

Protection and Restrictions of the Freedom of Business

— Comment on the Resolution of the
Judge-Council of the Supreme administrative
Court on November 22, 2005

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Abstract

The freedom of business as a special form of the freedom of profession is protected by the right of work in Art. 15 of the Constitution. Its protected area includes free establishment and free exercise of a business. The restrictions on the freedom of business by the state powers should meet all the requirements in Art. 23 of the Constitution. Among them, a statute or regulation explicitly authorized by a statute is required for the public powers to restrain people of his basic rights. Under the construction of constitutional guarantee of the basic rights, there is no so-called trifle attack on people's basic rights that is free from the constitutional control. The restrictions upon a basic right imposed by a statute means the maximal range of the legitimate attack by the state actions. Neither the Executive nor the Judiciary is allowed to extend the range of the legal restrictions on the basic rights.

“Statute” mentioned in Art. 23 of the Constitution should be confined to law passed by the Legislative Yuan, autonomous regulations passed by communal assemblies not included. Such autonomous regulations are invalid if they stand contrary to the statutes. They don't have the same legal status as the statute in restricting the basic rights.

It is highly doubtful, if the generally superior status of autonomous

regulations passed by communal assemblies to the autonomous rules passed by communal administrative authorities might be justified based on the legal provisions relating to the requirement of autonomous regulations passed by communal assemblies. Communal assemblies possess only the law-making competences to pass autonomous regulations within the self-governmental powers. Administrative matters conferred upon communal administrative authorities by organs of the state have nothing to do with communal assemblies. Under such circumstances, communal assemblies are principally not allowed to pass autonomous regulations to rule those delegated matters. An announcement issued by communal administrative authorities that attacks people's basic rights without statutory authorization is invalid; it's competent for the judge to refuse applying such an announcement to the legal matters concerned. However, such an announcement should not be redefined as an autonomous rule which refers to the field of the local government .

Key words : freedom of business, freedom of profession, restrictions of basic rights, requirement of a statute in restricting on basic rights, requirements of autonomous regulations passed by communal assemblies, three-stage-theory