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

Freedom of the Press and Its Restraint Case

Issue

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

Holding

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

* Translation and Note by Hsiao-Wei KUAN

Reasoning

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

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

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

intrusive in order to diminish the scope of punishment has excessively infringed upon freedom of the press and therefore violates the principle of proportionality.

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

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

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

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

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

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

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

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

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

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

and liberties as mentioned above.

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

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

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

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

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

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

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

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

Background Note by the Translator

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

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

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

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

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

