

Oct. 12 (Mon) 4-6 PM/ Furman Hall 120

Constitutional Review and Human Rights Protection on Taiwan

SYLLABUS

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I. Overview of the "Bill of Rights"

Cf. Chapter II, ROC Const.

- Q What are the characteristics of the ROC's Bill of Rights, compared to other constitutions?
- Q Is it unusual to have a "political rights" provision as comprehensive as Art. 17 supplemented with provisions of Chap. 12?
- Q Would it be different for the Constitutional Court if Art. 23 (the "Limitation Clause" on human rights restrictions) did not exist?

II. Interpretations concerning Right to Personal Security

Cf. Art. 8

- Q Does the distinction between the so-called "*reservation of statute*" (*Vorbehalt des Gesetzes*) and "*reservation of constitution*" (*Vorbehalt der Verfassung*) matter?
- Q why did the Constitution unambiguously require that detainees be turned over to the courts within 24 hours, instead of ambiguously requiring a "speedy or prompt" turn-over?
- Q What does the phrase "judicial organs" mean?

Cf. **Interp. #392** *infra*.

II.1 Due process guarantee incorporated (**Interp. No. 384**)

- Q Is it justified to construe the phrase "*in accordance with the procedure prescribed by law*" to mean that the procedure shall not only be prescribed by law, but **its contents must also be proper in substance**, and comply with the relevant conditions set up in **Article 23** of the Constitution (**proportionality principle**)?
- Q Is the requirement that the procedure prescribed by law is "*proper in substance*" equivalent to the requirement that it "complies with Art. 23" (**proportionality principle**)?
- Q Who shall decide whether a procedure prescribed by law is proper in substance or not?
- Q How shall one relate the holdings of Interpretation 384 to the "procedural due process" and "substantive due process" developed in the US constitutional jurisprudence?

II.2 Prosecutors are not judges (**Interp. No. 392**)

- Q What is the impact of this Interpretation on personal security?

II.3 Any detention lasting over 24 hours is "punishment"

(**Interp. Nos. 166 & 251**; 588, 300, 523, 471, 636, 528, 567, 664)

(**Summary of Relevant Interpretations**)

- Q Why should "administrative detention and forced labor" enforced by

policemen be characterized as "punishment", instead of "arrest & detention" under Art. 8? How about administrative detention for less than 24 hours?

❑ Why did Interp. No. 166 not declare the provisions at issue to be null and void right away or after some specific date?

❑ Why did Interp. No. 251 declare that the existing procedure regarding the "detention and forced labor" announced in Interp. 166 as well as the "punishments" at issue in this interpretation will be null and void together after July 1, 1991?

❑ II.4 Speedy review by the courts required anyway (Interp. No. 708)

❑ When a detention may, under some exceptional circumstances, constitutionally last over 24 hours, why is a "speedy review by the competent court" as relief still required?

❑ II.5 Legalization of Police Checks (Interp. No. 535)

❑ Why must the requirements for as well as procedures of police checks (警察臨檢), including searches, street checks, and interrogations conducted by policemen as part of their daily efforts of law enforcement, as well as legal remedies for unlawful checks be unambiguously prescribed by law? How shall one realize such "reservation of law" as a constitutional requirement?

❑ In order to be constitutional, what are the minimum substance and procedures to be provided for by law?

❑ How would it be possible for the Justices to extend the scope of review to the Police Service Act while the petitioner had petitioned for reviewing (the constitutionality of) Sec. 1, Art. 140 of the Criminal Code, which was applied by (and relied upon) in the final court decision?

❑

III. Interpretations concerning the right not to be subject to trial by court martial (Art. 9)

❑ III.1 A defendant receiving the sentence of imprisonment or more by court martial in peacetime shall be allowed to appeal to a civil court (Interp. No. 436)

❑ Did the petition satisfy the procedural requirements stipulated in the Grand Justices Proceedings Act? Which (constitutional) functions and duties were exercised when the petitioners (more than one third of the Legislators) came up with the "doubts" for interpretation?

❑ Based upon which clause of the Constitution did the Justices reach the conclusion that a defendant receiving the sentence of imprisonment in a final and conclusive judgment made by court martial in peacetime shall be permitted to directly appeal to a normal court?

IV. Interpretations concerning Freedom of Residence and Movement (Art. 10)

IV.1 Right of Nationals to Return (Interp. No. 558, 265, 497)

❑ Why did the Justices distinguished ROC nationals who have a household registry (戶籍) in Taiwan Area from those who have not, and grant only the former the right to return at any time without

asking for permission?

- IV.2 Lawfully admitted people from the Mainland Area are entitled to the same freedom as nationals of the Taiwan Area (Interp. No. 710)

- Q What is the implication of this Interpretation in the development of the cross-strait exchange?

V. Interpretations concerning Freedom of Expression (Art. 11)

- V.1 Prohibition of censorship & "dual track theory" Introduced (Interp. No. 445, 414)

- V.2 Harmonizing freedom of expression and protection of reputation by incorporating "actual malice doctrine" of *New York Times v. Sullivan* (Interp. No. 509)

- Q By broadly construing Article 310, Section 3, of the Criminal Code to substantially loosen the requirement of proving truth as an affirmative defense against conviction of criminal defamation, have the Justices achieved equivalent effects of *New York Times*, which requires that the plaintiff in a defamation or libel case prove that the publisher of the statement in question *knew that the statement was false or acted in reckless disregard of its truth or falsity*?

- Q Could the "actual malice doctrine" which originally emerged in the context of civil libel compensation be incorporated into (or directly applied to) the context of criminal defamation (Interp. 509)? If not, what additional adjustments are required therefore?

- Q Who shall decide if "the accused fails to prove that the defamatory statement is true, yet he/she can proffer evidential materials to support the conclusion that he/she had reasonable grounds to believe that the statement was true when disseminated", and that the accused must therefore be found not guilty of criminal defamation?

- V.3 Both Active Expression and Passive Omission are included (Interp. No. 577, 656)

- Q Who shall decide if a public apology ordered by a court judgment as a proper disposition for the restoration of reputation involves *self-humiliation or degradation of humanity*, and thus violates the *Principle of Proportionality* and unconstitutionally restricts the **freedom to withhold expression** protected under Article 11 of the Constitution or not?

- Q How can it be ensured that a public apology order made by a court does not involve *self-humiliation or degradation of humanity*, if the Justices, who established the principle in abstract, are not empowered to review the subsequent lower courts' decisions?

- V.4 State's obligation to create institutions to protect freedom of expression (*Schutzpflicht der Staat*) (Interp. No. 364)

VI. Interpretations concerning right of property (Art. 15)

- VI.1 Compensation for "particular sacrifice for the commonweal" (Sonderopfer theorie) required for either *physical taking* or *regulatory taking* (Interp. No. 400 & 440)

Q Is the "particular sacrifice for the commonweal" requirement somewhat different, in terms of scrutiny of review, when it involves "physical taking" (expropriation) and "regulatory taking"?

- VI.2 Prompt and fair compensation (Interp. No. 516)
- VI.3 Due Process required for Urban Renewal (Interp. No. 709)
- VI.4 Taxation upon Law (Gesetzmäßigkeit der Besteuerung) as *intensified reservation of law* (Interp. No. 674)

VII. Interpretations concerning Right to Work (Freedom of Occupation) (Art. 15)

VII.1 The reviewing procedures for public university faculty promotion shall be prescribed in conformity with the *principle of expertise evaluation* (Interp. No. 462)

VII.2 A person convicted of specific violent or sexual crimes may be prohibited from being a professional taxi driver forever (Interp. No. 584)

VIII. Interpretations concerning right to sue (Art. 16)

- VIII.1 *Ubi jus, ibi remedium* (Interp. No. 486)
- VIII.2 Special-Power-Relationship theory (*Besondere Gewaltverhältnis* Theorie) overhauled (Interp. Nos. 187, 201, 266 & 312; 243, 298, 323 & 338; 430; 382, 684; 681 & 691)

Q What is the relationship between Due Process of law and the right to sue? Is the latter part of the concept of the former?

Q Why did the Justices not declare the provision in question (Art. 484 of the Criminal Procedure Act) unconstitutional while unambiguously instructing the relevant authorities to reform the provision to enable parolees who disagree with the revocation of parole *to seek remedies in court prior to serving the remaining sentence(s)*?

Q If a parolee who disagrees with the revocation of his/her parole may seek *timely remedies in court* (as held in **Interp. 681**), why did the Justices not recognize, in **Interp. 691**, that an inmate whose petitions for parole has been denied by the administrative authority has a right to sue in the court?

IX. Interpretations concerning right to take public examination and hold public offices (Art. 18)

IX.1 The criteria for dismissal of civil servants shall be prescribed by laws (*Vorbehalt des Gesetzes*) and the decision shall be made through due process of law, and be executed only when it is confirmed after having exhausted all administrative appeal and judicial remedies (Interp. No. 491)

IX.2 Are the right to take public examination as well as the right to hold public offices one combined right or two separate rights? (Interp. **715_Concurring in Part and Dissenting in Part Opinion** (by J. Tang))

X. Interpretations concerning unenumerated fundamental rights (Art. 22)

- X.1 Right to privacy (**Interp. No. 603 & 293**)

- Q** How does "information(al) privacy" differ from other privacies, such as physical privacy and decisional privacy?
- Q** If the requirement of fingerprints for the issuance of national identity cards is unconstitutional, why did the Justices not declare the requirement that each national shall obtain an identity card as unconstitutional also?
- Q** What is the implication of citing "human dignity" and "respect for free development of personality" to support "information(al) privacy" as an unenumerated fundamental right enshrined by Art. 22?
- X.2 Right of name (Interp. No. 399)
- X.3 Freedom to marry and protection of Family (Interp. Nos. 554, 242)
 - Q** Why would the Justices step in to declare Article 992 of the Civil Code, which provides that "When any marriage in violation of Article 985 of the same Code ('Any person who has a spouse shall not marry again'), the interested parties may bring action asking the court to invalidate the marriage" as **partially unconstitutional**?
 - Q** Did the Justices declare the provision at issue as **unconstitutional per se** or **unconstitutional as applied**? If it was the latter, how would that be possible (permissible) for an abstract constitutional review?
- X.4 Right to learn one's own blood filiations (Interp. No. 587)

XI. Interpretations concerning equal protection of law (Art. 7)

- XI.1 Sex/Gender equality (Interp. No. 365)
- XI.2 (Social) Class equality (Interp. Nos. 455, 624)
- XI.3 No discrimination based upon disability (Interp. No. 626 & 649)
- XI.4 Affirmative action (Interp. Nos. 649 & 719)
 - Q** Have the Justices recognized the fundamental difference between typical discrimination and **affirmative action (reverse/positive/benign) discrimination**?
 - Q** Why did the Justices hold the affirmative action at issue in Interp. 649 (i.e., a statutory reservation of massage service as a profession for the blind only) as unconstitutional, while holding the affirmative action at issue of Interp. 719 (i.e., a statutory set-aside of 1% employment of the aboriginal for a major public contractor) as constitutional?
- XI.5 General Principle of Equity (Interp. No. 727)

XII. Challenges Ahead

- XII.1 Standards of judicial review (methodology of applying the proportionality principle) to be established
- XII.2 Abstract review provides no protection against unconstitutional (judicial) case judgments