the 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 being null and void?

RELEVANT LAWS:

Articles 7, 13, 20 and 23 of the Constitution（憲法第七條、第十三條、第二十條、第二十三條）; Articles 1, 3, Paragraph 1, 4, 5, 20, Paragraphs 1 and 2, 25, Paragraph 1, and 38, Paragraph 1, Subparagraph 2 of the Conscription Act（兵役法第一條、第三條第一項、第四條、第五條、第二十條第一項、第二項、第二十五條第一項、第三十八條第一項第二款）; Article 59, Paragraphs 1 and 2 of the Enforcement Act of the Conscription Act（兵役法施行法第五十九條第一項、第二項）; Article 19, Paragraph 1, Subparagraphs 4 and 5 of the Regulation Governing the Military Array（召集規則第十

* Translated by Jiunn-rong Yeh.

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

九條第一項第四款、第五款）.

KEYWORDS:

military service（服兵役）, freedom of religious belief（宗教信仰自由）, double jeopardy（一行為重複處罰、一事不再理）, principle of proportionality（比例原則）, national security（國家安全）, equal protection principle（平等保護原則）.**

HOLDING: Article 20 of the Constitution prescribes that the people shall have the duty to perform military service in accordance with laws. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding military service shall 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

解釋文：人民有依法律服兵役之義務，為憲法第二十條所明定。惟人民如何履行兵役義務，憲法本身並無明文規定，有關人民服兵役之重要事項，應由立法者斟酌國家安全、社會發展之需要，以法律定之。憲法第十三條規定：「人民有信仰宗教之自由。」係指人民有信仰與不信仰任何宗教之自由，以及參與或不參與宗教活動之自由；國家不得對特定之宗教加以獎勵或禁制，或對人民特定信仰畀予優待或不利益。立法者鑒於男女生理上之差異及因此種差異所生之社會生活功能角色之不同，於兵役法第一條規定：中華民國男子依法皆有服兵役之義務，係為實踐國家目的及憲法上人民之基本義務而為之規定，原屬立法政策之考量，非為助長、促進或限制宗教而設，且無助長、促進

extend any privileges or disadvantages to people on the basis of their particular religious beliefs. Nonetheless, given the physical differences between males and 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 of performing 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 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 in 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 beliefs of Article

或限制宗教之效果。復次，服兵役之義務，並無違反人性尊嚴亦未動搖憲法價值體系之基礎，且為大多數國家之法律所明定，更為保護人民，防衛國家之安全所必需，與憲法第七條平等原則及第十三條宗教信仰自由之保障，並無牴觸。又兵役法施行法第五十九條第二項規定：同條第一項判處徒刑人員，經依法赦免、減刑、緩刑、假釋後，其禁役者，如實際執行徒刑時間不滿四年時，免除禁役。故免除禁役者，倘仍在適役年齡，其服兵役之義務，並不因此而免除，兵役法施行法第五十九條第二項因而規定，由各該管轄司法機關通知其所屬縣（市）政府處理。若另有違反兵役法之規定而符合處罰之要件者，仍應依妨害兵役治罪條例之規定處斷，並不構成一行為重複處罰問題，亦與憲法第十三條宗教信仰自由之保障及第二十三條比例原則之規定，不相牴觸。

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 informs the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also amount to punishments prescribed in the Act Governing the Punishment of Offences Against Military Service shall be disposed 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: 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 a 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 a basis of their particular religious beliefs. The guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practices, as well as 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 in-

解釋理由書：現代法治國家，宗教信仰之自由，乃人民之基本權利，應受憲法之保障。所謂宗教信仰之自由，係指人民有信仰與不信仰任何宗教之自由，以及參與或不參與宗教活動之自由；國家不得對特定之宗教加以獎勵或禁制，或對人民特定信仰畀予優待或不利益，其保障範圍包含內在信仰之自由、宗教行為之自由與宗教結社之自由。內在信仰之自由，涉及思想、言論、信念及精神之層次，應受絕對之保障；其由之而派生之宗教行為之自由與宗教結社之自由，則可能涉及他人之自由與權利，甚至可能影響公共秩序、善良風俗、社會道德與社會責任，因此，僅能受相對之保障。宗教信仰之自由與其他之基本權利，雖同受憲法之保障，亦同受憲法之規範，除內在信仰之自由應受絕對保障，不得加以侵犯或剝奪外，宗教行為之自由與宗教結社之自由，在必要之最小限度內，仍應受國家相關法律之約束，非可以宗教信仰為由而否定國家及法律之存在。因此，宗教之信仰者，既亦係國家之人民，其所應負對國家之基本義務與責任，並不得僅

tegrity, are, hence, relative rights. Freedom of religious belief, like other fundamental rights, shall be protected in the Constitution while 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 will not be relieved because of their respective religious beliefs. 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 and 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

因宗教信仰之關係而免除。保護人民生命和財產等基本權利乃國家重要之功能與目的，而此功能與目的之達成，有賴於人民對國家盡其應盡之基本義務，始克實現。為防衛國家之安全，在實施徵兵制之國家，恆規定人民有服兵役之義務，我國憲法第二十條規定：人民有依法律服兵役之義務，即係屬於此一類型之立法。惟人民如何履行兵役義務，憲法本身並無明文規定，有關人民服兵役之重要事項，應由立法者斟酌國家安全、社會發展之需要，以法律定之。立法者鑒於男女生理上之差異及因此種差異所生之社會生活功能角色之不同，於兵役法第一條規定：中華民國男子依法皆有服兵役之義務；第三條第一項規定：男子年滿十八歲之翌年一月一日起役，至屆滿四十五歲之年十二月三十一日除役；第四條規定：凡身體畸形、殘廢或有箇疾不堪服役者，免服兵役，稱為免役；第五條規定：凡曾判處七年以上有期徒刑者禁服兵役，稱為禁役。上開條文，係為實踐國家目的及憲法上人民之基本義務而為之規定，原屬立法政策之考量，非為助長、促進或限制宗教而設，且無助長、促進或限制宗教之效果。復次，男子服兵役之義務，並無違反人性尊嚴亦未動搖憲法價值體系之

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 in accordance with laws have the duty to perform military service. 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.

基礎，且為大多數國家之法律所明定，更為保護人民，防衛國家之安全所必需，與憲法第七條平等原則及第十三條宗教信仰自由之保障，並無牴觸。

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 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 in 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 beliefs 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

兵役法施行法第五十九條第二項規定：同條第一項判處徒刑人員，經依法赦免、減刑、緩刑、假釋後，其禁役者，如實際執行徒刑時間不滿四年時，免除禁役。故被免除禁役者，倘仍在適

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 amount to punishments prescribed in the Act Governing the Punishment of Offences Against Military Service shall be accordingly disposed. 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, the 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 defer役年齡，其服兵役之義務，並不因此而被免除，兵役法施行法第五十九條第二項因而規定，由各該管轄司法機關通知其所屬縣（市）政府處理。若另有違反兵役法之規定而符合處罰之要件者，仍應依妨害兵役治罪條例之規定處斷，並不構成一行為重複處罰問題，亦與憲法第十三條宗教信仰自由之保障及第二十三條比例原則之規定，不相牴觸。又犯罪判處徒刑在執行中者，停服現役，稱為停役。停役原因消滅時，回復現役，稱為回役。兵役法第二十條第一項第二款後段及同條第二項定有明文。至於回役之程序如何，兵役法第二十五條第一項第一款、第二款祇分別規定常備軍官、常備士官、常備兵、補充兵在現役期間停役者，為後備軍人，應受後備管理而已，初無關於回役之技術性之程序規定。惟回役核其實質，仍不失為後備軍人平時為現役補缺之性質，依兵役法第三十八條第一項第二款規定，自得對之臨時召集。行政院訂定發布之召集規則第十九條第一項第四款乃規定，停役原因消滅，回復現役，得對之臨時召集，並未逾越兵役法第三十八條第一項第二款規定之範圍，亦未增加人民之負擔，核與憲法法律保留之原則，並無不符。本於同一理由，同規則第十九條第

ment have ended, they have to 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 officer, 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 reserved military service that is supplementary to the 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 Regulation Governing the Military Array enacted by the Executive Yuan dictates that military services 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, 一項第五款，補服義務役期之臨時召集之規定，亦與憲法保障人民權利之意旨無違，併此指明。

of the Conscription Act, nor does it impose additional burdens 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 Regulation 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.

Justice Ho-Hsiung Wang filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋王大法官和雄提出部分不同意見書；劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.491（October 15, 1999）*

ISSUE: Should the grounds for disciplinary actions against civil servants be stipulated by law, or can they be prescribed by the competent administrative agency with administrative regulations? Should due process of law be followed in making a discharge decision?

RELEVANT LAWS:

Articles 18 and 23 of the Constitution（憲法第十八條、第二十三條）; J. Y. Interpretation No. 443（司法院釋字第四四三號解釋）; Articles 12, Paragraph 1, Subparagraph 2, Paragraph 2, and 18 of the Public Functionaries Merit Evaluation Act（公務人員考績法第十二條第一項第二款、第二項、第十八條）.

KEYWORDS:

discharge decision（免職之懲處處分）, right to work（工作權）, right to serve in public service（從事於公務之權利）, clarity requirement of the law（法律明確性原則）, due process of law（正當法律程序）, civil service discipline（文官懲戒）, equal protection of law（法律之平等保護）.**

HOLDING: The right to serve in a public post prescribed in Article 18 of the Constitution aims at guaranteeing the

解釋文：憲法第十八條規定人民有服公職之權利，旨在保障人民有依法令從事於公務之權利，其範圍不惟涉

* Translated by Dennis T. C. Tang.

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people the opportunity for public service in accordance with laws and regulations. Such a right not only concerns the people's right to work and equal protection under law-- so that the state must establish relevant systems regulating the exercise of public authority and the fulfillment of the state's duties and responsibilities-- but also the security of civil employees' rights and interests. The (various) types of discipline of civil servants are punishments imposed by the state on a civil employee for his/her violations of the law and neglect of duty. The power to take disciplinary measures may, within a reasonable extent, be conferred to superior officers by law. A discharge decision made by either a central or a local administrative agency in accordance with the provisions of the Public Functionaries Merit Evaluation Act or other relevant laws and regulations having the effects of restricting the right(s) of people to serve in public post(s) is, in essence, disciplinary. The causes for a discharge must be stipulated by statute so that the intent of Article 23 of the Constitution can be preserved. Article 12, Paragraph 1, Subparagraph 2, of the Pub-

及人民之工作權及平等權，國家應建立相關制度，用以規範執行公權力及履行國家職責之行為，亦應兼顧對公務人員之權益之保護。公務人員之懲戒乃國家對其違法、失職行為之制裁。此項懲戒得視其性質，於合理範圍內，以法律規定由其長官為之。中央或地方機關依公務人員考績法或相關法規之規定對公務人員所為免職之懲處處分，為限制人民服公職之權利，實質上屬於懲戒處分，其構成要件應由法律定之，方符憲法第二十三條之意旨。公務人員考績法第十二條第一項第二款規定各機關辦理公務人員之專案考績，一次記二大過者免職。同條第二項復規定一次記二大過之標準由銓敘部定之，與上開解釋意旨不符。又懲處處分之構成要件，法律以抽象概念表示者，其意義須非難以理解，且為一般受規範者所得預見，並可經由司法審查加以確認，方符法律明確性原則。對於公務人員之免職處分既係限制憲法保障人民服公職之權利，自應踐行正當法律程序，諸如作成處分應經機關內部組成立場公正之委員會決議，處分前並應給予受處分人陳述及申辯之機會，處分書應附記理由，並表明救濟方法、期間及受理機關等，設立相關制度予以保障。復依公務人員考績法第十八

lic Functionaries Merit Evaluation Act prescribes that agencies may record two major demerits at one time in an evaluation for causes. Yet Paragraph 2 of the same Article prescribing that the causes for recording two major demerits at one time shall be promulgated by the Ministry of Civil Service is incompatible with the intent of the Interpretation expounded above. In addition, where the causes for a disciplinary decision are stipulated in abstract concepts by the law, their meaning shall be intelligible for and foreseeable by the regulated civil servants, and shall be verifiable by the courts in judicial review, in order to be in accordance with the principle of clarity and definiteness of law (Rechtsbestimmtheitprinzip). Since a discharge decision against a civil servant carries the effect of restricting the right of people to serve in public posts, an agency that makes such a discharge decision must follow due process of law, such as composing an unbiased committee within the agency for reaching the decision, giving the discharged employee a chance to present or rebut, making the decision in written form with accompanying reasons as

條規定，服務機關對於專案考績應予免職之人員，在處分確定前得先行停職。受免職處分之公務人員既得依法提起行政爭訟，則免職處分自應於確定後方得執行。相關法令應依本解釋意旨檢討改進，其與本解釋不符部分，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

well as instructions regarding the means, time period and competent agency for an appeal. The state must establish relevant systems guaranteeing such procedural rights. The employing agency may, in accordance with Article 18 of the Public Functionaries Merit Evaluation Act, suspend the duties of the discharged employee before the discharge is finalized. Yet the discharged employee is entitled to appeal pursuant to the law and the discharge decision can be implemented only when it is finalized. The relevant laws and regulations should be reviewed and revised in accordance with this Interpretation, whereas those contrary to the Interpretation shall become void within two years from the date of this Interpretation.

REASONING: The right to serve in a public post is aimed at guaranteeing the people the opportunity for public service in accordance with laws and regulations. Such a right concerns the people's right to work and equal protection under law and the state shall enact statutes protecting the rights of civil servants regarding, for example, employ-

解釋理由書：憲法第十八條規定人民有服公職之權利，旨在保障人民有依法令從事於公務之權利，其範圍不惟涉及人民之工作權及平等權，國家應制定有關任用、銓敘、紀律、退休及撫卹等保障公務人員權益之法律，用以規範執行公權力及履行國家職責之行為。公務人員之懲戒乃國家對其違法、失職行為之制裁，此項懲戒為維持長官監督

ment, appointment, discipline, retirement and relief pension, the exercise of public authority and the fulfillment of the state's duties. The (various) types of discipline of civil servants are punishments imposed by the state on a civil employee for his/her violations of law and neglect of duty. Such discipline is necessary for the superiors to preserve the power of oversight, and their exercise may, in view of the nature of the disciplinary measures and within a reasonable extent, be conferred to the superiors. A discharge decision made by either a central or a local administrative agency in accordance with the provisions of the Public Functionaries Merit Evaluation Act or other relevant laws and regulations carrying the effects of restricting the right of people to serve in public post(s) is, in essence, disciplinary. The causes for a discharge must be stipulated by statute so that the intent of Article 23 of the Constitution can be preserved. Whenever the law authorizes the competent agency to promulgate supplemental rules (See the Reasoning of this Yuan Interpretation No. 443) for restricting such a right to serve in public post(s) guaranteed

權所必要，自得視懲戒處分之性質，於合理範圍內，以法律規定由長官為之。中央或地方機關依公務人員考績法或相關法規之規定，對公務人員所為免職之懲處處分，為限制其服公職之權利，實質上屬於懲戒處分。其構成要件應由法律定之，方符憲法第二十三條規定之意旨。關於限制憲法第十八條所定人民服公職之權利，法律固得授權主管機關發布命令為補充規定（參照本院釋字第四四三號解釋理由書），其授權之目的、範圍及內容則應具體明確而後可。惟公務人員考績法第十二條第一項第二款規定各機關辦理公務人員之專案考績，一次記二大過者免職，同條第二項復規定一次記二大過之標準由銓敘部定之。此項免職處分係對人民服公職權利之重大限制，自應以法律定之。上開法律未就構成公務人員免職之標準，為具體明確之規定，與前述解釋意旨有違。又懲處處分之構成要件，法律以抽象概念表示者，不論其為不確定概念或概括條款，均須符合明確性之要求。其意義須非難以理解，且為一般受規範者所得預見，並得經由司法審查加以確認方可。對於公務人員之免職處分既係限制憲法保障人民服公職之權利，自應踐行正當法律程序，諸如作成處分應經機關內部組成

by Article 18 of the Constitution, the purpose, scope and contents of such an authorization has to be concrete and clear. Article 12, Paragraph 1, Subparagraph 2, of the Public Functionaries Merit Evaluation Act prescribes that agencies may record two major demerits at one time in an evaluation for causes. Paragraph 2 of said Article prescribes that the criteria for recording two major demerits at one time should be stipulated by the Ministry of Civil Service (by rules). Such a discharge decision is a primary restriction on the people's right to serve in public post(s); thus, its causes should be prescribed by law. The abovementioned statute does not concretely and clearly set up the criteria for a discharge and thus is contrary to the Interpretation rendered above. In addition, where the causes for a disciplinary decision are stipulated in abstract concepts by the law, either in open-ended or general clauses, their meaning shall be intelligible to and foreseeable by the regulated civil servants, and be verifiable by the courts in judicial review. As a discharge decision against a civil servant will restrict the right of the people to serve in public posts

立場公正之委員會決議，委員會之組成由機關首長指定者及由票選產生之人數比例應求相當，處分前應給予受處分人陳述及申辯之機會，處分書應附記理由，並表明救濟方法、期間及受理機關等，設立相關制度為妥善之保障。復依公務人員考績法第十八條規定，服務機關對於專案考績應予免職之人員，在處分確定前得先行停職。受免職處分之公務人員既得依法提起行政爭訟，則免職處分自應於確定後方得執行。相關法令應依本解釋意旨檢討改進，其與本解釋不符部分，應自本解釋公布之日起，至遲於屆滿二年失其效力。

guaranteed by the Constitution, an agency intending to take such an action must follow due process of law. Such due process of law includes composing an unbiased committee for reaching the decision whose members should be appointed by the head of the agency and elected by the employees in roughly equal ratio; providing the employee to be discharged with a chance to present or rebut; making the decision in written form with accompanying reasons as well as instructions regarding the means, time period and competent agency for appeal; and establishing relevant systems for adequate protection. Furthermore, the discharged employee is entitled to appeal pursuant to the law and the discharge decision can be enforced only when it is finalized. The relevant laws and regulations should be reviewed and revised in accordance with this Interpretation, whereas those contrary to this Interpretation shall become void within two years from the date of this Interpretation.

Justice Geng Wu filed concurring opinion.

Justice Hsiang-Fei Tung filed dissenting opinion.

本號解釋吳大法官庚提出協同意見書；董大法官翔飛、劉大法官鐵錚分別提出不同意見書。

Justice Tieh-Cheng Liu filed dissenting opinion.

J. Y. Interpretation No.492（October 29, 1999）*

ISSUE: Does the directive issued by the Ministry of Economic Affairs, which states that an entity whose business registration has been dissolved or revoked under the Company Act is deemed as a "terminated business," violate the people's property rights protected under Article 15 of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 33, Subparagraph 1 of the Trademark Act（商標法第三十三條第一款）; Articles 25 and 26 of the Company Act（公司法第二十五條、第二十六條）.

KEYWORDS:

right to the exclusive use of trademark（商標專用權）, dissolved company（解散之公司）, liquidation proceedings（清算程序）, termination of business（廢止營業）.**

HOLDING: Article 15 of the Constitution provides the protection of the people's property rights. Since the right to the exclusive use of a trademark is a property right, it falls under the protection of the Constitution. When the trademark pro-

解釋文：人民之財產權應予保障，為憲法第十五條所明定。商標專用權屬於人民財產權之一種，亦在憲法保障之列。惟商標專用權人結束營業，且並無於結束營業前或其後就同一商標專用權授權他人使用或移轉他人繼續營業

* Translated by Chung Jen Cheng.

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prietor terminates business and there is no likelihood that another party will be authorized to use the same exclusive trademark right before or after the termination of business or that the exclusive trademark right will be assigned to another party to continue the business, since the exclusive trademark right has lost its purpose, there is no need to continue the protection. Article 33, Subparagraph 1, of the Trademark Act amended and promulgated on January 26, 1983, prescribed that the right to exclusive use of a trademark shall lapse where the proprietor terminates business before the expiration of the duration of registration. Article 25 of the Company Act prescribes that: "A dissolved company shall not be deemed dissolved to the extent that liquidation proceedings are concerned"; Article 26 of the same Act prescribes that: "The dissolved company referred to in the preceding Article may, during the liquidation proceedings, temporarily operate its business for the purpose of closing and facilitating the liquidation." Therefore, a dissolved company that in fact operates its business and continues its original business activities shall not be deemed dissolved.

之可能時，因其已喪失存在之目的，自無再予保障之必要。中華民國七十二年一月二十六日修正公布之商標法第三十三條第一款規定，商標專用權人於商標專用期間內廢止營業者，其商標專用權當然消滅，即係本此意旨所為對人民財產權之限制；商標專用權人倘僅係暫時停止營業；或權利人本人雖結束營業，而仍有移轉他人繼續營業之可能時，其商標既有繼續使用之價值，即難謂與廢止營業相同，而使其商標專用權當然消滅。公司法第二十五條規定，解散之公司於清算範圍內，視為尚未解散，即法人尚未消滅；同法第二十六條規定，解散之公司在清算時期，得為了結現務及便利清算之目的，暫時經營業務。故解散之公司事實上據此規定倘尚在經營業務中，且係繼續原有之營業者，既不能認已廢止營業，從而其享有之商標專用權，要亦不能認為已當然消滅。於此，其為了結現務及便利清算之目的，自得將商標專用權與其商品經營一併移轉他人。經濟部七十四年八月二十日經（七四）商字第三六一一〇號關於「依公司法為解散登記或撤銷登記者」即係「廢止營業」之函釋部分，其對於人民財產權之限制，顯已逾越上述商標法第三十三條第一款所定之限度，與憲法保障人

Similarly, the trademark of said company cannot be considered to have lapsed naturally. As such, the exclusive trademark right along with its product profile owned by the dissolved company may certainly be transferred to others for the purpose of closing its business and facilitating the liquidation. The restriction applied to the people's property rights by stating that "an entity with business registration dissolved or revoked under the Company Act" is deemed as a "terminated business" in the directive of the Ministry of Economic Affairs No. (74) Shang-Tzi-'361110 dated August 20, 1985, apparently exceeds the bounds set forth in Article 33 (1) of the Trademark Act and runs counter to the intent of the Constitution in protection of the people's property rights and hence, it should no longer be applied.

民財產權之意旨有違，應不予援用。

REASONING: Article 15 of the Constitution provides for the protection of the people's property rights. Since the right to exclusive use of a trademark is a property right, it falls under the protection of the Constitution. A trademark right lasts ten years from the date of registra-

解釋理由書：人民之財產權應予保障，為憲法第十五條所明定；商標專用權既屬人民財產權之一種，當亦在憲法保障之列。商標專用期間為十年，自註冊之日起算，屆期並得依法申請延展註冊；其有授權他人使用或移轉他人者，雖未向商標主管機關登記，亦非無

tion, which may be extended by renewing the registration before its expiration. The authorization of use of a trademark or assignment of a trademark right to another party is valid even if the action is not registered with the trademark authority as prescribed in the first and second paragraphs of Article 24, the second paragraph of Article 26, and the first paragraph of Article 28 of the same Act. The natural lapse of an exclusive trademark right occurs when the trademark proprietor terminates business and there is no likelihood that another party will be authorized to use the same exclusive trademark right before or after the termination of business or that the exclusive trademark right will be assigned to another party to continue the business, for the exclusive trademark right has lost its purpose, so there is no need to continue the protection. Article 33, Subparagraph 1, of the Trademark Act amended and promulgated on January 26, 1983, prescribed that the right to exclusive use of the trademark shall lapse where the proprietor terminates business before the expiration of the duration of registration (this clause became Article

效，此觀商標法第二十四條第一項、第二項、第二十六條第二項、第二十八條第一項之規定即明。商標專用權之當然消滅，係指商標專用權人結束營業，且並無於結束營業前或其後就同一商標專用權授權他人使用或移轉他人繼續營業之可能時，因其已喪失存在之目的，自無再予保障之必要。中華民國七十二年一月二十六日修正公布之商標法第三十三條第一款規定，商標專用權人於商標專用期間內廢止營業者，其商標專用權當然消滅（八十二年十二月二十二日修正移為第三十四條第二款，然文字修正為：「商標專用權人為法人，經解散或主管機關撤銷登記者。但於清算程序或破產程序終結前，其專用權視為存續」；八十六年五月七日修正現行商標法則刪除該款規定），固係本於上述之意旨所為對人民財產權之限制；惟如上之說明，商標專用權人倘僅係暫時停止營業；或權利人本人雖結束營業，而仍有移轉他人繼續營業之可能時，其商標既有繼續使用之價值，即難謂係與廢止營業相同，而使其商標專用權當然消滅。民法第四十條第二項：「法人至清算終結止，在清算之必要範圍內，視為存續。」公司法第二十五條：「解散之公司，於清算範圍內，視為尚未解

34, Subparagraph 2, when the Trademark Act was again amended on December 22, 1993, and its language was also modified to: “the trademark proprietor is a juristic person whose business has been dissolved or who has had his/her business registration revoked by the competent authority. Notwithstanding the foregoing provision, the trademark right is deemed to continue to exist until the conclusion of the liquidation proceeding or bankruptcy procedure”; the aforesaid clause was deleted from the current version of the Trademark Act amended on May 7, 1997), and intended to restrict the people’s property rights. But as described above, if the trademark proprietor only suspends his/her business temporarily or even if the proprietor terminates business, but there is a possibility that he/she will assign the same exclusive trademark right to another party to continue the business, the trademark has the value of continuing use, and hence, this is different from the termination of business that will cause lapse of an exclusive trademark right. Article 40, Paragraph 2, of the Civil Code prescribes that: “Until the liquidation is completed, the dissolved juris-

散。」同法第二十六條：「前條解散之公司，在清算時期中，得為了結現務及便利清算之目的，暫時經營業務。」同法第一百十三條準用第八十四條第二項：「清算人執行前項職務，有代表公司為訴訟上或訴訟外一切行為之權；但將公司營業包括資產負債轉讓於他人時，應得全體股東之同意。」等之規定，或係就法人、公司於解散登記後、清算程序中，仍享有一定範圍之權利能力；或係對解散之公司於清算程序中，仍得為必要之營業行為，且亦得將公司之營業、包含資產或負債移轉於他人之事項予以規範。似此情形，解散之公司既仍享有一定範圍之權利能力，復得將其營業移轉於他人，則該公司之商標即有繼續使用之價值，而非屬前述商標法第三十三條第一款所稱「廢止營業」，其商標專用權並不當然消滅。

tic person is deemed to continue to exist in so far as is necessary for the purpose of the liquidation." Article 25 of the Company Act prescribes that: "A dissolved company shall not be deemed dissolved to the extent that liquidation proceedings are concerned"; Article 26 of the same Act prescribes that: "A dissolved company referred to in the preceding Article may, during the liquidation proceedings, temporarily operate its business for the purpose of closing its business and facilitating the liquidation"; and Article 113 of the same Act where Article 84, Paragraph 2, applies mutatis mutandis prescribes that: "the liquidator has the right to represent the company in all litigious or non-litigious actions when performing the duties described in the preceding Paragraph; but the consent of all shareholders is required in assigning company business, including company assets and liabilities to another party." The aforesaid clauses prescribe that a juristic person or corporation is still entitled to certain rights during the liquidation proceedings after filing dissolution, and stipulate the continuation of necessary business activities by a dis-

solved company yin the process of liquidation, and that a dissolved company may assign its business, including assets and liabilities to another party. Similarly since a dissolved company is still entitled to certain rights and is allowed to assign its business to another party, the trademark of said company retains the value of continuing use and the situation does not coincide with "termination of business" as stated in Article 33, Subparagraph 1, of the Trademark Act, upon which the trademark right lapses.

The directive of the Ministry of Economic Affairs, explanations 3(2) of the letter No. (74) Shang-Tzi-'361110 dated August 20, 1985, stated that "an entity with business registration dissolved or revoked under the Company Act" is deemed as a " terminated business" as prescribed in Article 33, Subparagraph 1, of the Trademark Act. Its interpretation runs counter to the provisions in the Civil Code and Corporate Act described above, and denies the exclusive trademark right of a dissolved juristic person having the value of continuing existence. Such inter-

經濟部七十四年八月二十日經（七四）商字第三六一一〇號函釋，說明三.竟以「依公司法為解散登記或撤銷登記者」認係上述商標法第三十三條第一款所稱「廢止營業」，否定上開民法、公司法之規定，致仍有存續價值之已解散法人之商標專用權，由是當然消滅，其對於人民財產權之限制，顯係逾越上述商標法第三十三條第一款所定之限度，與憲法保障人民財產權之意旨有違，應不予援用。

pretation apparently exceeds the bounds set forth in Article 33, Subparagraph 1, of the Trademark Act and runs counter to the intent of the Constitution in protection of the people's property rights, and hence, should no longer be applied.

J. Y. Interpretation No.493（October 29, 1999）*

ISSUE: Is it unconstitutional to use income ratio as the apportionment basis for costs and expenses of taxable and tax-free income?

RELEVANT:

Article 19 of the Constitution（憲法第十九條）; Interpretation No. 287（司法院釋字第二八七號解釋）; Articles 4-1, 24, Paragraph 1, and 42 of the Income Tax Act（所得稅法第四條之一、第二十四條第一項及第四十二條）.

KEYWORDS:

income tax（所得稅）, apportionment（分攤）, securities transaction tax（證券交易稅）, tax burden（租稅）.**

HOLDING: Article 24, Paragraph 1, of the Income Tax Act stipulates: "The amount of income of a profit-seeking enterprise shall be the net income, i.e., the gross annual income after deduction of all costs, expenses, losses and taxes." Under Article 4-1, the first sentence of the said Act, securities transaction tax shall no longer be levied commencing from January 1, 1990. According

解釋文：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，為所得稅法第二十四條第一項所明定。依所得稅法第四條之一前段規定，自中華民國七十九年一月一日起，證券交易所得停止課徵所得稅；公司投資收益部分，依六十九年十二月三十日修正公布之所得稅法第四十二條，公司組織之營利事業，投資於國內其他非受免徵

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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to Article 42 of the said Act as amended on December 30, 1980, "80% of the investment earnings gained by a profit-seeking enterprise, organized as a company, from its investment in another domestic profit-seeking enterprise, whose business income is taxable, shall not be included in its taxable income." Relevant costs and expenditure regarding the said investments, in accordance with the legislative purposes of the aforementioned laws as well as the principle of equality, shall not be deducted from other taxable income. In connection with apportionment of the costs and expenditure between taxable income and tax-free income, unless such costs and expenditure can be reasonably and clearly entered as cost of either income and shall be deducted from the income from sale of marketable securities, as both the investment income and the income from securities transactions come from the same cost input, it is difficult to use the cost input as an apportionment basis. In Explanation III in a letter of the Ministry of Finance dated February 8, 1994, Ref. No. (83)-Tai-Finance-Tax-831582472, the ratio of income is used to

營利事業所得稅待遇之股份有限公司組織者，其中百分之八十免予計入所得額課稅；則其相關成本費用，按諸收入與成本費用配合之上揭法律規定意旨及公平原則，自亦不得歸由其他應稅之收入項下減除。至應稅收入及免稅收入應分攤之相關成本費用，除可直接合理明確歸屬者得個別歸屬，應自有價證券出售收入項下減除外，因投資收益及證券交易收入源自同一投入成本，難以投入成本比例作為分攤基準。財政部八十三年二月八日台財稅第八三一五八二四七二號函說明三，採以收入比例作為分攤基準之計算方式，符合上開法條規定意旨，與憲法尚無牴觸。惟營利事業成本費用及損失等之計算涉及人民之租稅負擔，為貫徹憲法第十九條之意旨，仍應由法律明確授權主管機關訂立為宜。

calculate the apportionment basis, which conforms to the legislative purpose of the aforesaid articles of law and does not contradict the Constitution. However, since calculation of the costs, expenditure, and losses of a profit-seeking enterprise involves the taxation of the general public, it shall be prescribed by the competent authority under the express authorization of law so as to carry out the legislative purpose of Article 19 of the Constitution.

REASONING: Article 24, Paragraph 1, of the Income Tax Act stipulates: "The amount of income of a profit-seeking enterprise shall be the net income, i.e., the gross annual income after deduction of all costs, expenses, losses and taxes." Under the principle of equality, in case the contributed costs and expenditure regarding taxable income and tax-free income cannot be clearly allocated, the apportionment shall be effected based on the ratio of income. For a profit-seeking enterprise specializing in trading marketable securities, two types of operating revenues are generated from its securities investment. One is the investment income

解釋理由書：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，為所得稅法第二十四條第一項所明定。免稅所得與應稅所得之投入成本及費用若無法明確劃分歸屬者，依公平原則，自應以收入比例作為分攤之基準。以有價證券買賣為專業之營利事業，其經營有價證券投資業務產生之營業收入計有二種。一為有價證券未出售前因持有有價證券而獲配股息及紅利所取得之投資收益收入，一為因出售有價證券而產生之證券交易收入。投資收益部分，依所得稅法第四十二條規定，公司組織之營利事業，投資於國內其他非受免徵營利事業所得稅待遇之股份有限

from dividends and bonus of marketable securities held before sale. The other is the income from sale of marketable securities. Under Article 42 of the Income Tax Act, 20% of the investment income received by a profit-seeking enterprise organized as a company from its investment in another domestic profit-seeking enterprise which is not exempt from business income tax shall be taxable, and the related operating costs and interest expenditure shall be allowed to be deducted within such taxable scope. For the remaining 80% tax-free portion, the related operating costs and interest expenditure shall be deducted from investment income. In connection with trading of securities, under Article 4-1 of the Income Tax Act, securities transaction income tax shall no longer be levied commencing from January 1, 1990, and the related operating costs and interest expenditure shall be deducted from income from securities trading. As a result, in the case of an enterprise specializing in trading marketable securities, the operating costs and interest expenditure shall be allotted respectively as cost of investment income and cost of

公司組織者，百分之二十為應稅所得，其相關營業費用及利息支出，應在該課稅範圍內准予列支，其餘百分之八十免稅部分，其相關營業費用及利息支出，應配合自投資收益收入項下減除。證券交易部分，依所得稅法第四條之一規定，自七十九年一月一日起，證券交易所得停止課徵所得稅，其相關營業費用及利息支出，應配合自證券交易收入項下減除。從而以買賣有價證券為專業之公司，其營業費用及利息支出，即需分別攤歸投資收益及證券交易收入負擔。至分攤方式，除可直接合理明確歸屬者得個別歸屬，應自有價證券出售收入項下減除外，因投資收益及證券交易收入源自同一投入成本，難以投入成本比例作為分攤基準。財政部八十三年二月八日台財稅第八三一五八二四七二號函說明：「三、以有價證券買賣為專業之營利事業，其營業費用及借款利息，除可合理明確歸屬者得個別歸屬認列外，應按核定有價證券出售收入、投資收益、債券利息收入及其他營業收入比例，計算有價證券出售部分應分攤之費用及利息，自有價證券出售收入項下減除」，係採以收入比例作為分攤基準之計算方式，符合上開立法意旨，與憲法尚無牴觸。惟營利事業成本費用及損失等之計

securities trading income. For the apportionment method, unless the costs and expenditure can be reasonably and clearly entered as cost of either income and shall be deducted from the income from sale of marketable securities, as both the investment income and the income from securities transactions come from the same cost input, it is difficult to use the cost input as an apportionment basis. The letter of the Ministry of Finance dated February 8, 1994, Ref. No. (83)-Tai-Finance-Tax-831582472, stated: "III. In connection with the operating costs and interest payments for loans, unless they can be reasonably and clearly entered under specific items, an enterprise specializing in trading of securities shall calculate the expense and interest allocable for sale of marketable securities in proportion to the income from sale of marketable securities, investment returns, interest income from bonds, and other operating revenues, and deduct such from the income from sale of marketable securities." The calculation of apportionment is based on the ratio of income. This conforms to the legislative purpose of the aforesaid articles of law

算涉及人民之租稅負擔，為貫徹憲法第十九條之意旨，仍應由法律明確授權主管機關訂立為宜。又聲請人以其課稅事實發生於七十九年度，而主管稽徵機關竟引用財政部八十三年所為計算方法之函釋，有違法令不溯及既往原則一節，查行政主管機關就行政法規所為之釋示，係闡明法規之原意者，應自法規生效之日起有其適用，業經本院釋字第二八七號解釋釋示在案，不生牴觸憲法問題。

and does not contradict the Constitution. However, since calculation of the costs, expenditure, and losses of a profit-seeking enterprise involves the taxation of the general public, it shall be prescribed by the competent authority under express authorization of law so as to carry out the legislative purpose of Article 19 of the Constitution. Furthermore, the applicant contended that the fact of taxation occurred in 1990, while the competent authority in charge of tax levy cited the 1994 letter of the Ministry of Finance regarding the calculation method, which violated the principle that the law does not apply retroactively. However, if the interpretation of administrative laws and regulations by the relevant administrative competent aims to interpret the legislative purpose of the laws and regulations concerned, such interpretation shall be applicable upon the relevant laws and regulations taking effect. This has been interpreted per this Yuan Interpretation No. 287, and there is no contradiction with the Constitution.

J. Y. Interpretation No.494（November 18, 1999）*

ISSUE: The Labor Standards Act provides that the minimum standard regarding an increase of overtime pay specified by Article 24 of the said Act is applicable to the types of business specified in Article 3 of the said Act. Is the said standard applicable as well to supervisory, intermittent or other special types of jobs not within the categories of the aforesaid Article 24?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 3, 24 and 84-1 of the Labor Standards Act（勞動基準法第三條、第二十四條、第八十四條之一）; Article 50-2 of the Enforcement Rules of the Labor Standards Act （勞動基準法施行細則第五十條之二）.

KEYWORDS:

labor（勞工）, standard of working condition（勞動條件）.**

HOLDING: For protecting the workers' rights and interests, to strengthen the labor-management relationship and promote social and economic development, the Labor Standards Act was

解釋文：國家為保障勞工權益，加強勞雇關係，促進社會與經濟發展，而制定勞動基準法，規定勞工勞動條件之最低標準，並依同法第三條規定適用於同條第一項各款所列之行業。事

* Translated by Assistant Professor Y. K. Huang.

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thereby enacted by the State to provide minimum standards of labor conditions applicable to the industries listed in Article 3 of the Labor Standards Act. Although the business entity may, subject to the character of business and style of labor, separately enter into agreement with the workers in respect of the standards of working conditions, the conditions agreed to in such agreement should in no event provide less than the minimum standards set out by the Labor Standards Act. After the implementation of the Labor Standards Act, the provision relating to the overtime wage payment of the industries applicable to the Labor Standards Act shall thereupon apply to Article 24 of the same Act to implement thoroughly the intent of the law to protect the workers' rights and interests. Article 84-1 of the Act, relating to supervisory, intermittent or other special types of jobs, which should not be subject to the restriction of the above law in relation to working hours, national holidays and regular days off, was enacted as a supplement to the Act on December 27, 1996, and is not applicable to the matters incurred before

業單位依其事業性質以及勞動態樣，固得與勞工另訂定勞動條件，但不得低於勞動基準法所定之最低標準。關於延長工作時間之加給，自勞動基準法施行後，凡屬於該法適用之各業自有該法第二十四條規定之適用，俾貫徹法律保護勞工權益之意旨。至監視性、間歇性或其他性質特殊工作，不受上開法律有關工作時間、例假、休假等規定之限制，係中華民國八十五年十二月二十七日該法第八十四條之一所增訂，對其生效日期前之事項，並無適用餘地。

the effective date of that Article.

REASONING: Based on the intent of the Constitution to protect the people's rights of existence and work, and to promote the workers' livelihood, the Labor Standards Act was thereby enacted. For purposes of protecting workers' rights and interests, strengthening the labor-management relationship and to promote social and economic development, the Labor Standards Act provides the minimum standards of working conditions in relation to the wages, working hours, time off, leave of absence, retirement and compensation for occupational accidents applicable to the industries listed in Article 3, Paragraph 1, of the Labor Standards Act. Furthermore, in order to implement thoroughly the intent of the law to protect the workers' rights and interests, a supplement was added to Article 3, Paragraph 3, on December 27, 1996, to ensure that the law would be applied to all kinds of employee-employer relations, at least before the end of 1998, except for certain cases where the application is especially difficult.

解釋理由書：勞動基準法依據憲法維護人民生存權、工作權及改善勞工生活之意旨，以保障勞工權益，加強勞雇關係，促進社會與經濟發展為目的，而規定關於工資、工作時間、休息、休假、退休、職業災害補償等勞工勞動條件之最低標準，並依同法第三條規定適用於同條第一項各款所列之行業；且於八十五年十二月二十七日修正之第三條條文中增列第三項，規定於八十七年底以前，除確有窒礙難行者外，適用於一切勞雇關係，確保所有勞工皆得受本法之保障，以貫徹法律保護勞工權益之意旨。

Although the business entity should apply to the Labor Standards Act subject to the character of the business, but the styles of labor of various businesses are extremely different. To the workers engaged in supervisory jobs, supervision is their principal duty and to be deployed at a fixed place. The degree of tenseness of their bodies and spirits is normally lower than regular workers'. To the workers engaged in intermittent jobs, the way to proceed their work is normally that the waiting hours are longer than the working hours. To the business with those characters, although the business entity may separately enter into agreement with the workers in respect of the standards of working conditions, the conditions agreed to should in no event provide less than the minimum standards set out by the Labor Standards Act. According Article 84-1 of the Act, which was added to the Act on December 27, 1996, irrespective of whether the worker is engaged in supervisory, intermitted or other special types of jobs, such work should be approved and announced by the relevant central competent authority; and the written agreement

事業單位固應依其事業性質適用勞動基準法，但各業之勞動態樣甚為分殊，其中從事監視性性質之工作者，原則上於一定之場所就一定之配置，以監視為其本來之業務，其身體與精神之緊張程度通常較低；從事間歇性性質之工作者，其進行之方式，等待時間較工作時間為長，就該等性質之工作，雖得與勞工另訂定勞動條件，惟不得低於勞動基準法所定之最低標準。就是否屬於監視性、間歇性或其他性質特殊之工作者，依八十五年十二月二十七日增訂之第八十四條之一規定，應經中央主管機關核定公告；雇主依同條規定與勞工所訂立之勞動條件書面約定，關於工作時間等事項，亦應報請當地主管機關核備，並非雇主單方或勞雇雙方所得以決定；且依八十六年六月十二日新修正之同法施行細則第五十條之二規定，其內容應包括職稱、工作項目、工作權責或工作性質、工作時間、例假、休假、女性夜間工作等有關事項。惟關於延長工作時間之加給，自勞動基準法施行後，凡屬於該法適用之各業自有該法第二十四條規定之適用。至監視性、間歇性或其他性質特殊工作，不受上開法律有關工作時間、例假、休假等規定之限制，係前述該法第八十四條之一所增訂，對

as to the working conditions in respect of the working hours, etc., should be made between the employer and workers in accordance with that Article. It should not merely be mutually agreed upon by the employer and workers, but should also be reported to and approved by the relevant local competent authority. Furthermore, according to Article 50-2 of the Enforcement Rules of the Labor Standards Act as amended on July 12, 1997, the description of the working conditions should include the position, item, responsibility or character, working hours, national holidays, regular days off, female workers' night shift, etc. After the implementation of the Labor Standards Act, the provision relating to the overtime wage payment to the industries applicable to the Labor Standards Act should apply to Article 24 of the Labor Standards Act. Article 84-1 of the Act, relating to supervisory, intermittent or other special types of jobs, which should not be subject to the restriction of the above law in relation to working hours, national holidays and regular days off, was enacted as a supplement to the Act as aforesaid, and is not applicable to

其生效日期前之事項，並無適用餘地。又工作時間或休息時間之計算，為按各行業之性質，依有關法令認定事實之問題，不在本件解釋範圍，併此敘明。

the matters incurred before the effective date of that Article. Furthermore, the calculation of working hours and rest is a matter of fact which shall be decided by the related ordinance or regulations subject to the character of various businesses is beyond the scope of this Interpretation.

J. Y. Interpretation No.495（November 18, 1999）*

ISSUE: Is Article 31-1 of the Customs Smuggling Control Act unconstitutional by providing that, where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contract and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J. Y. Interpretation No. 275（司法院釋字第二七五號解釋）; Articles 1, 3 and 31-1 of the Customs Smuggling Control Act（海關緝私條例第一條、第三條、第三十一條之一）.

KEYWORDS:

import（進口）, export（出口）, customs duty（關稅）, declaration（申報）, Customs （海關）, seizure（查緝）, Hatch List（艙口單）, manifest（載貨清單）, transshipment manifest（轉運艙單）, carriage contract（運送契約）.**

HOLDING: As expressly provided in Articles 1 and 3 of the Customs

解釋文：凡規避檢查、偷漏關稅或逃避管制，未經向海關申報而運輸

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Smuggling Control Act (hereinafter the "Act"), any person who imports/exports goods into/out of the ROC without filing declaration with the Customs, in an attempt to avoid inspection, evade customs duty, or avoid control, shall have his/her goods subject to inspection and seizure by the Customs. Article 31-1 of the Act provides: "Where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contracts and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake." The said provision imposes upon importers and exporters the obligations to make true statements and declarations in the hatch list, manifest, transshipment manifest, or carriage contracts and documents in accordance with the general practices and procedures of international trade and navigation. Goods proven to be shipped by mistake are exempt from confiscation. The condition of liability does not exclude

貨物進、出國境者，海關應予查緝，海關緝私條例第一條及第三條定有明文。同條例第三十一條之一規定：「船舶、航空器、車輛或其他運輸工具所載進口貨物或轉運本國其他港口之轉運貨物，經海關查明與艙口單、載貨清單、轉運艙單或運送契約文件所載不符者，沒入其貨物。但經證明確屬誤裝者，不在此限」，係課進、出口人遵循國際貿易及航運常規程序，就貨物與艙口單、載貨清單、轉運艙單或運送契約文件，誠實記載及申報之義務，並對於能舉證證明確屬誤裝者，免受沒入貨物之處分，其責任條件未排除本院釋字第二七五號解釋之適用，為增進公共利益所必要，與憲法第二十三條尚無牴觸。

the application of this Yuan Interpretation No. 275, is necessary for enhancing public interests, and does not contradict Article 23 of the Constitution.

REASONING: The Customs is responsible for inspection and seizure with respect to the smuggling of goods for import or export. According to Articles 1 and 3 of the Act, the term "smuggling goods for import or export" refers to the transportation of goods into or out of the ROC without filing of declaration with the Customs in an attempt to avoid inspection, evade customs duty, or avoid control. The legislators shall, taking into consideration the international trade practice, the operation process of the Customs and its implementation technique, determine how the Customs should conduct inspections and what measures should be taken to prevent smuggling. This is a matter for legislative decision. With respect to the people's act subject to administrative penalty due to failure to perform obligations under the law, if the law does not specifically require, the penalty is not necessarily conditioned on willfulness, but fault is still

解釋理由書：私運貨物進出口之查緝由海關為之，而所謂私運貨物進口、出口者，係指規避檢查、偷漏關稅或逃避管制，未經向海關申報而運輸貨物進、出國境者而言，海關緝私條例第一條及第三條定有明文。海關究應如何執行各項檢查及採行何種措施以達成防堵私運貨物之目的，應由立法者參酌國際貿易慣例、海關作業實務與執行技術而為決定，屬立法裁量之事項。人民違反法律上義務而應受行政罰之行為，法律上無特別規定時，雖不以出於故意為必要，仍須以過失為其責任條件。但應受行政罰之行為，僅需違反禁止規定或作為義務，而不以發生損害或危險為要件者，推定為有過失，於行為人不能舉證證明自己無過失時，即應受處罰，業經本院釋字第二七五號解釋在案。海關緝私條例第三十一條之一規定：「船舶、航空器、車輛或其他運輸工具所載進口貨物或轉運本國其他港口之轉運貨物，經海關查明與艙口單、載貨清單、轉運艙單或運送契約文件所載不符者，

a requirement for the liability. However, where an act is subject to administrative penalty for the mere fact of violating the prohibitive provision of law or obligation of act rather than conditioned on the occurrence of damage or hazard, it is presumed that fault is involved. If the wrongdoer fails to prove his/her innocence with evidence, he/she shall be punished. This has been interpreted per this Yuan Interpretation No. 275. Article 31-1 of the Act provides: "Where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contracts and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake." Under normal international trade circumstances, exporters are obliged to deliver accurate documents for carriers to fill out, and importers should demand shippers to ship goods as specified in contracts and documents to avoid violating the laws of the country of importation due to discrepancies between imports and the cargo. Article 31-1 of the Act provides: "Where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contracts and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake." Under normal international trade circumstances, exporters are obliged to deliver accurate documents for carriers to fill out, and importers should demand shippers to ship goods as specified in contracts and documents to avoid violating the laws of the country of importation due to discrepancies between imports and the cargo. Article 31-1 of the Act provides: "Where the Customs finds that the goods imported or transported for transshipment to other domestic ports by vessels, aircraft, vehicles or other means of transportation are inconsistent with those stated in the hatch list, manifest, transshipment manifest, or carriage contracts and documents, such goods shall be confiscated, unless it is evidenced that shipment has been made by mistake." Under normal international trade circumstances, exporters are obliged to deliver accurate documents for carriers to fill out, and importers should demand shippers to ship goods as specified in contracts and documents to avoid violating the laws of the country of importation due to discrepancies between imports and the cargo.

沒入其貨物。但經證明確屬誤裝者，不在此限」，係因在正常國際貨物買賣情況下，出口人有義務交付正確文件供運送人據以填載，而進口人也應要求託運人裝運依契約文件所買賣之貨物，以避免進口貨物與運送契約文件不符，致違反進口國法令。從而本條係課進、出口人遵循國際貿易及航運常規程序，就貨物與艙口單、載貨清單、轉運艙單或運送契約文件，誠實記載及申報之義務，並對於能舉證證明確屬誤裝者，免受沒入貨物之處分，其責任條件未排除本院釋字第二七五號解釋之適用，為增進公共利益所必要，與憲第二十三條尚無牴觸。

riage contracts and documents. The said provision of law imposes upon importers and exporters the obligations to make true statements and declarations in the hatch list, manifest, transshipment manifest, or carriage contracts and documents in accordance with the general practices and procedures of international trade and navigation. Goods proven to be shipped by mistake are exempt from confiscation. The condition of liability does not exclude the application of this Yuan Interpretation No. 275, is necessary for enhancing public interests, and does not contradict Article 23 of the Constitution.

J. Y. Interpretation No.496（December 3, 1999）*

ISSUE: Are the Ministry of Finance's Directive Ref. No. TTSF-2665 dated September 2, 1970, and No. TTS-770656151 dated May 18, 1988, which provide that "where the non-operating income is less than non-operating losses, such income shall be considered as zero," unconstitutional?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; J. Y. Interpretation Nos. 420 and 493（司法院釋字第四二〇號、第四九三號解釋）; Act of Encouragement of Investment（獎勵投資條例）; Income Tax Act（所得稅法）.

KEYWORDS:

duty of tax payment（納稅義務）, encouragement of investment（獎勵投資）, non-operating income（非營業收入）.**

HOLDING: Article 19 of the Constitution stipulates: "The people shall have the duty of paying taxes in accordance with law," which means that the people shall have the duty to make tax payment and the privilege to enjoy tax

解釋文：憲法第十九條規定「人民有依法律納稅之義務」，係指人民有依法律所定要件負繳納稅捐之義務或享減免繳納之優惠而言。稅法之解釋，應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

reduction or exemption in accordance with the requirements set forth by law. The tax laws shall be interpreted in accordance with the legislative purpose of each of such laws based on the spirit of the principle of taxation by law, and take into consideration the economic meaning and the principle of equality in connection with substantive taxation. The Ministry of Finance issued a directive Ref. No. TTSF-26656 dated September 2, 1960, and a letter Ref. No. TTS-770656151 dated May 18, 1988, to amend the calculation formula for deducting and exempting the income tax of the profit-seeking enterprises entitled to the encouragement. The said directive/letter relates to the interpretation of the authority who integrates the relevant provisions of the Act of Encouragement of Investment and the Income Tax Act to facilitate the operation of both the tax levying agency and taxpayer. In the said interpretation, it was stated that "where the non-operating income is less than non-operating losses, the balance shall be considered as zero." This is to avoid the consequence that the income from non tax-free products is also exempt

及實質課稅之公平原則為之。財政部中華民國五十九年九月二日台財稅發第二六六五六號令及七十七年五月十八日台財稅第七七〇六五六一五一號函，核發修正獎勵減免營利事業所得稅計算公式，乃主管機關為便利徵納雙方徵繳作業，彙整獎勵投資條例及所得稅法相關規定所為之釋示，其中規定「非營業收入小於非營業損失時，應視為零處理」，係為避免產生非免稅產品所得亦不必繳稅之結果，以期符合該條例獎勵項目之產品其所得始可享受稅捐優惠之立法意旨。惟相關之非營業損失，如可直接合理明確定其歸屬者，應據以定其歸屬外，倘難以區分時，則依免稅產品銷貨（業務）收入與應稅產品銷貨（業務）收入之比例予以推估，始符合租稅公平原則。有關機關應依本解釋意旨從速檢討修正相關法令，併此指明。

from tax so as to conform to the legislative intent that only the income from goods meeting the criteria of encouragement is entitled to tax benefits. However, in connection with related non-operating losses, those that can be directly categorized in a reasonable and clear manner shall be so categorized. If it is difficult to make a distinction, the calculation shall be made based on the ratio of sales revenue from tax-free goods (business) to the sales revenue from taxable goods (business) so as to comply with the principle of taxation fairness. The relevant authorities shall promptly review and amend relevant laws and regulations in accordance with the intent of this Interpretation.

REASONING: Article 19 of the Constitution stipulates that the people shall have the duty of paying taxes in accordance with the law, which means that the people have the duty of tax payment or the privilege of tax deduction or exemption in accordance with the subject of tax payment, tax item, tax rate, tax payment method, and tax deduction/exemption prescribed by law. The laws involving taxa-

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指人民有依法律所定之納稅主體、稅目、稅率、納稅方法及稅捐減免等項目，負繳納稅捐之義務或享受減免稅捐之優惠而言。涉及租稅事項之法律，其解釋應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之，業經本院釋字第四二〇號解釋在案。主管機關雖得基於職

tion shall be interpreted in accordance with the legislative purpose of each of such laws based on the spirit of the principle of taxation by law, and take into consideration the economic meaning and the principle of equality in connection with substantive taxation. The above has been interpreted per this Yuan Interpretation No. 420. Though the competent authority may make necessary interpretation ex officio for the enforcement of taxation laws, it is a matter of course that the principles of law first mentioned above should be met.

權，就稅捐法律之執行為必要之釋示，惟須符合首開意旨，乃屬當然。

The Act of Encouragement of Investment (becoming void upon expiration on December 31, 1990) was enacted for the purposes of encouraging investment activities and accelerating the national economic development. Tax deduction was adopted as a major encouragement measure to realize the legislative purpose. To ensure that all the productive enterprises and profit-seeking enterprises falling within the encouragement scope are equally benefited, and that improper acquisition of tax deduction/exemption

獎勵投資條例（已於七十九年十二月三十一日因施行期間屆滿失效）係為獎勵投資活動，加速國家經濟發展之目的所制定，採用稅捐減免優惠為主要獎勵方法，以實現其立法意旨。而為期符合獎勵範圍之各種生產事業及營利事業均能公平同霑其利，並防止以迴避租稅行為獲取不正當減免稅捐優惠，規定有各種享受獎勵之條件，必須合於獎勵類目及獎勵標準者，始得享有稅捐減免之優惠。財政部五十九年九月二日台財稅發第二六六五六號令及七十七年五月十八日台財稅第七七〇六五六一五一號

privileges through circumvention of taxes may be prevented, various conditions for the entitlement to the encouragement were prescribed, and only those who meet the encouragement categories and criteria can enjoy the tax deduction/exemption privileges. The Ministry of Finance issued a directive Ref. No. TTSF- 26656 dated September 2, 1960, and a letter Ref. No. TTS-770656151 dated May 18, 1988, to amend the calculation formula for deducting and exempting the income tax of the profit-seeking enterprises entitled to the encouragement. The said directive/letter relates to the interpretation of the competent authority who integrates the relevant provisions of the Act of Encouragement of Investment and the Income Tax Act to facilitate the operation of both the tax levying agency and taxpayer. In the said interpretation, it was stated that "where the non-operating income is less than non-operating losses, the balance shall be considered as zero." This is to avoid the consequence that the income from non-tax-free products is also exempt from tax, which conforms to the legislative intent of the statute that only the income from

函，核發獎勵減免營利事業所得稅計算公式，乃主管機關為便利徵納雙方徵繳作業，彙整獎勵投資條例及所得稅法相關規定所為之釋示，其中規定「非營業收入小於非營業損失時，應視為零處理」，係為避免產生非免稅產品所得亦不必繳稅之結果，與該條例對稅捐減免優惠以獎勵項目之產品所得為限之立法意旨相符。

goods meeting the criteria of encouragement is entitled to tax deduction / exemption privileges.

As stated in the explanations of the said directive/letter of the Ministry of Finance, with respect to the balance of "non-operating income" less "non-operating losses," if the "non-operating losses" are more than the "non-operating income," thus resulting in a non-operating deficit, the balance shall be considered as zero. However, there are numerous non-operating loss items, such as interest expenditure, exchange loss, inventory loss from tax-free goods, or losses resulting from disasters. Therefore, in connection with non-operating losses related to business items, those that can be directly categorized in a reasonable and clear manner shall be specifically categorized. If it is difficult to make a distinction, the calculation shall be made based on the ratio of sales revenue from tax-free goods (business) to the sales revenue from taxable goods (business) so as to comply with the principle of taxation fairness (See this Yuan Interpretation No. 493). The relevant authorities should promptly review and amend relevant laws and regulations in accordance with the explanations of this interpretation. This is hereby explained.

上開財政部令函說明固謂：計算公式中「非營業收入」減「非營業損失」之餘額，若「非營業損失」大於「非營業收入」而發生營業外虧損時，應視為零處理。惟查相關之非營業損失項目繁多，如利息支出、兌換損失、免稅產品盤損或發生災害之損失等皆屬之。故與營業項目相關之非營業損失，如可直接合理明確定其歸屬者，應具體定其歸屬外，倘難以區分時，則依免稅產品銷貨（業務）收入與應稅產品銷貨（業務）收入之比例予以推估，始符合租稅公平原則（參照本院釋字第四九三號解釋）。有關機關應依本解釋意旨從速檢討修正相關法令，併此指明。

vant authorities shall promptly review and amend relevant laws and regulations in accordance with the intent of this Interpretation.

J. Y. Interpretation No.497（December 3, 1999）*

ISSUE: Is the regulation enacted by the Ministry of the Interior constitutional in specifying the qualifications, conditions, permission procedure, and length of stay for people from mainland China who apply for entry into the Taiwan area?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 11 of the Amendment of the Constitution（憲法增修條文第十一條）; Articles 10, 17 and 18 of the Act Governing Relations between People of the Taiwan Area and Mainland Area（臺灣地區與大陸地區人民關係條例第十條、第十七條、第十八條）.

KEYWORDS:

freedom of residence（居住自由）, prevent infringement upon the freedoms of other persons（防止妨害他人自由）, to avert imminent crisis（避免緊急危難）, to maintain social order（維持社會秩序）, to advance public welfare（增進公共利益）.**

HOLDING: The Act Governing Relations between People of the Taiwan Area and Mainland Area (hereinafter the"

解釋文：中華民國八十一年七月三十一日公布之臺灣地區與大陸地區人民關係條例係依據八十年五月一日公

* Translated by Professor Fuldien Li.

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

Act"), promulgated on July 31, 1992, is enacted in accordance with Article 10 of the Amendment to the Constitution promulgated on May 1, 1991 (presently Article 11 of the prevailing Amendment to the Constitution), which states: "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 law." It is a special law governing the rights and obligations between the peoples of the Taiwan area and the Mainland area prior to the reunification of the nation. As authorized by Articles 10 and 17 of the Act, the Ministry of the Interior has enacted the Regulation Governing the Approval of Entry of People from the Mainland Area Into the Taiwan Area and the Regulation Governing the Approval of Permanent or Temporary Residence for the People from the Mainland Area, which Regulations stipulate the qualifications, conditions, permission procedure and length of stay concerning the entry of said people into the Taiwan area, are to protect the security and welfare of the people of the Taiwan area, and are in accordance with the legis-

布之憲法增修條文第十條（現行增修條文改列為第十一條）「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定」所制定，為國家統一前規範臺灣地區與大陸地區間人民權利義務之特別立法。內政部依該條例第十條及第十七條之授權分別訂定「大陸地區人民進入臺灣地區許可辦法」及「大陸地區人民在臺灣地區定居或居留許可辦法」，明文規定大陸地區人民進入臺灣地區之資格要件、許可程序及停留期限，係在確保臺灣地區安全與民眾福祉，符合該條例之立法意旨，尚未逾越母法之授權範圍，為維持社會秩序或增進公共利益所必要，與上揭憲法增修條文無違，於憲法第二十三條之規定亦無牴觸。

lative purpose of the Act. It is essential to maintain the social order and to advance the public welfare; hence, such Regulations conform to the aforesaid Article of the Amendments to the Constitution, are within the scope of the delegation by such Act and are not in violation of said Amendment and Article 23 of the Constitution.

REASONING: Although Article 10 of the Constitution stipulates that the people shall have freedom of residence and change of residence, such freedoms may be restricted by law in order to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain the social order or to advance the public welfare pursuant to Article 23 thereof. In addition, Article 10 of the Amendment to the Constitution, promulgated on May 1, 1991 (presently Article 11 of the prevailing Amendment to the Constitution) states: "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 law." Promulgated on

解釋理由書：人民有居住遷徙之自由，固為憲法第十條所保障，惟為防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益之必要，得以法律限制之，憲法第二十三條亦有明文。又八十年五月一日公布之憲法增修條文第十條（現行增修條文改列為第十一條）規定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定。」八十一年七月三十一日公布之臺灣地區與大陸地區人民關係條例係依上開增修條文所制定，為國家統一前確保臺灣地區安全與民眾福祉，規範臺灣地區與大陸地區人民間權利義務之特別立法。再者，法律授權訂定命令，如涉及限制人民之自由權利時，其授權之目的、範圍及內容固須符合具體明確之要件；若法律僅為概

July 31, 1992, the Act Governing Relations between People of the Taiwan Area and Mainland Area has been enacted in accordance with said Article 10. It is a special law governing the rights and obligations between the peoples of the Taiwan area and the Mainland area to ensure the security and public welfare of the Taiwan area before the reunification of the nation. If delegation by the legislative to the executive branch to implement the law by ordinance concerns the freedoms and rights of the people, the purpose, scope and content of such delegation should be explicit and concrete. If the legislature only makes a general delegation, construction of the legislative intent should be made from the related meanings of the entirety of the law, not being restricted by the respective characters in the specific provision of law (See Interpretation No. 394). According to said Article 10, "Unless permission is granted by the competent authority, no people of the Mainland area may enter the Taiwan area. (Paragraph 1)"; "People of the Mainland area who have entered the Taiwan area by permission may not engage in any activity

括授權時，則應就該項法律整體所表現之關聯意義以推知立法者授權之意旨，而非拘泥於特定法條之文字（參照本院釋字第三九四號解釋）。內政部依該條例第十條「大陸地區人民非經主管機關許可，不得進入臺灣地區」（第一項）、「經許可進入臺灣地區之大陸地區人民，不得從事與許可目的不符之活動或工作」（第二項）、「前二項許可辦法，由有關主管機關擬訂，報請行政院核定後發布之」（第三項），第十七條第一項「大陸地區人民有左列情形之一者，得申請在臺灣地區居留：一、臺灣地區人民之配偶，結婚已滿二年或已生產子女者。二、其他基於政治、經濟、社會、教育、科技或文化之考量，經主管機關認為確有必要者」，同條第七項（現行條文為第八項）「前條及第一項申請定居或居留之許可辦法，由內政部會同有關機關擬訂，報請行政院核定後發布之」，及同條例第十八條第一項第二款，進入臺灣地區之大陸地區人民，經許可入境，已逾停留期限者，治安機關得逕行強制出境等規定，於八十二年二月八日以內政部臺（八二）內警字第八二七三四六六號令發布「大陸地區人民進入臺灣地區許可辦法」、臺（八二）內警字第八二七三四五九號令

or take up any job inconsistent with the purposes for which the permission was granted. (Paragraph 2)"; "Rules governing the granting of the permission, referred to in the two preceding paragraphs of this Article, shall be formulated by the competent authorities concerned and promulgated after approval by the Executive Yuan. (Paragraph 3)"; Article 17, Paragraph 1, "In any of the following situations, any people of the Mainland area may apply for residency in the Taiwan area: 1. Being the spouse of any citizen of the Taiwan area and married for two years or more or having given birth to a child or children. 2. Residency being deemed truly necessary by the competent authorities of our political, economic, social, educational, scientific, technological or cultural consideration"; Paragraph 7 (now Article 17, Paragraph 8), "Rules governing the granting of permission for residency or permanent residency, referred to in the immediately preceding Article and Paragraph 1 of this Article, shall be formulated, respectively, by the Ministry of Interior in conjunction with the competent authorities concerned and promulgated

發布「大陸地區人民在臺灣地區定居或居留許可辦法」，明文規定大陸地區人民進入臺灣地區之資格要件、許可程序、定居或停留期限及逾期停留之處分等規定，符合該條例之立法意旨，尚未逾越母法之授權範圍，為維持社會秩序或增進公共利益所必要，與上揭憲法增修條文無違，於憲法第二十三條之規定亦無牴觸。

after approval by the Executive Yuan.", and Article 18, Paragraph 1, Subparagraph 2, any people of the Mainland area who entered the Taiwan area may be deported therefrom by the police and the security authorities if such people have entered the Taiwan area by permission but stayed beyond the authorized duration. On February 8, 1993, the Ministry of the Interior in Tai- (82)-Interior-Police- No.-8273466 promulgated the Regulation Governing the Approval of Entry of People from the Mainland Area Into the Taiwan Area and in Tai- (82)-Interior-Police-No.-8273459, the Regulation Governing the Approval of Permanent or Temporary Residence for the People from the Mainland Area, wherein the qualifications, conditions, permission procedure and length of stay concerning the entry of the people of the Mainland area into the Taiwan area are clearly set forth. Essential to maintain the social order and to advance the public welfare, these regulations are to protect the security and welfare of the people of the Taiwan area. They conform to the legislative intent of the aforesaid Act and are within the scope of the

delegation. Therefore, the above regulations are not in violation of the Amendment and Article 23 of the Constitution.

J. Y. Interpretation No.498（December 31, 1999）*

ISSUE: Is the public functionary of a local self-governing body obligated to appear before the various committees of the Legislative Yuan for purpose of interpellation?

RELEVANT LAWS:

Articles 67, 111, 118, 121, 123, 124, 126, 128 and 147 of the Constitution（憲法第六十七條、第一百十一條、第一百十八條、第一百二十一條、第一百二十三條、第一百二十四條、第一百二十六條、第一百二十八條及第一百四十七條）; Articles 14, 16, 33, 35-37, 40, 41, 48, 49 and 55 of the Local Government Systems Act（地方制度法第十四條、第十六條、第三十三條、第三十五條至第三十七條、第四十條、第四十一條、第四十八條、第四十九條、第五十五條）; Article 30 of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第三十條）; Articles 1, 2 and 69 of the Public Officials Election and Recall Act （公職人員選舉罷免法第一條、第二條、第六十九條）; J. Y. Interpretation No. 461（司法院釋字第四六一號解釋）.

KEYWORDS:

local self-government（地方自治）,local self-governing body（地方自治團體）, local administrative body（地方行政機

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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

關）,local legislative body （地方立法機關）, check and balance（制衡）, self-government matters（自治事項）, commissioned matters（委辦事項）. **

HOLDING: Local self-government is a system guaranteed by the Constitution. Based on the concept of local residents' self-government and the function of the vertical separation of powers, a local self-governing body that has an established local administrative body as well as a local legislative body, shall have both its administrative body's chiefs and its legislative body's representatives elected in accordance with law by the constituents of the local self-governing body. The local administrative body shall be in charge of the self-government matters, whereas the local legislative body shall be in charge of the legislative matters. Pursuant to law, the relation between the local administrative body and the local legislative body with respect to their rights and obligations is, thus, one of checks and balances. Under the law, the central government or any other higher government agencies may

解釋文：地方自治為憲法所保障之制度。基於住民自治之理念與垂直分權之功能，地方自治團體設有地方行政機關及立法機關，其首長與民意代表均由自治區域內之人民依法選舉產生，分別綜理地方自治團體之地方事務，或行使地方立法機關之職權，地方行政機關與地方立法機關間依法並有權責制衡之關係。中央政府或其他上級政府對地方自治團體辦理自治事項、委辦事項，依法僅得按事項之性質，為適法或適當與否之監督。地方自治團體在憲法及法律保障之範圍內，享有自主與獨立之地位，國家機關自應予以尊重。立法院所設各種委員會，依憲法第六十七條第二項規定，雖得邀請地方自治團體行政機關有關人員到會備詢，但基於地方自治團體具有自主、獨立之地位，以及中央與地方各設有立法機關之層級體制，地方自治團體行政機關公務員，除法律明定應到會備詢者外，得衡酌到會說明之必要性，決定是否到會。於此情形，地

only supervise the local self-governing body to determine if it, in implementing local self-government matters or the matters commissioned by higher government agencies, acts legally and/or appropriately as per its nature. Consequently, within the purview of the powers guaranteed by the Constitution and laws, the local self-governing body is entitled to have self-governing and sovereign powers and the government agencies shall therefore respect such powers. Various committees set up by the Legislative Yuan may, in accordance with Article 67 of the Constitution, invite the self-governing body's personnel concerned to be present at their meetings to answer questions raised by the legislators; however, due to the local self-governing body's self-governing and sovereign status and given that the central government and local self-government both have their own legislative body, unless otherwise required by law, the officials of the local self-governing body may at their own discretion determine whether it is necessary to be present at such meetings. Under the circumstances, the Legislative Yuan may not reduce or delete the

方自治團體行政機關之公務員未到會備詢時，立法院不得因此據以為刪減或擱置中央機關對地方自治團體補助款預算之理由，以確保地方自治之有效運作，及符合憲法所定中央與地方權限劃分之均權原則。

subsidy, even the appropriation of the subsidy is pending, granted by the central government to the local self-governing body simply because officials of the local self-governing body refuse to be present at the Legislative Yuan's meetings. Thus, the local self-government system will be ensured, and the equal division of powers between the central and local government provided in the Constitution will be conformed to.

REASONING: By the time this petition was filed by the former Taiwan Provincial Council and after this Yuan reviewed and placed the petition on the agenda for further deliberation, Article 9 of the Amendments to the Constitution had already been amended (July 21, 1997); and the Local Government Systems Act was enacted and promulgated on January 25, 1999. As such, the Self-Governance Acts of Provinces, Special Municipalities, Counties and Cities had thus been abolished. This interpretation is thus rendered in accordance with the current laws.

解釋理由書：本件係前台灣省議會聲請解釋，本院受理後，憲法增修條文第九條於中華民國八十六年七月二十一日已有修正，地方制度法並於八十八年一月二十五日制定公布，省縣自治法及直轄市自治法則經廢止。是本件解釋自應以現行法律為基準，合先敘明。

Local self-government is a system guaranteed by the Constitution. Except for those powers of the central and local governments explicitly set forth in Chapter 10 of the Constitution, matters not enumerated in said Chapter, pursuant to Article 111 of the Constitution, shall fall within the jurisdiction of the Central Government, if they are national in nature; of the county, if they concern the county in nature. The intent of the Constitution is to endue the local self-governing body with the self-governing and sovereign powers to implement the self-government matters by its own will and under its own authority. The local self-governing body may, during the course of executing specific matters, possess separate powers decentralized from and by the central government and as such, it may cooperate with the central government in implementing specific matters, which will result in the local self-government's jointly sharing certain powers with the central government and would mean that, based on its relation the with central government, its respective power would arise from the vertical separation of powers so as to meet

地方自治為憲法所保障之制度，憲法於第十章詳列中央與地方之權限，除已列舉事項外，憲法第一百十一條明定如有未列舉事項發生時，其事務有全國一致之性質者屬於中央，有一縣性質者則屬於縣，旨在使地方自治團體對於自治區域內之事務，具有得依其意思及責任實施自治之權。地方自治團體在特定事務之執行上，即可與中央分權，並與中央在一定事務之執行上成為相互合作之實體。從而，地方自治團體為與中央政府共享權力行使之主體，於中央與地方共同協力關係下，垂直分權，以收因地制宜之效。憲法繼於第十一章第二節設「縣」地方制度之專節規定，分別於憲法第一百十八條、第一百二十一條、第一百二十八條規定直轄市、縣與市實行自治，以實現住民自治之理念，使地方人民對於地方事務及公共政策有直接參與或形成之權。憲法增修條文第九條亦係本諸上述意旨而設，地方制度法並據此而制定公布。

the local requirements. In addition to the "County (Hsien) Self-Government" stipulated in Section 2, Chapter 11, of the Constitution, Articles 118, 121 and 128 of the Constitution also provide for self-government for special municipalities, counties and cities, respectively, with the intent to realize the concept of local residents' self-government and in order to have local constituents directly involved in local affairs and public policy-making. Article 9 of the Amendments to the Constitution is in line with the abovementioned intent and the Local Government Systems Act is, thus, enacted and promulgated.

Based on the concept of local residents' self-government and the function of the vertical separation of powers, a local self-governing body that has an established local administrative body as well as a local legislative body, shall have both its administrative body's chiefs and its legislative body's representatives elected and/or recalled in accordance with the law by the constituents of the local self-governing body (See Articles 123, 124

基於住民自治之理念以及中央與地方垂直分權之功能，地方自治團體有行政與立法機關之自治組織設置，其首長與民意代表均由自治區域內之人民依法選舉、罷免之，此分別有憲法第一百二十三條、第一百二十四條、第一百二十六條，地方制度法第三十三條、第五十五條，公職人員選舉罷免法第一條、第二條、第六十九條等規定可據。地方自治團體不僅依法辦理自治事項，並執行上級政府委辦事項。地方自治區域內

and 126 of the Constitution, Articles 33 and 55 of the Local Government Systems Act, and Articles 1, 2 and 69 of the Public Officials Election and Recall Act).The local self-governing body shall implement not only self-government matters but also the matters commissioned by higher government agencies. The people of the local self-government shall, in accordance with law, exercise the rights of initiative and referendum in matters within the scope of local self-government (See Article 123 of the Constitution and Article 14, Paragraph 2 of Article 16 and Section 2, Chapter 3, of the Local Government Systems Act). The legislative body of local self-government shall exercise its powers by reviewing the total budget submitted by the local self-government's administrative body. The chief of the local self-government's administrative body shall present his or her administrative report during the regular sessions of the councils of the local legislative body and the councils of the local legislative body shall have the right to interpellate the chief or heads of departments of the local self-government. In the event of the need to

之人民對於地方自治事項，有依法行使創制、複決之權（憲法第一百二十三條、地方制度法第十四條、第十六條第二款、第三章第二節參照）。地方立法機關行使其立法機關之職權，地方行政機關應將總預算案提請其立法機關審議。地方立法機關開會時，其行政機關首長應提出施政報告，民意代表並有向該機關首長或單位主管行使質詢之權；就特定事項有明瞭必要時，則得邀請其首長或單位主管列席說明（地方制度法第三十五條至第三十七條、第四十條、第四十一條、第四十八條、第四十九條參照）。此乃基於民意政治及責任政治之原則，地方行政與地方立法機關並有權責制衡之關係。中央政府或其他上級政府對地方自治團體辦理自治事項、委辦事項，依法僅得按事項之性質，為適法、適當與否或其他一定之監督（同法第四章參照）。是地方自治團體在憲法及法律保障範圍內，享有自主與獨立之地位，國家機關自應予尊重。

clarify specific issues, the heads of relevant agencies or departments of the local self-government apart from the chief may be invited to attend and explain issues during meetings of the local legislative body (See Articles 35 to 37, Article 40, Articles 41, 48 and 49 of the Local Government Systems Act). This is based on the principles of democracy and accountability with respect to the relationship in view of the principle of checks and balances concerning responsibility and the powers between the local administrative and legislative bodies. The Central Government or any other higher agencies may only supervise the local self-governing body to determine if it, in implementing local self-government matters or the matters commissioned by higher government agencies, acts legally and/or appropriately as per its nature (See Chapter 4 of the same law). Consequently, within the purview of the powers guaranteed by the Constitution and laws, the local self-governing body is entitled to have self-governing and sovereign powers and any of the government agencies shall therefore respect such powers.

The Legislative Yuan may, in accordance with Article 67 of the Constitution, set up various committees and then convene meetings at which the government officials and private parties concerned may be invited to be present and answer questions. Since the Executive Yuan is accountable to the Legislative Yuan under the Constitution, the heads of ministries and the subordinates thereof, except for those who are mandated by law to exercise their functions independently and are free from external check, are under the obligation to be present and give answers when invited to meetings by those various committees according to Article 67, Paragraph 2, of the Constitution, which was interpreted by this Yuan before in Interpretation No. 461. However, in consideration of the separation of powers and the equal division of powers between the central and local govern ments provided in the Constitution, such obligation shall be subject to some appropriate restrictions in the event that officials of the local self-government are to be invited to be present at the meetings of the Legislative Yuan. Since the local self-government is a sys-

按立法院所設各種委員會，得邀請政府人員及社會上有關係人員到會備詢，為憲法第六十七條第二項所明定。鑑於行政院應依憲法規定對立法院負責，故凡行政院各部會首長及其所屬公務員，除依法獨立行使職權，不受外部干涉之人員外，於立法院各種委員會依憲法第六十七條第二項規定邀請到會備詢時，有應邀說明之義務，亦經本院釋字第四六一號解釋在案。惟考量權力分立及憲法上中央與地方均權之原則，就地方自治團體行政機關公務員到會備詢應作適當之規範。地方自治既受我國憲法制度性之保障，有一定之自主權限，為與中央政府共享國家權力行使，並共同協力之主體，且中央與地方各設有立法機關，建立層級體制。是地方自治團體行政機關人員受立法院各種委員會邀請到會備詢時，除法律明定應到會備詢者外，尚不負到會備詢之義務。惟得衡酌到會說明之必要性，決定是否到會。又中央對地方自治團體得視其財政狀況予以適當之補助（憲法第一百四十七條、地方制度法第六十九條、財政收支劃分法第三十條參照），俾使地方自治團體足應其財政之基本需求，以保障全國各地區住民之生活，實現全國經濟平衡發展之憲法意旨。立法院自不得逕因

tem guaranteed by the Constitution, it therefore possesses certain levels of self-governing and sovereign powers and it also shares with the central government to a certain extent the power to exercise rights accordingly. Additionally, given that both the central government and the local self-government have a legislative body under different levels of systems, unless otherwise required by law, officials of the local self-government are, however, not obligated to be present at the Legislative Yuan's meetings, provided, however, that such officials may nevertheless, at their own discretion, determine if it is necessary to attend the meetings. Moreover, the central government may provide to local self-governing bodies, if their financial conditions so require, appropriate subsidy (See Article 147 of the Constitution; Article 69 of the Local Government Systems Act and Article 30 of the Act Governing the Allocation of Government Revenues and Expenditures) so as to enable local self-governing bodies to meet their basic financial requirements, to ensure thestability or livelihood of the people nationwide and to attain a balanced

地方自治團體所屬公務員之未到會備詢，據以為刪減或擱置中央機關依法對地方自治團體補助款預算之理由，以確保地方自治之有效運作，及符合憲法所定中央與地方權限劃分之均權原則。

nationwide economic development. Under the circumstances, the Legislative Yuan may not reduce or delete the subsidy, even the appropriation of the subsidy is pending, granted by the central government to the local self-governing body simply because officials of the local self-governing body refuse to be present at the Legislative Yuan's meetings. Consequently, the local self-government system will be ensured, and the equal division of powers between the central and local government provided in the Constitution will be conformed to.

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