

Chapter 23

Freedom of Movement in Taiwan

A Local Development to Meet International Standards

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Abstract According to Article 12 of the ICCPR, the freedom of movement includes at least three distinct rights: (1) the right to enter one's own country; (2) the right to leave any country; and (3) the right to liberty of movement within the territory of a state. In Taiwan, the three rights are all covered by the Constitution and have been expanded on by the Constitutional Court. Article 10 of the Constitution states that people should have the freedom of migration and the Constitutional Court has declared a series of interpretations that elaborate on the freedom of migration. In addition to the traditional freedom of movement, the Constitutional Court has also developed a freedom of movement in Article 22 of the Constitution. Therefore, further observation and analysis is required regarding the actual scope of the freedom of movement in Article 22 of the Constitution as developed by the Constitutional Court. By observing the constitutional interpretations in Taiwan, the author intends to introduce the freedom of migration as it exists in the Constitution and how it corresponds to the freedom of movement under international treaties.

1 Introduction

The scope and definition of "freedom of movement" seem to be consistent under the various world human rights treaties. For instance, Article 13 of the Universal Declaration of Human Rights (hereinafter UDHR) reads: "(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country."¹

Article 12 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) has a similar definition.² The article bestows on an individual the following freedoms:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence (Paragraph 1).
2. Everyone shall be free to leave any country, including his own (Paragraph 2).
3. No one shall be arbitrarily deprived of the right to enter his own country (Paragraph 4).

Together, the freedoms under Article 12 are known by the Human Rights Committee as "freedom of movement."³ We may summarize the freedom presented by Paragraph 1 of the ICCPR as the "freedom of movement within a country," Paragraph 2 as the "freedom to leave any country" and Paragraph 4 as the "right to enter one's own country." Interestingly, an individual's freedom to enter a foreign country is not explicitly protected by either the UDHR or the ICCPR. A fair reason is that the states are reserved for border sovereignty.

Paragraph 3, Article 12 of the ICCPR provides that necessary restrictions may be imposed by law on the freedom of movement within a country and the freedom to leave any country if the purpose is to "protect national security, public order (ordre public), public health or morals or the rights and freedoms

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1 1G.A. Res. 217 (III) A, Universal Declaration of Human Rights (10 Dec 1948) [hereinafter Universal Declaration of Human Rights]. <http://www.refworld.org/docid/3ae6b3712c.html>. Accessed 10 Oct 2017.

2 International Covenant on Civil and Political Rights, 16 Dec 1966, 999 UN T.S 171 [hereinafter ICCPR]. <http://www.refworld.org/docid/3ae6b3aa0.html>. Accessed 9 Oct 2017.

3 See UN Human Rights Committee [HRC], CCPR General Comment No. 27: Article 12 (freedom of movement), para 11, UN Doc. CCPR/C/21/Rev.1/Add.9 (2 Nov 1999) [hereinafter General Comment No. 27]. <http://www.refworld.org/docid/45139c394.html>. Accessed 9 Oct 2017.

of others, and are consistent with the other rights recognized in the present Covenant.”⁴ However, the restrictions in Paragraph 3 of Article 12 are not applicable to Paragraph 4.⁵ In other words, the right to enter one’s own country may not be restricted. The Human Rights Committee emphasizes in General Comment No. 27 that “[i]n no case may a person be arbitrarily deprived of the right to enter his or her own country.”⁶

To understand the scope of the “right to enter one’s own country” as presented in paragraph 4, Article 12 of the ICCPR it is important to determine who enjoys this right. The Human Rights Committee pointed out in General Comment No. 27 that “[t]he scope of ‘his own country’ is broader than the concept ‘country of his nationality’”⁷ and “it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.”⁸ The Human Rights Committee thus adopted a substantive view in finding “his own country” under Paragraph 4, Article 12 of the ICCPR.

As to “freedom of movement within a country” and “freedom to leave any country,” the Human Rights Committee stressed that once a person is lawfully within a state he/she should not suffer differential treatment regarding the freedom without justifiable reason under paragraph 3, Article 12 of the ICCPR.⁹

Taiwan’s Constitution also contains an article to protect freedom of movement, and the Constitutional Court has rendered a number of interpretations to illustrate its scope and content. Although freedom of residence is also provided by paragraph 1, Article 12 and interpreted by the Human Rights Committee in General Comment No. 27,¹⁰ in order to limit the analysis of this article, focus will be given to the “freedom of movement within a country,” the “freedom to leave any country” and the “right to enter one’s own country” as provided for by the Constitution and the Constitutional Court Interpretations in parts 2 and 3.

2 Freedom of Migration Under the Constitution

Article 10 of the ROC Constitution reads: “The people shall have freedom of residence and migration.” In Chinese, Article 10 of the Constitution uses “遷徙” (qian xi), which incorporates meanings of moving from one place to another and change of status.¹¹ Due to the wide range of meanings contained in the word “遷徙,” there are various options for an English translation. The English translator of J.Y. Interpretation No. 265 chose “freedom of migration,”¹² while the English translator of J.Y. Interpretation No. 443 chose “to move freely.”¹³ The English translation of J.Y. Interpretation No. 558

⁴ ICCPR, at art. 12, para 3.

⁵ See General Comment No. 27, at para 11.

⁶ Id., at para 21.

⁷ Id., at para 20.

⁸ Id.

⁹ Id., at para 4.

¹⁰ Id., at paras 4–7.

¹¹ Re-codified Chinese dictionary by Ministry of Education.
http://dict.revised.moe.edu.tw/cgi-bin/cbdict/gswweb.cgi?ccd=b57j_o&o=e0&sec=sec1&op=v&view=5-1.
Accessed 12 Nov 2017.

¹² Dafaguan Shizi Di 265 Hao [大法官釋字第 265 號] (J.Y. Interpretation No. 265) (5 Oct 1990) (R.O.C.) [hereinafter Interpretation No. 265]. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=265. Accessed 15 Nov 2017; see also Dafaguan Shizi Di 454 Hao [大法官釋字第 454 號] (J.Y. Interpretation No. 454) (22 May 1998) (R.O.C.) [hereinafter Interpretation No. 454]. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=454. Accessed 15 Nov 2017; Dafaguan Shizi Di 542 Hao [大法官釋字第 542 號] (J.Y. Interpretation No. 542) (4 Apr 2002) (R.O.C.) [hereinafter Interpretation No. 542]. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=542. Accessed 15 Nov 2017.

¹³ Dafaguan Shizi Di 443 Hao [大法官釋字第 443 號] (J.Y. Interpretation No. 443) (26 Dec 1997) (R.O.C.) [hereinafter Interpretation No. 443]. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=443. Accessed 15 Nov 2017.

uses “freedom of movement,”¹⁴ and the English translation for Article 10 available at the ROC laws and regulations database website uses “change of residence.”¹⁵

Since the Constitutional Court has developed an independent “freedom of movement” in Article 22 of the Constitution through its Interpretations,¹⁶ in order to distinguish between Article 10 and Article 22, the translations of “to move freely” or “freedom of movement” will not be used for the translation of “遷徙.” Further, “遷徙” is not necessarily limited to “change of residence” and the Constitutional Court has declared Article 10 to include one’s right to depart from or to enter Taiwan, whether changing residence or not.¹⁷ Therefore, in this chapter “freedom of migration” will be used to represent “遷徙自由” under Article 10 of the Constitution.

Unlike ICCPR Article 12, Article 10 of the Constitution does not specify the exact content of freedom of migration. From a textual reading of “freedom of migration,” it may include people’s freedom to move freely inside Taiwan, freedom to leave Taiwan, and freedom to enter Taiwan (without differentiating a national or a foreigner), corresponding to and even broader than freedom of movement under Article 12 of the ICCPR.¹⁸

The Constitutional Court has issued the following Interpretations to elaborate on the meaning of “freedom of migration” under Article 10 of the Constitution.

2.1 J.Y. Interpretation No. 265 (5 October 1990)¹⁹

The National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion (hereinafter NSA during the Period) was enacted in 1987 and was abolished and replaced by the National Security Act in 1992.²⁰ Article 3, Paragraph 2, Subparagraph 2 of the NSA during the Period provides that entry into and exit from the country may not be permitted if, judging from the facts, it may be reasonably suspected that the applicant may pose a threat to national security or social stability. Further, Article 12 (6) of the Enforcement Rules of the NSA during the Period further specifies that those from Mainland China may not be permitted to enter Taiwan if they fail to reside in the free area continuously for five years.

In this case, the petitioner’s wife was from Mainland China, having moved from China to Hong Kong on 10 February 1987 and having applied for residency in Taiwan on 17 February of the same year.²¹ The immigration agency, based on the NSA during the Period and its Enforcement Rules, rejected the petitioner’s wife’s application because she had not resided in Taiwan continuously for five years.²² The petitioner resorted to complaint, administrative appeal, and administrative suit to remedy his wife’s case, and he finally petitioned the Constitutional Court after those remedies had failed.²³

¹⁴ Dafaguan Shizi Di 558 Hao [大法官釋字第 558 號] (J.Y. Interpretation No. 558) (18 Apr 2003) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=558. Accessed 15 Nov 2017.

¹⁵ English translation of the Constitution, on the ROC laws and regulations database website, available at: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0000001>.

¹⁶ See infra Section 3.

¹⁷ See, e.g., J.Y. Interpretations Nos. 454 and 558.

¹⁸ See e.g., Fa and Dung (2006), p. 214 (recognizing freedom of migration may include people’s freedom to move and reside within a state, foreigners’ freedom to enter a state, and people’s freedom to go abroad); Wu (2015), pp. 314–315 (agreeing that freedom of migration includes people’s freedom to move freely inside Taiwan, freedom to leave Taiwan, and freedom to enter Taiwan); Chen (2005), p. 235 (pointing out that freedom of migration may refer to a people’s general freedom of movement as the broader meaning, or may refer to freedom to change residence as the narrower meaning, and concluding that freedom of migration under the Constitution should be understood as the broader meaning. Also, he concludes that freedom of migration may include freedom of migration within a state and freedom to go abroad).

¹⁹ J.Y. Interpretation No. 265.

²⁰ Legislative History of the National Security Act. Laws and Regulations Database of the ROC. <http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?Code=A0030028vggb>. Accessed 12 Nov 2017.

²¹ See the Petition of J.Y. Interpretation No. 265, available at: http://www.judicial.gov.tw/constitutionalcourt/P03_01_detail.asp?expno=265&showtype=%AC%DB%C3%F6%AA%FE%A5%F3.

²² Id.

²³ Id.

The Constitutional Court announced J.Y. Interpretation No. 265 on 5 October 1990. The Court first pointed out that a law such as Article 3, Paragraph 2, Subparagraph 2, of the NSA during the Period is a regulation on immigration and restricts people's freedom of residence and migration.²⁴ However, the Court also indicated that such restrictions "were necessary to maintain the country's social order and therefore not in conflict with the Constitution."²⁵ Further, Article 12 (6) of the Enforcement Rules of the NSA during the Period provided the government with criteria for finding facts, and because the Enforcement Rules only provide that the application "may" not be permitted instead of "should" not be permitted, such Rules are consistent with the intent of the NSA during the Period to ensure national security and social order.²⁶ The Court, nonetheless, stated that "the said Enforcement Rules should be reviewed and amended from time to time after taking into account the purposes of Article 3, Paragraph 2, Subparagraph 2 of the NSA during the period so as to meet the needs as dictated by social developments."²⁷

The case of J.Y. Interpretation No. 265 seems to regard the restriction on people's right to enter a foreign country (or a foreigner's right to enter a state) as a right that is not explicitly emphasized by Article 12 of the ICCPR and Article 13 of the UDHR. Although the restriction on a citizen's freedom of migration was upheld by J.Y. Interpretation No. 265, there are still a few lessons to learn from this Interpretation. First, a foreigner's right to enter Taiwan is protected by freedom of migration under Article 10 of the Constitution, though such freedom may be restricted with justifiable reason. Second, protection of the freedom of migration under Article 10 of the Constitution does not distinguish between local or foreign citizens.

2.2 J.Y. Interpretation No. 443 (26 December 1997)²⁸

In 1993, the petitioner was a draftee who intended to go abroad. According to the Regulations for the Exit of Draftees, draftees are, in principle, restricted from departure and need to apply for exceptional permission. The petitioner's application was denied, leading to a challenge of the constitutionality of such a restriction under the Regulations for the Exit of Draftees.²⁹

J.Y. Interpretation No. 443 is well known as the Interpretation which established the structure and system for the principle of "Vorbehalt des Gesetzes."³⁰ However, as this article focuses on freedom of migration, the principle of "Vorbehalt des Gesetzes" as derived from J.Y. Interpretation No. 443 will not be explored.³¹

The Court first explained that freedom of residence and migration refer to "the freedom [of people] to choose their residences, to enjoy their lives without intrusion, and the right to move or travel around based on their free will."³² The Court then cited Article 23 and Article 22 of the Constitution³³ to conclude that without a law or a regulation explicitly authorized by law, people's freedom and rights shall not be limited, and major matters concerning the military service of draftees shall not be regulated.³⁴ The Court therefore found the Regulations to limit the right of draftees to freely leave the country are in violation of the Constitution.³⁵

²⁴ Reasoning of J.Y. Interpretation No. 265, para 1.

²⁵ Holding of J.Y. Interpretation No. 265.

²⁶ Reasoning of J.Y. Interpretation No. 265, para 2.

²⁷ Id.

²⁸ J.Y. Interpretation No. 443.

²⁹ See Petition of J.Y. Interpretation No. 443, available at:

http://www.judicial.gov.tw/constitutionalcourt/P03_01_detail.asp?expno=443&showtype=%AC%DB%C3%F6%AA%FE%A5%F3.

³⁰ See, e.g., Wu (2007), pp. 103–106; Chen (2013), pp. 159–160. The principle of "Vorbehalt des Gesetzes" originated in Germany. A similar principle in U.S. law would be the non-delegation principle. See, e.g., Hwang (2004), pp. 1–45.

³¹ See Reasoning of J.Y. Interpretation No. 443, para 1.

³² Id., at para 2.

³³ Article 22 of the ROC Constitution reads: "All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution." Article 23 of the ROC Constitution reads: "All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare."

³⁴ Reasoning of J.Y. Interpretation No. 443, para 2.

³⁵ Id.

In addition to underscoring that the freedom of migration may not be restricted without a law or a regulation authorized by law, J.Y. Interpretation No. 443 recognizes that freedom of movement within a country and freedom to leave any country are covered by the articles of the Constitution.

2.3 J.Y. Interpretations No. 454 (22 May 1998)³⁶

The petitioner in this case was from Hong Kong and had applied for a long-term residency permit, which was granted by the government. However, based on the Guidelines for Nationals' Temporary Entry into Long-term Residence in, and Listing on, the Household Registry of the Country (hereinafter the Guidelines), the immigration agency subsequently decided to revoke the long-term residency permit. The immigration agency sought to revoke the permit based on reports that the petitioner was involved in criminal activities in Hong Kong. After exhausting the administrative litigation remedies, the petitioner challenged the constitutionality of the Guidelines.³⁷

The Constitutional Court first pointed out that the Guidelines to "refuse to grant long-term residency permits, cancel such permits, or cancel or deregister household registration to nationals not listed on the household registry of Taiwan" are "major restraints on the people's freedom of residence and migration, and thus must be authorized by law or by the authorities legally empowered to do so."³⁸ The Constitutional Court therefore declared part of the Guidelines to be unconstitutional owing to a lack of legal authority.³⁹

When expounding on the freedom of residence and the freedom of migration under Article 10 of the Constitution, the Court stated that the freedom "is to protect the people's freedom to select their residence, to change their residence and to travel, including the right to exit or enter the country."⁴⁰ However, the Court also indicated that:

The degrees of restriction on the right of entry and residence for nationals listed on Taiwan's household registry, those residing overseas or residing in Hong Kong or Macau may differ reasonably, provided such restriction conforms to the principle of necessity stipulated in Article 23 of the Constitution, and is provided for by law or by rules prescribed by administrative bodies with the express authorization from the legislative bodies.⁴¹

Although part of the Guidelines were held to be unconstitutional by the Constitutional Court, the Court based its reasoning mainly on the principle of "Vorbehalt des Gesetzes," meaning that the Guidelines restricted people's freedom of migration without legal authority.

Although the Court recognized the right of foreigners to enter Taiwan, the Court also considered it justifiable for the Legislative Yuan to differentiate between nationals listed on Taiwan's household registry and those residing overseas, and that stricter and reasonable limitations may be applied on the latter's freedom of entry. Regarding the right to enter one's own country, the Court allows differential treatment based on whether an individual appears on Taiwan's household registry, which is not consistent with ICCPR Article 12 and General Comment No. 27.

2.4 J.Y. Interpretation No. 497 (3 December 1999)⁴²

The petitioner, in this case, applied on behalf of his wife for a permit to stay and reside in Taiwan China in December 1994. The petitioner's wife had visited Taiwan in July 1995 and had failed to depart until October of that year as the result of an error by her of travel agency. For this reason, the immigration agency rejected the petitioner's application and issued an order to the petitioner's wife prohibiting her from entry into Taiwan in 1996. After exhausting the administrative judicial remedies, the petitioner filed the case with the Constitutional Court, challenging the constitutionality of the Regulations Governing

³⁶ J.Y. Interpretation No. 454.

³⁷ See Petition of J.Y. Interpretation No. 454, available at: http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=454.

³⁸ Holding of J.Y. Interpretation No. 454.

³⁹ See *id.*

⁴⁰ Reasoning of J.Y. Interpretation No. 454, para 1.

⁴¹ *Id.* (Emphasis added.)

⁴² Dafaguan Shizi Di 497 Hao [大法官釋字第 497 號] (J.Y. Interpretation No. 497) (3 Dec 1999) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=497. Accessed 15 Nov 2017.

Permission to Enter the Taiwan Area for People from Mainland China and the Regulations Governing Permission for Permanent or Temporary Residence for People from Mainland China.⁴³

The Constitutional Court first stated that although people's freedom of migration is protected by Article 10 of the Constitution, "such freedoms may be restricted by law in order to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain the social order or to advance the public welfare pursuant to Article 23 thereof."⁴⁴ Citing Article 10 of the Amendment to the Constitution (presently Article 11 of the prevailing Amendment to the Constitution), reading, "Rights and obligations between the people of the Chinese Mainland area and those of the free area, and the disposition of other related affairs may be specified by law," the Court found the Act Governing Relations between People of the Taiwan Area and the Mainland Area "is a special law governing the rights and obligations between the people of the Taiwan area and the Mainland Area to ensure the security and public welfare of the Taiwan area before the reunification of the nation."⁴⁵ The relevant regulations were therefore found as being authorized by law and, as such, constitutional.⁴⁶

Owing to Article 11 of the Amendment to the Constitution, the Constitutional Court seems to have adopted a rational scrutiny regarding whether the relevant restriction on freedom of migration of people from Mainland China is authorized by law.

2.5 J.Y. Interpretation No. 542 (4 April 2002)⁴⁷

J.Y. Interpretation No. 542 deals with freedom of movement within a country.

The area in which the petitioner in this case lived was designated as the reservoir catchment area for the establishment of Feitsui Reservoir. Since the area would be endangered by the construction of the Feitsui Reservoir, and the residents would also pollute the water source, the government announced the "Implementation Plan for the Relocation of Residents in Bi Shan, Yun An and Ge To Villages of Shediang County, Feitsui Reservoir Catchment Area" (hereinafter the Plan) forcing the residents to migrate. According to the Plan, compensation would only be issued to those who had household registry records from before 1 January 1980, and who were actually residents in the area. Since the petitioner did not have household registry records in the area until August 1980, his application for compensation was rejected. The petitioner therefore exhausted the judicial remedies and petitioned for a constitutional interpretation, challenging the Plan.⁴⁸

Citing J.Y. Interpretations No. 443 and No. 454, the Constitutional Court first confirmed that the "restriction on this freedom shall not exceed the degree of necessity required by Article 23 of the Constitution and must be mandated by the law."⁴⁹ Since the Plan was to "preserve the water quality and quantity in the protected water supply region, and the means it adopts are necessary," the Court therefore concluded "[a]lthough the Plan places a restriction on the people's freedom of residence and migration, it cannot be said to have infringed upon Article 10 of the Constitution since the means of relocation conforms to the principle of proportionality when considering the end—the protection of the water resources."⁵⁰

As to the provision of compensation, the Court indicated that as the Plan used household registry records as the sole determinant of actual residence in the water supply region, it excluded residents who had actually been residing in and had vacated the water supply region from receiving the benefit of relocation compensation. Though such an exclusion did not necessarily violate the principle of equality under the Constitution, the Court still requested the administrative agency to amend the Plan to consider other factors in determining residence in the area.⁵¹

⁴³ See Petition of J.Y. Interpretation No. 497, available at: <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/497.pdf>.

⁴⁴ See Reasoning of J.Y. Interpretation No. 497.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ J.Y. Interpretation No. 542.

⁴⁸ See Summary of Facts of J.Y. Interpretation No. 542, available at: http://www.judicial.gov.tw/constitutionalcourt/P03_01_detail.asp?expno=542&showtype=%AC%DB%C3%F6%AA%FE%A5%F3.

⁴⁹ Holding of J.Y. Interpretation No. 542, para 1.

⁵⁰ Reasoning of J.Y. Interpretation No. 542, para 2.

⁵¹ See Reasoning of J.Y. Interpretation No. 542, para 3.

2.6 J.Y. Interpretation No. 558 (18 April 2003)⁵²

Mr. Huang, a national of Taiwan, entered Taiwan in 1996 without obtaining a permit and was found to be in violation of the National Security Act. The judges of the Taiwan High Court found the application of Paragraph 1, Article 3 of the National Security Act, reading, "People exiting or entering the country shall apply to the Ministry of the Interior Entry and Exit Service Bureau to be granted permission, and those who are not granted permission are prohibited from exiting or entering the country" as unconstitutional and therefore petitioned the Constitutional Court for an interpretation.⁵³

The Constitutional Court reaffirmed that the freedom of residence and immigration under Article 10 of the Constitution includes "people's freedom to choose and change their residence and to travel, including the right to exit or enter the country,"⁵⁴ which had already been reiterated by prior constitutional interpretations.⁵⁵ The Court further stated that "[i]f the nationals choose their domicile and have a household registry in the Taiwan Area, they can return to the homeland at any time without asking to be granted permission."⁵⁶ Like the general human right, the right of the people to exit or enter the country may be restricted if such a restriction is provided by law and is in accordance with the proportionality principle under Article 23 of the Constitution.⁵⁷

As to the constitutionality of Article 3, Paragraph 1 of the National Security Act, a similar article of the NSA during the Period was upheld by the Constitutional Court in J.Y. Interpretation No. 265.⁵⁸ The Court did not choose to overrule J.Y. Interpretation No. 265; instead, it admitted that the NSA during the Period was intended to meet the country's needs that were specific to the period and necessary for the Suppression of the Communist Rebellion, therefore not in conflict with the Constitution.⁵⁹ However, the Court also pointed out that after the end of the Period of National Mobilization for Suppression of the Communist Rebellion and martial law, the Legislative Yuan enacted the Immigration Act, which became effective on 21 May 1999. Although the National Security Act was amended in 1992, Article 3, Paragraph 1 of the Act:

[M]aking no distinction between those people who chose their domicile and thus have a household registry in the Taiwan Area and those who do not, uniformly requires that people apply with the governing authority to be granted permission to enter the country and prohibits those people who are not granted permission from entering the country.⁶⁰

Also, given that the Act imposed a punishment clause on people who entered the country without being granted permission, the Court therefore concluded the provision "is in violation of the principle of proportionality as elaborated on in Article 23 of the Constitution and the freedom of people to return to the homeland at any time."⁶¹

The Court also indicated two special groups of people, whose freedom to enter Taiwan may be subject to further legal restrictions. One group is people living in Mainland China. Citing Article 11 of the Amendments to the Constitution⁶² and J.Y. Interpretation No. 497, the Court found the restriction imposed on the people from the Chinese Mainland from entering Taiwan is consistent with the rationale

⁵² Dafaguan Shizi Di 558 Hao [大法官釋字第 558 號] (J.Y. Interpretation No. 558) (18 Apr 2003) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=558. Accessed 13 Nov 2017.

⁵³ See Summary of Facts of J.Y. Interpretation No. 558, available at: http://www.judicial.gov.tw/constitutionalcourt/P03_01_detail.asp?expno=558&showtype=%AC%DB%C3%F6%AA%FE%A5%F3.

⁵⁴ Reasoning of J.Y. Interpretation No. 558, para 2.

⁵⁵ See, e.g., J.Y. Interpretations No. 443 and No. 454.

⁵⁶ Reasoning of J.Y. Interpretation No. 558, para 2.

⁵⁷ See *id.*

⁵⁸ Subparagraph 2, Paragraph 2, Article 3 of the NSA during the Period provides that entry into and exit from the country may not be permitted if, judging from the facts, it may be reasonably suspected that the applicant may pose a threat to national security or social stability.

⁵⁹ Reasoning of J.Y. Interpretation No. 558, para 3.

⁶⁰ *Id.* (Emphasis added.)

⁶¹ *Id.* (Emphasis added.)

⁶² Article 11 of the Amendments to the Constitution reads: "Rights and obligations between the people living in the free area and those of the Chinese Mainland Area, and the disposition of other related affairs may be specially prescribed by law."

of the Constitution.⁶³ Another group is citizens of Taiwan, residing outside the country and who have no domicile but have a household registry in the Taiwan Area, for whom the relevant provisions of the Immigration Act should also be applicable.⁶⁴

In J.Y. Interpretation No. 558 the court emphasized for the first time that people's freedom to return to the homeland at any time is protected by Article 10 of the Constitution. However, the freedom enjoyed by those nationals who have a domicile and are on the household registry in Taiwan seem to receive more protection. The reason why Article 3, Paragraph 1 of the National Security Act was declared unconstitutional was not merely because it created a permit system for entry into Taiwan but because it failed to distinguish between people who have a domicile and are on the household registry in Taiwan and those who are not.

Justice Liu Tieh-Cheng pointed out in his dissenting opinion that J.Y. Interpretation No. 558 seemed to recognize Article 3, Paragraph 1 of the National Security Act's constitutionality in asking for a permit if the national has only a household registry in Taiwan without having a domicile.⁶⁵ However, citing Article 13, Paragraph 2 of the UDHR⁶⁶ and Article 14, Paragraph 4 of the ICCPR,⁶⁷ both of which recognize an individual's right to freely return to his country, Justice Liu doubted the justifiability for the Legislative Yuan to choose a domicile as the condition upon which to restrict people's freedom of migration, since a domicile is not like a nationality which connects people with a nation.⁶⁸

Based on Justice Liu Tieh-Cheng's doubt as to the justifiability of using a domicile as a standard for determining whether people should obtain a permit before entering Taiwan, one could also ask why a national on the household registry should be exempt from requiring a permit. Unfortunately, J.Y. Interpretation No. 558 failed to provide ample reasoning for requiring a national to have a domicile and a household registry if he/she desires to freely return to his/her own country. The conclusion of J.Y. Interpretation No. 558 regarding the right to enter one's own country is not consistent with the ICCPR or the Human Rights Committee's General Comment No. 27, which does not narrow the scope of protection in one's own country.

2.7 J.Y. Interpretation No. 710 (5 July 2013)⁶⁹

The petitioner in this instance was from Mainland China, having married a Taiwanese citizen in 2003. Thereafter, the petitioner frequently traveled between Taiwan and China as a Taiwanese spouse. In 2007, the fourth time the petitioner was permitted to enter Taiwan as a citizen's spouse, the National Immigration Agency found significant discrepancies in the statements of the petitioner and her husband during their interviews. Therefore, the National Immigration Agency revoked the petitioner's Entry and Exit Permit in accordance with the relevant laws. At the same time, the National Immigration Agency imposed a mandatory deportation on the petitioner according to the Cross-Strait Relations Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area, and also temporarily detained the petitioner in accordance with the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau. The petitioner was detained for a total of 126 days, and then she was mandatorily deported from Taiwan. The petitioner thereafter filed a lawsuit for national compensation based on the detention. The court's final decision was to reject the petitioner's claim. The petitioner therefore applied for an interpretation.⁷⁰

Before the announcement of J.Y. Interpretation No. 710, a group of petitioners with similar case backgrounds had petitioned and obtained from the Constitutional Court J.Y. Interpretation No. 708,

⁶³ Reasoning of J.Y. Interpretation No. 558, para 2.

⁶⁴ Id.

⁶⁵ See Dissenting Opinion of Justice Liu Tieh-Cheng of J.Y. Interpretation No. 558, available at: http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=558.

⁶⁶ Paragraph 2, Article 13 of the Universal Declaration of Human Rights reads: "Everyone has the right to leave any country, including his own, and to return to his country."

⁶⁷ Paragraph 4, Article 14 of the ICCPR reads: "No one shall be arbitrarily deprived of the right to enter his own country."

⁶⁸ Id.

⁶⁹ Dafaguan Shizi Di 710 Hao [大法官釋字第 710 號] (J.Y. Interpretation No. 710) (5 July 2013) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=710. Accessed 15 Nov 2017.

⁷⁰ This paragraph is summarized from the Summary of Facts of J.Y. Interpretation No. 710.

dated 6 February 2013.⁷¹ The petitioners of J.Y. Interpretation No. 708 had been temporarily detained and mandatorily deported from Taiwan. The Constitutional Court in J.Y. Interpretation No. 708 found the laws regarding “the temporary detention of a foreign national for a reasonable period in order to complete repatriation does not provide the detainee with prompt judicial relief” and “an extension of the aforementioned temporary detention is also not subject to judicial review.”⁷² The laws of temporary detention and mandatory deportation were thus declared to be “in violation of the meaning and purpose of the protection of physical freedom guaranteed under Article 8 of the Constitution, and shall be null and void no later than two years from the issuance of this Interpretation.”⁷³

The conclusion of J.Y. Interpretation No. 710 is similar to that of J.Y. Interpretation No. 708. The relevant laws were found to be in violation of due process of law.⁷⁴ However, J.Y. Interpretation No. 710 added that the laws endorsing mandatory deportation “without providing any defense opportunity to such person,” in addition to immediate actions required in response to a threat to national security or social order, were in violation of Article 10 of the Constitution and due process of law.⁷⁵ The Court expounded in its reasoning that the restrictions imposed on the freedom of people from Mainland China, owing to the particular political factors between the two sides of the Taiwan Strait,⁷⁶

[A]fter formally obtaining permission from the competent authorities and having legally entered the Taiwan Area, the freedom of migration of people from the Mainland Area should in principle be protected by the Constitution (see Article 12 and Paragraph 6 of General Comment No. 15 of the UN International Covenant on Civil and Political Rights),

and:

Except where immediate actions are otherwise required in response to a threat to national security or social order, the mandatory deportation of a person from the Mainland Area who legally entered the Taiwan Area must fulfill the corresponding due process requirements (see Article 13 of the UN International Covenant on Civil and Political Rights; Article 1 of Protocol No. 7 of the European Convention on Human Rights).⁷⁷

Therefore, J.Y. Interpretation No. 710 seems to suggest that after entry into Taiwan, freedom of migration, including one’s freedom of movement within Taiwan and freedom to leave any country, shall be equally protected. Further, since J.Y. Interpretation No. 710 cites the ICCPR and its General Comments, it can be fairly concluded that the content of freedom of movement under the ICCPR and the international covenants is recognized by the Constitutional Court and has become part of Article 10 of the Constitution via the interpretations made by the Constitutional Court.

3 Freedom of Movement Created by the Constitutional

Court Under Article 22 of the Constitution Article 22 of the Constitution reads: “All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.” The Constitutional Court has used this article many times to recognize human rights that are not listed in Articles 7–21 of the Constitution, including the right of privacy,⁷⁸ freedom of marriage,⁷⁹ freedom to adopt children,⁸⁰ the right to reputation,⁸¹ the right to establish paternity,⁸² etc.

⁷¹ Dafaguan Shizi Di 708 Hao [大法官釋字第 708 號] (J.Y. Interpretation No. 708). (6 Feb 2013) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=708. Accessed 15 Nov 2017.

⁷² Holding of J.Y. Interpretation No. 710.

⁷³ Id.

⁷⁴ See Holding of J.Y. Interpretation No. 708.

⁷⁵ Id.

⁷⁶ See J.Y. Interpretations Nos. 497 and 558.

⁷⁷ Reasoning of J.Y. Interpretation No. 710, para 2.

⁷⁸ J.Y. Interpretation No. 603 reads:

Although the right of privacy is not among those rights specifically enumerated in the Constitution, it should nonetheless be considered as an indispensable fundamental right and thus protected under Article 22 of the Constitution for purposes of preserving human dignity, individuality and moral integrity, as well as preventing invasions of personal privacy and maintaining self-control of personal information.

⁷⁹ J.Y. Interpretation No. 748 reads:

Unspoused persons eligible to marry shall have their freedom of marriage, which includes the freedom to decide

Although the Constitutional Court had already opined on the freedom of migration under Article 10 of the Constitution to include the right or freedom to travel,⁸³ the Court seemed to consider the right of freedom to travel as encapsulated by Article 10 to be limited, and thus established a further “freedom of movement” (一般行動自由) from a reading of Article 22 of the Constitution.

The freedom of movement was referred to by the Constitutional Court for the first time in J.Y. Interpretation No. 535, announced on 14 December 2011.⁸⁴ The Court found that the police stop-and-check powers under the Police Service Act, including searches, street checks, and interrogations, “may have a great effect upon personal freedom, freedom of [movement],⁸⁵ property rights and the right of privacy, and therefore found that such checks must be in accordance with the rule of law as well as the legal principles guiding police functions and legal enforcement.”⁸⁶ However, in its reference to freedom of movement, the Constitutional Court failed to specify the exact content of such a freedom and how such a freedom was inferred from the Constitution. The reason for this failure might be because the rights of privacy and property were referred to together in J.Y. Interpretation No. 535. The critical point of J.Y. Interpretation No. 535 is, however, to depict due process of law as being required for the police to stop and check.⁸⁷

“whether to marry” and “whom to marry” (see J.Y. Interpretation No. 362). Such decisional autonomy is vital to the sound development of personality and to the safeguarding of human dignity, and therefore is a fundamental right to be protected by Article 22 of the Constitution. The creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons of the same-sex will not affect the application of those provisions on betrothal, conclusion of marriage, general effects of marriage, matrimonial property regimes, and divorce, as provided for in Sections 1 through 5 of the Marriage Chapter to the union of two persons of the opposite sex. Nor will it alter the social order established upon existing opposite-sex marriages. Furthermore, the freedom of marriage for two persons of the same-sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriages.

⁸⁰ J.Y. Interpretation No. 712 reads:

The family system is based on the free development of personality and is essential for ensuring the functions of inheritance, education, the economy and culture. It is vital for an individual’s growth in society and is the foundation for the creation and development of our society. Adoption is part of our country’s family system. It is an action that establishes a parent-child relationship with a view to creating an identity. In this way, it forms human relationships between the adopter and the adoption of education, nurturing, support, belonging and inheritance of property. It plays an important role in developing the mind and body and molding the personality of both adopter and adopted. The people’s freedom to adopt children, in particular the freedom of development of personality for both adopter and adopted, is protected under Article 22 of the Constitution.

⁸¹ J.Y. Interpretation No. 656 reads: “The right to reputation, necessary in the realization of human dignity, aims to maintain and protect individual sovereignty and moral integrity. It is guaranteed under Article 22 of the Constitution (see J. Y. Interpretation Nos. 399, 486, 587 and 603).”

⁸² J.Y. Interpretation No. 587 reads:

A child’s right to identify his/her blood filiations is declared by Article 7, Section 1, of the UN Convention on the Rights of the Child, validated on 2 Sept 1990. The right to establish paternity is concerned with a child’s right to personality and shall be protected under Article 22 of the Constitution.

⁸³ See, e.g., J.Y. Interpretations Nos. 443 and 454.

⁸⁴ Dafaguan Shizi Di 535 Hao [大法官釋字第535號] (J.Y. Interpretation No. 535) (14 Dec 2001) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=535. Accessed 15 Nov 2017.

⁸⁵ The English translation of J.Y. Interpretation No. 587 uses “right to travel,” however, to distinguish the right to travel under Article 10 of the Constitution; I choose “freedom of movement” as a more correct English translation of “一般行動自由.”

⁸⁶ Holding of J.Y. Interpretation No. 587, para 1.

⁸⁷ Holding of J.Y. Interpretation No. 535 reads:

The relevant provisions concerning police checks in the aforementioned Act never delegate police unlimited authority to exercise any check, law enforcement or interrogation without due consideration of time, place, manner and subjects. Unless prescribed otherwise in the law, the police shall limit their checking authority to public transportation, public places, or other places where danger exists or may exist according to reasonable and objective judgments. Among these places, some places may be private residences that must be protected to the same extent as any homes. Police shall not exercise checking authority over any persons unless there is a reasonable belief that actions taken by such persons have caused or may cause danger; and in so doing, police must abide by the principle of proportionality and not go beyond the degree of necessity. Before conducting any checks, police must immediately inform the involved persons of the reasons for exercising such checks and identify themselves clearly as law enforcement officers. Any police checks must be conducted on the spot. If police do not obtain the consent of the persons to be checked and, with no alternative to identify the persons to be checked or to conduct on-the-spot checks, and they still conduct such checks, this may have harmful effects

“Freedom of movement” appeared again in J.Y. Interpretation No. 689, dated 29 July 2011.⁸⁸ Article 89, Paragraph 2 of the Social Order Maintenance Act punishes stalking behavior, which has been urged to end, yet has continued without any legitimate reason. The court found that this provision “does not violate the principle of clarity and definitiveness of law.”⁸⁹ Further, the Court pointed out that “a journalist following a person shall be considered to have legitimate reasons and shall not be subject to penalty... if judging from the facts a specific event is of concern to the public, of public interest, and newsworthy, it is not intolerable under the general social standard.”⁹⁰ The Court therefore found the provision to be constitutional. When elaborating on the purpose of Article 89, Paragraph 2 of the Social Order Maintenance Act, the Court referred to “a person’s freedom of movement, freedom from bodily and mental harm, freedom from intrusion with reasonable expectation in public space and the right to autonomous control of personal information, and to punish stalking behavior that has been urged to end, yet has continued without any legitimate reason.”⁹¹ The Court further opined on the freedom of movement in the reasoning of J.Y. Interpretation No. 689 as follows:

Based on respect of human dignity, we believe that one’s autonomy and the free development of personality shall be safeguarded by the Constitution (see J. Y. Interpretation Number 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 action, including willful action or inaction, shall 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 move toward or stay in a place (see J. Y. Interpretation Number 535) shall be protected within the scope of freedom of action. Nevertheless, the freedom of movement is not an absolute right that cannot be appropriately restrained by laws or administrative regulations clearly authorized by laws, for instance if the restriction is necessary for preventing the obstruction of another person’s freedom or for preserving social order. (Emphasis added.)⁹²

The scope of the freedom of movement is therefore clear from reading J.Y. Interpretation No. 689, being the freedom to move to another place or stay in any place. Such freedom is protected and inferred by the general freedom of action under Article 22 of the Constitution. However, if freedom of movement is one’s freedom to move around or to stay in a place, then it should be asked: what is the difference between the freedom of movement in Article 22 and the right to travel under Article 10 of the Constitution? Why would the Constitutional Court neglect the right to travel or freedom of migration and choose to infer freedom of movement from the general freedom of action?

Freedom of movement was further expounded upon in J.Y. Interpretation No. 699, dated 18 May 2012.⁹³ The Interpretation dealt with the constitutionality of the Road Traffic Management Penalties Regulation, requiring that the government to suspend a motor vehicle operator’s driver’s license, prohibiting such a driver from taking/ receiving a driver’s license for three years, and suspending all classes of vehicle licenses if the driver refuses to participate in a test of blood alcohol concentration or a sobriety test.⁹⁴ The Court found that the Regulation exists to “strengthen the ban on driving under the influence and to ensure traffic safety,”⁹⁵ and to “avert any loopholes when controlling driving under the influence and to effectively deter driving under the influence,”⁹⁶ and therefore the relevant provisions

or may impede traffic flows and interfere with social tranquility. Moreover, police are not permitted to ask checked persons to go to a police station for further interrogation. After the identification of such persons has been confirmed, police should permit them to leave without delay unless they are suspected of having committed a crime, in which case criminal law procedures should be followed.

⁸⁸ Dafaguan Shizi Di 689 Hao [大法官釋字第 689 號] (J.Y. Interpretation No. 689) (29 Jul 2011) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=689. Accessed 15 Nov 2017.

⁸⁹ Holding of J.Y. Interpretation No. 689.

⁹⁰ Id.

⁹¹ Id.

⁹² Reasoning of J.Y. Interpretation No. 689, para 5.

⁹³ Dafaguan Shizi Di 699 Hao [大法官釋字第 699 號] (J.Y. Interpretation No. 699) (18 May 2012) (R.O.C.), available at: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=699. Accessed 15 Nov 2017.

⁹⁴ Holding of J.Y. Interpretation No. 699.

⁹⁵ Reasoning of J.Y. Interpretation No. 699, para 4.

⁹⁶ Id.

under the Regulation “do not contravene the principle of proportionality of Article 23 of the Constitution and do not violate the constitutional safeguards for people’s freedom of movement and right to work.”⁹⁷ Regarding the freedom of movement, the court indicated that:

Under the premise of not offending the social order of the public interest, people shall have the freedom of movement to arbitrarily head to another location at any time or to remain at a certain premise, as is protected under Article 22 of the Constitution (with reference to J. Y. Interpretation Nos. 535 and 689). This freedom of movement shall include the freedom of operating a motor vehicle or any other transportation vehicle.⁹⁸ (Emphasis added.)

The Court expanded the freedom of movement to include an individual’s freedom to operate a motor vehicle or any other transportation vehicle. The expansion, however, does not help in understanding the difference between the right to travel and the freedom of movement. It may be fairly concluded that the Constitutional Court to a certain extent relocated the right to travel and the freedom of migration under Article 10 of the Constitution to Article 22 of the Constitution. Freedom of movement seems also to be broader than the right to travel; whenever there is a restriction on an individual’s freedom of action (e.g., stops and checks, stalking, or a mandatory test of alcohol concentration), freedom of movement may enter into the discussion.

4 Conclusion

Under Article 12 of the ICCPR, freedom of movement includes freedom of movement within a country, freedom to leave any country, and the right to enter one’s own country.

The ICCPR has already been cited by the Constitutional Court in J.Y. Interpretation No. 710. The Taiwanese government further enshrined the ICCPR when it enacted the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 2009. It may be fairly concluded that the ICCPR is an explanatory tool for the Constitutional Court to interpret the Constitution and has binding effect in Taiwan.

Regarding the three distinct rights contained within the freedom of movement under the ICCPR and the freedom of migration under Article 10 of the Constitution, the following conclusions may be drawn:

1. The freedom of movement within a country, the freedom to leave any country, and the right to enter one’s own country are all covered by Article 10 of the Constitution (Interpretations Nos. 443 and 558). Differing from the ICCPR and the UDHR, the Constitutional Court seems to recognize a foreigner’s right to enter Taiwan (J.Y. Interpretation Nos. 265 and 454). However, such freedoms may be restricted with justifiable reason (J.Y. Interpretation No. 265).
2. The Constitutional Court will tolerate more in regard to restrictions on the freedom of migration of people from Mainland China, as evidenced by Article 11 of the Amendments to the Constitution (Interpretations Nos. 497 and 558).
3. The Court allows differential treatment regarding the right to enter one’s own country based on whether an individual appears in the Taiwan household registry. This is not consistent with ICCPR Article 12 and General Comment No. 27 (J.Y. Interpretation No. 454), and the restrictions on those nationals who have a domicile and appear on the household registry in Taiwan require stricter scrutiny (J.Y. Interpretation No. 558). The necessity test under Article 23 may be applicable to the right to enter one’s own country, which also differs from ICCPR Article 12.
4. Once a foreigner has legally entered Taiwan, his freedom of movement within the country and freedom to leave Taiwan should be protected by Article 10 of the Constitution, and due process of law must be followed (J.Y. Interpretation No. 710).
5. In regard to the freedom of movement within a country, in addition to the right to travel under Article 10 of the Constitution, the Constitutional Court has also inferred “freedom of movement” to be derived from Article 22 of the Constitution. However, the Court has not elaborated on the differences between these rights.

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⁹⁷ Holding of J.Y. Interpretation No. 699.

⁹⁸ Reasoning of J.Y. Interpretation No. 699, para 1.

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