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

The Prosecutor's Power to Detain Suspects without Warrant Case

Issue

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

Holding

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

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

* Translation at Note by Chien-Chih LIN

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

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

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

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

Reasoning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

composed of judges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background Note by the Translator

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

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

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

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

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

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

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