The Enforcement of Human Rights Treaties in Korean Courts

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1 Introduction

Korea acceded to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1990 as a result of democratization. Korea's accession to seven major human rights treaties is symbolic of its development of democracy and respect for human rights. The ICCPR, among human rights treaties, has been the most frequently referred to in decisions of courts, though their effects are sometimes dubious. The advice and comment of international human rights committees have been disregarded by Korean courts, with regard to the freedom of expression in the National Security Act, death penalty and conscientious objection to military service. The opinions of the courts have been split, revealing possible room for change in the future. It was evidenced in the decision of the Constitutional Court in 2018, ordering the government to make amendments to the Military Service Act so that conscientious objectors could make the choice of performing alternative service. Invocation of human rights treaties has been expanded to more specific protection of the socially weak and minorities. Lower courts have been occasionally active in referring to human rights treaties directly. The formation and activities of the international human rights research society under the Supreme Court have drawn attention to the more active invocation of human rights treaties. In light of the limitation to the enforcement of human rights treaties by courts, some feasible remedies are suggested.

This article analyses the attitude of Korean courts and their perspective toward human rights treaties in their rulings, featuring the main holdings of the court decisions. The way human rights treaties have been invoked in the decisions of the highest courts of Korea in major areas and their content and application will be examined. Suggestions for feasible judicial remedies in Korea will be made.

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2 Korea's Accession to Human Rights Treaties and Current Situation

Korea has acceded to major human rights treaties.¹ Speaking of the main features² of accession to the human rights treaties, Korea above all acceded to the ICCPR and the ICESCR in 1990 with the democratization of domestic politics, followed by the accession to other human rights treaties. Second, the National Assembly has been involved in the process of acceding to the treaties by giving its consent.³ Article 60(1) of the Constitution⁴ requires treaties to obtain consent of the National Assembly before ratification or accession, if the treaties restrict the sovereignty of the state, or need legislation etc. Third, reservations which have been made upon accession or ratification have been withdrawn over time.⁵

1 Human rights treaties (seven treaties and protocols) Korea acceded to are as follows (Digits in brackets refer to the date of entry into force for Korea): International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1979) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Jan. 26, 1985) [hereinafter CEDAW]; Optional Protocol to the CEDAW, opened for signature Dec. 10, 1999, 2131 U.N.T.S. 83 (entered into force Jan. 18, 2007) [hereinafter CEDAW-OP]; International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force July 10, 1990) [hereinafter ICCPR]; Optional Protocol to the ICCPR, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force July 10, 1990) [hereinafter CCPR-OP1]; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force July 10, 1990) [hereinafter ICESCR]; Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Dec. 20, 1991) [hereinafter CRC]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force Feb. 8, 1995) [hereinafter CAT]; Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force Jan. 10, 2009) [hereinafter CRPD].

2 Whiejin Lee, *Ingwon-ui Gugjejeog Bohowa Gugnaejeog Ihaeng* [International Protection of Human Rights and Their Domestic Implementation], 61 THE KOREAN JOURNAL OF INTERNATIONAL LAW 207, 218 (2016).

3 The treaties to which the National Assembly gave consent are as follows: CEDAW, ICCPR, ICESCR, CCPR-OP1, CAT, CRPD, CEDAW-OP.

4 Article 60(1) of the Constitution provides:

The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaty; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

DAEHANMINKUK HUNBOEB [HUNBOEB] [CONSTITUTION] art. 16.

5 The treaties whose reservations have been withdrawn are as follows (Digits in brackets refer to the date of entry into force): CEDAW arts. 16(1)(c), (d), (f) (Mar. 15, 1991), ICCPR art. 23(4) (Mar. 15, 1991), ICCPR art. 14(7) (Jan. 21, 1993), CERD art. 14 (Mar. 5, 1997), CEDAW art. 9 (Aug.

The accession of these treaties is related to the domestic political situation. The accession to human rights treaties has been achieved mainly since 1990 when Korea joined the international human rights covenants coinciding with democratization. Naturally, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) were acceded to beforehand, but their accession had less realistic implications, though symbolic, as these treaties with the provisions of basic obligations to be carried out by states have not very much reflected Korea's domestic situation.

The Korean government, which has given priority to national security under the circumstances of division between South and North Korea, suppressed the people's desire for democracy and human rights. A set of laws were legislated to control freedom and civil liberties. Typically, the National Security Act, the Assembly and Demonstration Act, and the Basic Act on the Press were legislated, exercising control over the freedom of press and thought.⁶ This policy has been used as a means of maintaining the regime.

The accession to human rights treaties has been related to Korea's policy on human rights and human right situations, and the year 1987 became a watershed in its democratization with the amendment of the Constitution which limited the term of the president to only one 5 year term.⁷ With the progress of economic development, the Korean people's desire for democracy and human rights has accelerated and led an aversion to dictatorships. The hosting of significant international events such as the Asian Games in 1986 and the Seoul Olympics in 1988 has elevated Korea's status in the international community as well as Korea's commitment to human rights and democratization. In this context, Korea acceded to the ICCPR and the ICESCR.

The National Assembly has been involved in the process of acceding to treaties by giving its consent. However, accession to the Convention on the Rights of the Child (CRC) was not referred to the National Assembly for its consent. It may be a lapse of judgement or was construed as not requiring consent of the National Assembly as the CRC was considered outside the range of treaties

24, 1999), ICCPR art. 14(5) (Apr. 2, 2007), CAT arts. 21, 22 (Jan. 3, 2008), CRC art. 9(3) (Oct. 16, 2008).

6 Jongdae Bae, *Eine Theorie des Politischen Strafrechts* [Theory on Political Criminal Law], 26 BEOB HAK NON JIP 197, 200–04 (1991).

7 See Kyungsoo Chung, *Hangukbeobwon-ui Ingwongyujeong-ui Jeogyonggwa Baljeonbanghyang: Gukjeingwonjoyageul Jungsimeuro* [Critical Analysis on the Domestic Application of International Human Rights Law – Focused upon Korean Practice], 8 CONSTITUTIONAL RESEARCH JOURNAL 152 (2002); Hyebong Shin, *Hangugeseoui Gukjeingwonbeom Gungnae Silsi - Beobwongwa Gukgawiwonhoereul Jungsimeuro* [Domestic Implementation of International Human Rights Law in Korea], 46 INTERNATIONAL LAW REVIEW 135, 137 (2017).

provided for in Article 60(1) of the Constitution. Whether the CRC is the type of treaty not applicable to Article 60(1) of the Constitution is arguable.⁸

It is characteristic that the reservations which were made upon accession or ratification have been withdrawn incrementally over time.⁹ More concretely, in reference to reservations and the withdrawal of reservations, reservations have been made upon the accession or ratification of the CEDAW, the Convention against Torture (CAT), the CRC, and the ICCPR. Reservation to Article 16(1)(c)(d)(f) of the CEDAW was withdrawn on March 15, 1995, followed by the ICCPR, the CAT, and the CRC. The CERD, with the acceptance of Article 14 on individual communication, was acceded to.

Having gone over reservations made upon accession to human rights treaties, Korea's attitude is illustrated as follows.¹⁰ First, it has been deduced that if the provisions of treaties are found to be inconsistent with municipal law upon their ratification or accession, a reservation tends to be made without making amendment to municipal law. The significance of accession to human rights treaties has been undermined, since concern has been raised that accession would not lead to better protection of human rights. Second, in the process of accession, stringent comparative analysis of treaties has not been made with relevant municipal law and human rights treaties that were acceded to beforehand. For example, one year after accession to the ICCPR, withdrawal of reservation to Article 14(7) was made. Taking note of a lapse in the interpretation of the treaty, it seems that reservation was withdrawn accordingly. Third, the withdrawal of a reservation through amendment to municipal law has been half-hearted. A rare example is the CEDAW, whose reservation to Article 16(1)(c)(e)(f) was withdrawn after amending municipal law.

3 The Application of Human Rights Treaties in Korean Courts

Korean courts started to invoke human rights treaties since Korea's accession to the ICCPR. Though Korea was a party to the CERD and the CEDAW ahead of

8 Not just the CRC, but also two protocols supplementary to the conventions have not received consent of the National Assembly upon their accession.

9 The withdrawals of reservations to treaties made by Korea are as follows (Digits in brackets refer to the date of entry into force): CEDAW arts. 16(1)(c), (d), (f) (Mar. 15, 1991); ICCPR art. 23(4) (Mar. 15, 1991), art. 14(7) (Jan. 21, 1993); CERD art. 14 declaration (Mar. 5, 1997); CEDAW art. 9 (Aug. 24, 1999); ICCPR art. 14(5) (Apr. 2, 2007); CAT arts. 21, 22 declaration of acceptance (Jan. 3, 2008); CRC art. 9(3) (Oct. 16, 2008).

10 Kyungsoo Chung, A Study on Domestic Application of International Human Rights Law 158 (1999) (Master's Degree thesis, Korea University) (on file with Korea University Library).

the ICCPR, no court decisions have been observed to invoke those treaties. Following the accession to the ICCPR, court precedents that have referred to human rights treaties tended to increase incrementally.¹¹ The ICCPR is the most frequently invoked treaty, and the courts have adhered to an inactive position concerning direct application¹² of treaties, based upon the perception that treaties are in principle to regulate relations among states, and without relevant implementing laws, are not to be applied to individuals.¹³ The cases are as a general rule limited and not diverse in kinds, concentrated around the decisions relating to conscientious objection of military service. In the cases concerning the National Security Act and death penalty, the Supreme Court and the Constitutional Court have handed down rulings to the exclusion of the provisions of human rights treaties and held that the National Security Act and death penalty would not infringe human rights treaties.

Even in case of inconsistency with municipal law, the issue has been evaded by means of construction in decisions of the Supreme Court or Constitutional Court and so treaties are not deemed to be in breach of municipal law, without invoking treaties directly. It is a tendency that the range of treaties that are invoked in the court decisions has been widened incrementally. It has been shown that the most frequently invoked treaty is the ICCPR and in addition,

11 According to the international human rights law research society under the Supreme Court, it was revealed that the number of cases that invoked human rights treaties inclusive of the refugee convention and the UDHR etc. tended to increase; from zero before 1990, 18 in the 1990s, 949 in the 2000s to 1,959 in the period of 2010 to September 2013. Particularly, rapid increase in 2000s has been shown. Among human rights treaties, to name some of the most invoked treaties: 1,428 (ICCPR), 736 (Refugee Convention), and 721 (Refugee Protocol). INT'L HUMAN RIGHTS LAW RESEARCH SOC'Y, DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW AND COURTS 34 (2013); Shin, *supra* note 7, at 152–53.

12 Direct application of treaties derives from the division of treaties between self-executing and non-self – executing [treaties] by a decision of the U.S. Supreme Court in *Foster v. Neilson* (1829). A self-executing treaty is “directly applied within domestic jurisdiction without requiring implementing legislation,” while a non-self-executing treaty implies that the treaty requires “implementing legislation.” M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 27, 28 n.4 (2004).

13 The application of international human rights law in decisions of courts is classified into two categories: first, decisions directly applying human rights treaties; second, decisions indirectly applying treaties. Among the decisions directly referring to treaties, there are two types: decisions in which treaties are applied directly or indirectly, by the argument of litigants or the authority of courts, and decisions in which despite the argument of litigants for their application, it was dismissed by the courts. INT'L HUMAN RIGHTS LAW RESEARCH SOC'Y, *supra* note 11, at 32.

the CEDAW, the CAT, the CRC, the CERD, the ICESCR, and the UDHR are also invoked occasionally.

Since 2011 when the international human rights law research society was formed under the Supreme Court, junior judges who hold forward-looking positions toward international human rights law have raised their voices for the direct application of human rights treaties and thus their opinions have been reflected in the decisions of lower courts. The kinds of human rights treaties have been extended in their scope of application progressively to the CRC, the CEDAW, the CAT, and the CRPD, from the ICCPR in 1990s.¹⁴

The way human rights treaties have been invoked in the decisions of the highest courts of Korea in major areas and their content and application will be examined.

a *Freedom of Expression*

The Constitution of Korea provides for the freedom of speech and the press, and freedom of assembly and association in Article 21(1). Article 21(2) states that licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized. Article 7 of the National Security Act has been criticized for suppressing the freedom of expression.¹⁵

With regard to the issue of the unconstitutionality of the National Security Act, the Constitutional Court and the Supreme Court have maintained in their decisions the position that the National Security Act is constitutional. The views of the UN Human Rights Committee have been at variance with the decisions of Korean courts. With regard to the interpretation of Article 7 (praise, incitement etc.), paragraphs 1 & 5 of the National Security Act, the Constitutional Court, in an adjudication on the unconstitutionality of Article 7 of the

14 To take a look at the breakdown of human rights treaties that have been invoked, in 1990s the ICCPR was invoked 18 times, with no other human rights treaties invoked. After 2000, the ICCPR was still the most frequently invoked, followed by the ICESCR which was invoked 5 times in the 2000s and 3 times in the period between 2010 to September 2013, the CEDAW 7 times in the 2000s, the CAT 5 times in the 2000s and 1 time in the 2010s, the CRC 1 time in the 2000s and the 2010s respectively, the CRPD 1 time in the 2010s. *Id.* at 34.

15 Article 7 (Support, Incitement, etc.) paragraph 1 of the National Security Act provides:

Any person who supports, incites or propagates the activities of an antigovernment organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years.

Kukga Boan Beob [National Security Act], Act No. 10, Dec. 1, 1948, *amended by* Act. No. 13722, Jan. 1, 2016, art. 7, ¶ 1.

National Security Act of 1990,¹⁶ interpreted that “[t]he above provisions are not deemed to infringe the constitution, if it is construed and applied in a narrow sense only that the applicable act endangers the existence and security of a state or poses clear threat to the basic order of a free democratic society.” In another case on the unconstitutionality of Article 7, paragraphs 1, 3 & 5 of the National Security Act of 2002 as well,¹⁷ the Constitutional Court held that, unlike the provisions of the previous act prior to the amendment made as law no. 4373 on May 31, 1991, the act is not deemed to contravene the Constitution. The amended act removed the danger of an expansive interpretation likely to cause deviation from the purpose of enactment by getting rid of unambiguity of the concept in comparison with the original act by means of adding a subjective constituent element like knowingly endangering the existence and security of a state or the basic order of a free and democratic society. Thus, the court has maintained the same position as before. The Supreme Court has the same position as that of the Constitutional Court concerning the issue of unconstitutionality of the National Security Act. The Supreme Court, in its full bench ruling of 1997,¹⁸ held that:

[T]he National Security Act whose purpose is to establish the security of a state and livelihood and freedom of people by regulating anti-state activities which pose danger to the security of the state is not considered to be unconstitutional, and as far as the provisions of the National Security Act are interpreted reasonably in light of the purpose of the Act, the constituent element of crimes enumerated in the National Security Act is not deemed so ambiguous and extensive as to contravene the intrinsic content of the principle of *nulla poena sine lege*, and as far as the purpose and limits of application of the National Security Act is construed restrictively within the limits of not infringing the intrinsic content of freedom and rights in accordance with Article 37(2) of the Constitution, the Act is not unconstitutional.

In the wake of this decision, the Supreme Court delivered the same rulings of constitutionality.¹⁹

16 Constitutional Court [Const. Ct.], 89Hun-Ka113, Apr. 2, 1990 (2 KCCR, 49, 49).

17 Constitutional Court [Const. Ct.], 99Hun-Ba27 & 51, Apr. 25, 2002 (14 KCCR, 278, 280).

18 Supreme Court [S. Ct.], 97Do985, July 16, 1997.

19 Supreme Court [S. Ct.], 98Do1395, July 28, 1998; Supreme Court [S. Ct.], 99Do4027, Dec. 28, 1999; Supreme Court [S. Ct.], 2000Do1226, May 30, 2000; Supreme Court [S. Ct.], 2002Do47, July 8, 2004; Supreme Court [S. Ct.], 2003Do758, Apr. 17, 2008.

Unlike the decisions of the Constitutional Court and the Supreme Court that the National Security Act is constitutional, the UN Human Rights Committee has expressed disparate opinions. In the *Park Tae-hoon* case in 1998, the Human Rights Committee held that the criminal punishment in Article 7(5) of the National Security Act violated the freedom of expression under Article 19 of the covenant unjustifiably.²⁰ In the *Kim Keuntae* case, the Human Rights Committee considered that without any proof that his political speech and distribution of political documents alleged to be sympathetic with North Korean policy posed a danger to national security, prosecution and punishment imposed upon him under the National Security Act and the restriction of his right to freedom of expression was not compatible with the requirements of Article 19, paragraph 3 of the Covenant.²¹ The Human Rights Committee, in its concluding observations (paragraphs 48 & 49)²² on the fourth periodic report

20 U.N. Human Rights Comm., *Tae Hoon Park v. Republic of Korea*, Comm. No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995, ¶10.3 (Nov. 3, 1998):

While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law [T]he Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of Article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by Article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

21 U.N. Human Rights Comm., *Keun-Tae Kim v. Republic of Korea*, Commc'n No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (Jan. 4, 1999).

22 U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the Republic of Korea, General Comment, CCPR/C/KOR/CO/4 (Dec. 3, 2015):

48. The Committee is concerned that prosecutions continue to be brought under the National Security Act. In particular, it is concerned that the unreasonably vague wording of article 7 of the Act could have a chilling effect on public dialogue and is reported to have unnecessarily and disproportionately interfered with freedom of opinion and expression in a number of cases. The Committee notes with concern that the Act is increasingly used for censorship purposes (art. 19).

49. The Committee recalls its general comment No. 34 (2011) on freedoms of opinion and expression and its concluding observations on the second periodic report of the State party . . . and reminds the State party that the Covenant does not permit restrictions on the expression of ideas merely because they coincide with those held by an enemy entity

of Korea, expressing concern about the continuous prosecution and imposition of punishment under the National Security Act, made the recommendation to abrogate Article 7 of the said act.

In the event of a conflict between the opinions of domestic courts and international organizations, the issue is which opinion has prevailing effect. The views of the UN Human Rights Committee do not have binding force and in general has the character of a recommendation.²³ The interpretation of the ICCPR by the Human Rights Committee could be conferred the status as an authoritative interpretation, but the decision of domestic courts concerning the National Security Act has legally binding force on the concerned case and creates a direct effect. In the *Park Taehoon* case²⁴ in 1993, the Supreme Court held that:

Though the Human Rights Committee established by the ICCPR pointed out some problems relating to the National Security Act from its perspective, the effect of the National Security Act would not naturally be lost by itself [P]unishing the defendant on the charge of a breach of the National Security Act would not be deemed to contravene the ICCPR, as is argued.

In light of Supreme Court decisions on the views of the Human Rights Committee and other general circumstances, there is no other choice but to respect and follow the decision of the Supreme Court domestically. It is also necessary and practical to respect the interpretation of the Human Rights Committee on the ICCPR as an authoritative view.²⁵ Korea has submitted its periodic report to the Committee by which its compliance and implementation of the ICCPR has been regularly evaluated, enhancing its status as a law-abiding state whose Constitution provides for and directs toward the respect of international law and international pacifism.

or may be considered to create empathy for that entity. The State party should abrogate article 7 of the National Security Act.

- 23 Whether binding force will be granted to the view of the Human Rights Committee has been in controversy. Some opinions support the recognition of its binding force. Geungwan Lee, Jayugwongyuyagwiwonhoe Gyeonhae(view)-ui Gyubeomjeog Hyoryeog-e Gwanhan Gochal [*An Inquiry into the Normative Effect of the Views of the Human Rights Committee*], 13 SEOUL INTERNATIONAL LAW JOURNAL 1, 11 (2006).
- 24 Supreme Court [S. Ct.], 93Do111, Dec. 24, 1993.
- 25 Jisung Kang, *Gukgaboanbeob Wiban (Chanyang, Gomudeung)*, Joe Deunggwa Pyohyeon-ui Jayu [*Violations of the National Security Act and Freedom of Expression*], in HUMAN RIGHTS LAW CASES 97 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa 2017).

b *Death Penalty and the Right to Life*

The right to life is not provided for in the Constitution, but it is recognized by the decisions of the Constitutional Court. Article 41 of the Criminal Act stipulates death penalty as a punishment.

The Constitutional Court has on two occasions taken decisions concerning the issue of the unconstitutionality of the death penalty. In the first decision²⁶ of 1996, the Court declared by a majority of 7 to 2 that it was constitutional, and the second decision²⁷ was taken by 5 to 4 in 2010. The dissenting opinion, which argued the unconstitutionality of death penalty, invoked human rights treaties including the ICCPR. Because there has been no exercise of the death penalty during the past 20 years or so, Korea has been considered a *de facto* abolitionist state in terms of the death penalty. Whereas the number of states abolishing the death penalty tends to be on the rise in the world, and as the number of justices objecting to the death penalty in the Constitutional Court seems to be increasing, the likelihood of a decision that the death penalty is determined to be unconstitutional is a real possibility depending upon the composition of the justices on the Court.

The Constitutional Court, in its decision of 1996, held that “if only applied in exceptional circumstances meeting the unavoidable need for the protection of the public interest, even the punishment of depriving life is not deemed to contravene Article 37(2) of the Constitution.” It ruled that as far as the death penalty is seen as constitutional as a kind of punishment, the provisions for capital punishment in the law as a punishment for homicide, which is a type of crime that takes away human life, is not considered to breach the Constitution. The minority opinion enumerated several reasons that emphasized the abolition of the death penalty: death penalty is contrary to the purpose of rehabilitation; in terms of preventing crime, the effect seems negligible compared with life imprisonment; in particular, the number of states which has abolished the death penalty has increased; Article 6 of the ICCPR and Article 1 of the European Convention on Human Rights (ECHR) emphasize the abolition of the death penalty and the number of states which acceded to these treaties has increased. While these two treaties do not provide for the abolition of death penalty explicitly, it is presumed that the provisions on the protection of human life are broadly construed to abolish the death penalty.²⁸

26 Constitutional Court [Const. Ct.], 95Hun-Bai, Nov. 28, 1996 (8 KCCR, 537).

27 Constitutional Court [Const. Ct.], 2008Hun-Ga23, Feb. 25, 2010 (22 KCCR, 36).

28 Jinee Nah, *Saengmyeonggwongwa Sahyeongjedo* [The Right to Life and Capital Punishment], in HUMAN RIGHTS LAW CASES 3, 6–10 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa 2017).

Though the minority opinion invokes human rights treaties, treaties to which Korea acceded do not explicitly prohibit or abolish death penalty and it is deemed that treaties are not likely to affect a decision on the unconstitutionality of the death penalty decisively. However, in the future, the decisions may be affected by the fact that the Protocol to the Convention abolishes the death penalty and that the basic purpose of human rights treaties is oriented towards the respect of life and the abolition of the death penalty.²⁹

The Human Rights Committee has expressed the view that the deprivation of life by state authorities is a matter of utmost gravity. It expressed the view that laws should control and limit strictly the circumstances in which the right to life is deprived by state authorities.³⁰ The exercise of state immunities is not compatible with the protection of the right to life of an individual. That is, the justification for the deprivation of the right to life in the exercise of the state's sovereign right is not acceptable. In its concluding observations³¹ on the fourth periodic report of Korea, the Human Rights Committee, acknowledging the current non-application of the death penalty, made recommendations that Korea should give due consideration to the legal abolition of the death penalty.

c *Freedom of Conscience*

1 Conscientious Objection to Military Service

Article 19 of the Constitution provides for freedom of conscience and Article 20(1) for freedom of religion. Whether refusing the obligation of military service on account of religious belief is in the realm of freedom of religion and conscience is at issue.

29 The dissenting view of Justice Seunghyeong Cho concerning death penalty held that:

Death penalty should be abolished conforming to the change of times *i.e.* changes in political, social, cultural, international and other fields. Internationally, treaties such as Article 6 of the ICCPR and Article 1 of the ECHR put emphasis on the abolition of death penalty and the number of states which has acceded to these treaties has increased gradually.

Constitutional Court [Const. Ct.], 95Hun-Bai, Nov. 28, 1996 (8 KCCR, 537, 563).

30 U.N. Human Rights Comm., CCPR General Comment No: Article 6 (Right to Life) (Apr. 30, 1982).

31 U.N. Human Rights Comm., *supra* note 22, ¶¶ 22–23:

22. While acknowledging the current non-application of the death penalty, the Committee is concerned that a significant number of persons remain sentenced to death.

23. The State party should give due consideration to the legal abolition of the death penalty as well as to the commutation of all death sentences to terms of imprisonment. On the occasion of the twenty-fifth anniversary of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, the State party should also consider acceding to that instrument.

A host of cases on which decisions have been taken invoking human rights treaties are concerned with conscientious objection to military service. The Constitutional Court and the Supreme Court, while denying the direct effect of human rights treaties, have ruled that punishing conscientious objectors to military service would not contravene the right to freedom of conscience in the Constitution.

In 2011 decision,³² the Constitutional Court by a majority of 7 to 2 held that taking into account Korea's real circumstances such as:

Its specific security situation where South and North Korea have been confronted against each other, the possible reduction of military manpower in case of the introduction of alternative service, and the difficulty of examining whether military objector is attributable to genuine conscience, the introduction of alternative service would impede social unity and cause serious damage to national capabilities, if public opinion is critical of conscientious objection.

It appears difficult to realize conscientious objection to military service and this does not infringe the principle of minimum legal encroachment. This does not appear to violate the ICCPR and the principle of respect for international law.³³

In respect of the ICCPR, it is difficult to recognize the right of conscientious objection in the covenant itself or for the covenant to have legally binding force concerning conscientious objection. There are no human rights treaties recognizing the right of conscientious objection explicitly, and even though some European states guarantee the right of conscientious objection, it is not considered that the right of conscientious objection is recognized as customary international law, and therefore, the right of conscientious objection cannot be accepted in Korea as a generally

32 Constitutional Court [Const. Ct.], 2008Hun-Ka22, Aug. 30, 2011 (23 KCCR, 174, 192–94).

33 More concretely, as to the issue of the application of the ICCPR and formation of customary international law, the Constitutional Court held:

Not only Article 18 of the ICCPR, but any other provisions of the covenant have not stated the right of conscientious objection to military service as one of basic human rights, and in fact though there was argument to include conscientious objection in Article 18 of the ICCPR in the process of drafting, general opinions of negotiating states were negative, and the interpretation of international organizations has only recommendatory effect in each state, with no legally binding force. The issue of recognizing conscientious objection of military service and introducing alternative service is considered as the field in which policy choice should be respected in light of disparate and diverse factors in respective states such as history and security environment, the structure of social strata, and political, cultural, religious, or philosophical value of a state.

recognized international norm, and accordingly the punishment of conscientious objectors pursuant to the applicable provision of the law would not violate Article 6(1) of the Constitution which proclaims the principle of respect for international law.

The dissenting opinion, without judging explicitly upon Article 6(1) or the principle of respect for international law, articulated the recommendation of the Human Rights Committee made to every state of the world on numerous occasions to recognize the right of conscientious objection and provide for alternative service with disciplinary consequences, while citing examples of foreign states enforcing conscientious objection. The Constitutional Court on June 28, 2018 changed its position and found that Article 5(1) of the Military Service Act, which does not allow alternative service to conscientious military service objectors, does not conform to the Constitution.³⁴

In its decision of 2007,³⁵ the Supreme Court dismissed the lawsuit for reasons that the right to receive an exemption from the obligation of military service cannot be derived from the provisions of the ICCPR itself, since Article 18 of the ICCPR provides for the same content as the scope of protection of basic human rights guaranteed in the interpretation of Article 19 of the Constitution on the freedom of conscience and Article 20 on the freedom of religion. With regard to the application of the ICCPR, the Supreme Court held that:

Not only Article 18 of the ICCPR, but any other provisions of the covenant have not stated the right of conscientious objection to military service as one of basic human rights, and in fact though there was the argument to include conscientious objection in Article 18 of the ICCPR in the process of drafting, general opinions of negotiating states seemed to be negative . . . [A]rticle 8(3)(c)(ii) of the covenant on the prohibition of forced labor provides for 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors' as one of those which are excluded from the scope of forced labor prohibited in the covenant.

34 The Constitutional Court ruled: "Categories of military service, which have not included alternative service program for conscientious objectors, infringe on objectors' freedom of conscience by violating principle of excessive restriction." Constitutional Court [Const. Ct.], 2011Hun-Ba379, June 28, 2018 (30 KCCR, 370, 371).

35 Supreme Court [S. Ct.], 2007Do7941, Dec. 27, 2007.

In considering an individual communication, the ICCPR Committee reached a conclusion that Article 18 of the ICCPR does not guarantee conscientious objection in consideration of Article 8(3)(c)(ii) of the Covenant.³⁶ The European Commission of Human Rights, in numerous decisions, held that Article 9 of the ECHR, while protecting the freedom of thought, conscience, and religion in the general sense, is not interpreted to confer the right to demand exemption from the obligation of military service upon conscientious objectors.³⁷

The main reason for not recognizing conscientious objection is that Article 8(3)(ii) of the ICCPR and Article 4(3)(b) of the ECHR provide that “in countries where conscientious objection is recognized, any national service required by law of conscientious objectors” is excluded from the scope of forced labor prohibited in the covenant. The phrase “where conscientious objection is recognized” in the relevant provision presupposes that the state party can determine for itself whether conscientious objection could be recognized or not.

This position has changed in the 1990s, shifting toward recognizing the right of conscientious objection. The Human Rights Committee, in its General Comment no. 22 in 1993,³⁸ adopted the position that “[t]he Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief,” opening the possibility of recognizing conscientious objection, but not definitively recognizing the right to conscientious objection.

Following this decision, the Human Rights Committee has intensified its position and point of argument. In an individual communication case adopted on November 3, 2006,³⁹ the Human Rights Committee held that “Article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of Article 18

36 U.N. Human Rights Comm., *L.T.K. v. Finland*, Commc’n No. 185/1984, UN doc. CCPR/C/OP/2, at 61 (July 9, 1985). The complainant was initially not recognized as a conscientious objector, and on appeal was ordered to perform unarmed military service which he refused. He was subsequently sentenced to nine months imprisonment for refusing military service.

37 *N. v. Sweden*, No. 10410/83, 40 Eur. Comm’n H.R. Dec. & Rep. 203 (1984); *Autio v. Finland*, No. 17086/90, Eur. Comm’n H.R. Dec. & Rep. 246 (1991).

38 U.N. Human Rights Comm., CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (Jan 30, 1993).

39 U.N. Human Rights Comm., Commc’n Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004 (Jan. 23, 2007). The Human Rights Committee made a decision in *Yeobeom Yoon and Myungjin Choi Communication* case of 2006 that Korea violated Article 18 of the ICCPR.

of the Covenant, the understanding of which evolves like that of any other guarantee of the Covenant over time in view of its text and purpose,” judging that the Korean government’s measure is unjustifiable. Thereafter, the Committee made public its views of accepting five individual communications concerning conscientious objection.⁴⁰ In its decision of 2011, the Committee held that “military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs. The right must not be impaired by coercion,”⁴¹ strengthening its point of argument. In its decision of 2014, the Committee referred to the violations of the prohibition of arbitrary detention in Article 9(1) of the ICCPR, in addition to the freedom of conscience and religion in Article 18(1) of the Covenant.

Thus, the decisions of the Human Rights Committee and the European Court of Human Rights have recognized the right of conscientious objection which has further evolved into the provisions of the Charter of Fundamental Rights of the European Union⁴² which recognizes the right explicitly. From this trend, there may be room for a changes in the positions of the Constitutional Court and the Supreme Court of Korea arising from the changing situations of the international community. It was expected that the decisions of Korean courts might be modified through a progressive interpretation of the ICCPR.⁴³ It resulted in the decision of the Constitutional Court in 2018, which ordered the amendment to the Military Service Act to allow alternative military service for conscientious objectors. Furthermore, the Supreme Court decided on November 1, 2018 that conscientious military service objectors shall

40 U.N. Human Rights Comm., Eun-min Jung et al. v. Republic of Korea, Commc’n Nos. 1593 to 1603/2007, U.N. Doc. CCPR/C/98/D/1953-1603/2007 (Mar. 23, 2010); U.N. Human Rights Comm., Min-Kyu Jeong et al. v. Republic of Korea, Commc’n Nos. 1642 to 1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007 (Mar. 24, 2011); U.N. Human Rights Comm., Jong-nam Kim et al. v. Republic of Korea, Commc’n No. 1786/2008 (Oct. 25, 2012); U.N. Human Rights Comm., Young-kwan Kim et al. v. Republic of Korea, Commc’n No. 2179/2012, U.N. Doc. CCPR/C/112/D/2179/2012 (Oct. 15, 2014).

41 U.N. Human Rights Comm., Min-Kyu Jeong et al. v. Republic of Korea, Commc’n Nos. 1642 to 1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007 (Mar. 24, 2011).

42 Article 10(2) of the Charter provides “[t]he right to conscientious objection is recognized, in accordance with the national laws governing the exercise of the right.”

43 Youngsik Kim, *Yangsimgjeog Byeongyeog Geobugwon* [*The Right of Conscientious Objection to Military Service*] in HUMAN RIGHTS LAW CASES 71–75 (Int’l Human Rights Law Research Soc’y ed., Parkyoung-sa, 2017); Jaewon Kang, *Yangsimgjeog Byeongyeog Geobuja-e Daehan Hyeongsacheobeol-ui Wiheonseong* [*The Unconstitutionality of Criminal Punishment Against Conscientious Objectors*] in HUMAN RIGHTS LAW CASES 60–64 (Int’l Human Rights Law Research Soc’y ed., Parkyoung-sa, 2017).

not be punished criminally, considering that the conscientious objection to military service is a justifiable reason for refusal of military service in the Military Service Act.⁴⁴

II Apology Advertisement Contrary to Freedom of Conscience

In a lawsuit against a publisher for compensation and the publication of an apology on account of alleged defamation resulting from a report from a monthly article, the publisher filed a constitutional appeal arguing that Article 764 of the Civil Act was unconstitutional on account of the inclusion of the publication of the apology. Article 764 provides that in the case of defamation “the court may order the person who has defamed another’s reputation to take measures appropriate for repairing the injured party’s reputation, either in lieu of, or together with provision of compensation including the publication of an apology in newspapers, etc.” The Constitutional Court made the decision of limited unconstitutionality, considering that the provision of the Civil Act, which is construed to include the publication of an apology, is contrary to the principle of proportionality and unjustified due to an excess of the means in comparison with the ends, and is deemed to be in violation of Article 19 of the Constitution on freedom of conscience and infringe the right of personality guaranteed in the Constitution. Furthermore, the Constitutional Court held that referring to Article 18(2) of the ICCPR to which Korea acceded to in 1990 and which provides that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice,” the publication of an apology is contrary to the freedom of conscience guaranteed in Article 19 of the Constitution, as the publication of an apology was ordered by judicial proceeding against the belief of the person.⁴⁵ There is a minority opinion concerning law-abiding oath with regard to the freedom of expression and conscience.⁴⁶

44 Supreme Court [S. Ct.], 2016Do10912, Nov. 1, 2018.

45 Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991 (3 KCCR, 149, 151).

46 In the dissenting opinion, Justices Seonhoe Ju and Hyojong Kim held:

Law-abiding oath, though a medium of expression, is considered to de facto force inward belief rather than the aspect of an act of conscience realization, in the sense that the state forces an individual to confess one’s inmost belief as a matter of fact. . . . [A]rticle 18(2) of the ICCPR providing that ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’ is to prevent the infringement of inmost freedom that such a compulsion of confession of belief might bring about.

Constitutional Court [Const. Ct.] 98Hun-Ma425, Oct. 27, 2005 (14 KCCR, 351, 352) (Seonhoe Ju, J., and Hyojong Kim, J., dissenting).

d *Personal Liberty*

Article 12 of the Constitution provides for the right not to be tortured, *habeas corpus*, and the right of access to lawyers and Article 13 for the prohibition of retroactive punishment and the principle of *non bis in idem*. that guarantees human rights in criminal proceedings.

In the constitutional appeal in which the meetings with visitors, communication by letter, and exercise for inmates were banned pursuant to the Enforcement Decree of the Criminal Administration Act, the Constitutional Court, referring to the ICCPR, recognized the unconstitutionality with regard to the order of banning exercise. The Constitutional Court held that:

Even inmates, as human beings, have the right of human dignity and value which is non-derogable. The ICCPR to which Korea acceded, providing in Article 10(1) that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' and with the provision of Article 7 on the prohibition of 'cruel, inhuman or degrading treatment or punishment' represents the institutional manifestation of universal spirit to respect such basic authority of human beings. . . . [T]hen, the absolute ban of exercise of the inmate who received prohibitive measures is deemed to deviate from the necessary minimum extent in terms of ways and means even in consideration of the purpose of discipline and reach the extent of infringing human dignity and value under Article 10 of the Constitution and personal liberty of Article 12 of the Constitution inclusive of the freedom of physical safety not to be derogated.⁴⁷

In the case in which the suspect who was arrested while participating in a demonstration for the annulment of the National Security Act was investigated in the prosecutor's office, being handcuffed and with his upper body and arms bound with rope, the Constitutional Court considered its constitutionality, referring to the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) and held that:

As rule 111(2) of the UN Standard Minimum Rules for the Treatment of Prisoners⁴⁸ adopted by the UN General Assembly on the Prevention of

47 Constitutional Court [Const. Ct.], 2002Hun-Ma478, Dec. 16, 2004 (16 KCCR, 548, 562).

48 A revised version of the UN Standard Minimum Rules was adopted on December 17, 2015 unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175.

Crime and the Treatment of Offenders in 1955 provides that '[u]nconvicted prisoners are presumed to be innocent and shall be treated as such,' the principle of presumption of innocence is the guiding principle which governs the whole process of criminal procedure from investigation to prosecution, and the use of restraining implements in this case cannot be seen as an indispensable measure at all for the purpose of maintaining safety and order in the prosecutor's investigation office, if any, becoming unconstitutional exercise of state power which excessively infringes personal liberty and contravenes the spirit and purpose of guaranteeing the principle of presumption of innocence and the right of defense.⁴⁹

e *Right to Labor*

Article 32 of the Constitution provides for the right to labor and Article 33 for the right to organize trade unions and other social rights.

The petitioner, Sohn Jongkyu, filed a communication with the Human Rights Committee on July 7, 1992 pursuant to the Optional Protocol to the ICCPR, for reasons that his punishment contravened the freedom of expression set forth in Article 19(2) of the ICCPR. The Committee found that:

The facts before it disclose a violation of Article 19, paragraph 2 of the Covenant. The Committee is of the view that Mr. Sohn is entitled, under Article 2, paragraph 3(a) of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review Article 13(2) of the Labor Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.⁵⁰

The Supreme Court held that as the ICCPR, which guarantees the freedom of expression in Article 19(2) and meanwhile restricts "the exercise of the rights in consideration of the rights or reputations of others or for the protection of national security or of public order such as are provided by law or necessary"

The revised Rules are known as the "Nelson Mandela Rules" to honor the legacy of Nelson Mandela.

49 Constitutional Court [Const. Ct.], 2001Hun-Ma728 May 26, 2005 (17 KCCR, 709, 709).

50 U.N. Human Rights Comm., Jongkyu Sohn v. Republic of Korea, Commc'n No. 518/1992, UN Doc. CCPR/C/54/D/518/1992, ¶¶ 11–12 (1995).

in Article 19(3), recognizes the freedom of expression to the necessary extent pursuant to the law. Further, Article 13 *bis* of the Labor Dispute Adjustment Act provides for the prohibition of a third party's intervention to adjust, incite, disturb, or influence the concerned parties concerning a labor dispute. The punishment of the plaintiff according to this provision is not deemed to infringe upon freedom of expression in contravention of the object of Article 19 of the ICCPR. As Article 2(3) of the ICCPR provides for the reciprocal obligation of states parties in international law to ensure within a legal system for individuals to receive an effective remedy, including appropriate compensation when their rights and freedom in the covenant are violated, nevertheless, the right to make a compensation claim against the state is only exercisable based upon municipal law. Thus, the Supreme Court held that pursuant to the covenant, a special right of an individual to claim compensation and other remedial measures against the state is not created.⁵¹ It appears that the decision of the Supreme Court, seeing it as a provision on the obligation of a state, denies the direct effect of the covenant with respect to individuals insofar as it does not recognize the self-execution or direct applicability of the covenant.

In the above case, Article 2(3)(a) of the ICCPR confers the obligation to secure an effective remedy upon the state. Other provisions of the covenant, rather than taking the form of conferring this obligation upon the state, provides for the right of an individual definitively. In this regard, the interpretation of the Supreme Court in its decision, which excludes direct application of the covenant concerning the obligation of a state for compensation, cannot be applied extensively to other provisions of the Covenant.⁵²

In relation to the issue of non-performance of international law and state responsibility, the Supreme Court held that Article 13 *bis* of the Labor Dispute Adjustment Act does not contravene Article 19(2) of the ICCPR without addressing whether the legislation and enforcement of law in breach of international law could be the cause of state compensation.

The said case is the first circumstance where an international claim was filed after exhaustion of local remedies since Korea's accession to the ICCPR, which drew considerable attention. It was anticipated that the Supreme Court would determine the scope of the right along with whether the rights of laborers included the intervention of a third party and whether the law that prohibits the intervention of a third party is lawful or not. However, the Supreme

⁵¹ Supreme Court [S. Ct.], 96Da55877, Mar. 26, 1993.

⁵² Junghoon Ha, *Sohn Jongkyu Guggabaesang Sageon – Gugjebeobgwa Gugnaebeob-ui Gwangye* [Sohn Jongkyu State Compensation Case – the Relationship Between International Law and Municipal Law], in HUMAN RIGHTS LAW CASES 233, 239 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

Court did not accept the views of the Human Rights Committee, but instead ruled that state compensation would be paid in accordance with municipal law.

In the case of the unconstitutionality of imposing criminal punishment on laborers collectively refusing to provide labor on charge of forcible business obstruction, the Constitutional Court held that:

As Article 8(3) of the ICCPR provides that '[n]o one shall be required to perform forced or compulsory labor save in pursuance of a sentence to such a punishment by a competent court' and forced labor refers to labor imposed against the will of the person . . . which is equivalent to the provision of Article 12(1) of the Constitution in its purpose which provides that labor shall not be imposed against the will of the person except in pursuance of law and due process of law. . . . [F]or the Covenant and the Constitution concerning the prohibition of forced labor are deemed to provide for the same content substantially, and as far as the relevant provision for this case or the interpretation of the Supreme Court regarding this issue is not considered to contravene the Constitution, there is no room for a determination of unconstitutionality of this provision.⁵³

In the constitutional appeal on the provisions of the Local Public Officials Act which prohibits labor movements and other collective actions by local public servants and punishes them in violation thereof, the Constitutional Court dismissed the argument of the claimant.⁵⁴ Denying the binding force of soft laws including general comments and recommendations of international human rights organizations, the Constitutional Court held that:

Even though 'the Committee on the Freedom of Association' of the ILO, 'the Committee on the Economic, Social and Cultural Rights' of the UN, and 'the Consultative Committee on Trade Union' of the OECD and other international organizations make recommendations to Korea to ensure basic labor rights to public servants of all areas as soon as possible, they themselves would not render the provisions of the said Act unconstitutional, thus losing no effect naturally.

53 Constitutional Court [Const. Ct.], 97Hun-Ba23, July 16, 1998 (10 KCCR, 243, 264).

54 Constitutional Court [Const. Ct.], 2003Hun-Ba50, Oct. 27, 2005 (17 KCCR, 238, 240) (Hyo-sook Chun, J., and Daehyun Cho J., dissenting).

Two justices, however, offered dissenting opinions,⁵⁵ interpreting the Constitution in consideration of the object and purpose of international human rights law. The dissenting opinions remarked that Korea has accepted most human rights treaties, and as a member of the ILO has to respect the UDHR, international human rights covenants, and the conventions and recommendations of ILO. The legislative body has to take them into account in determining the scope of public servants for whom basic labor rights are ensured. Furthermore, referring to the relevant provisions of the treaty and recommendations of international organizations, the dissenting opinions held that the provisions of the law which excessively restrict the basic labor rights of public servants are not consistent with the Constitution. The declarations, treaties, and recommendations of international organizations could be important guidelines to interpret the meaning, content and scope of application of the Constitution whose provisions are highly abstract.

f *Violations of Human Rights by State Organs and Statute of Limitations*

Claimants argued for the non-applicability of statute of limitations with respect to their claims for arrest, violence, and detention by the abuse of authority. Their claims were based on the Statute of the International Criminal Court (ICC) which has domestic legal effect pursuant to Article 6(1) of the Constitution, and further that the crime of torture is not subject to the statute of limitations under customary international law as a generally recognized international norm under Article 6(1) of the Constitution having the same effect as municipal law.

55 In the dissenting opinion concerning the provision of the State Public Officials Act which prohibits labor campaigns and other collective actions by public officials and punishes them in violation thereof, Justice Doohwan Song held:

Article 6, paragraph 1 of the Constitution declares that we accept and respect international law, stating that 'treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as municipal law of the Republic of Korea,' and currently our nation is an official member of the ILO and a treaty power that has accepted almost all international human rights norms, with the consent of our National Assembly. Therefore, the Constitution is interpreted to cover the Universal Declaration of Human Rights and the International Human Rights Covenants of the UN, and the agreement and recommendations of the ILO. Also, though municipal law that does not conform with such international regulations cannot immediately be declared unconstitutional, international law should serve as an important standard when evaluating the constitutionality of said laws.

Constitutional Court [Const. Ct.], 2003Hun-Ba51, Aug. 30, 2007 (19 KCCR, 213, 245).

In its decision of 2004,⁵⁶ the Constitutional Court deemed that it was hard to exclude the application of statute of limitations in this case by applying the provision of the ICC Statute because the crime of torture, which is under the jurisdiction of the ICC, and whose application of prescription is excluded in pursuance of Article 29 of the ICC Statute. The Constitutional Court further ruled that the crime of torture alleged by the claimants as customary international law which should be excluded from the application of statute of limitations has no ground to be recognized as universal norm of the international community by most of states the world over, and is not deemed to be applied in this case as a “generally recognized international norm” under Article 6(1) of the Constitution.

Article 29 of the ICC Statute provides that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. Article 6 of the Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court which is an implementing act legislated for ratification of the ICC Statute provides, concerning Articles 8 through 14 including the crime against humanity in Article 9 of the Act, that:

The crime of genocide, etc. shall not be subject to the prescription for public prosecution provided for in Articles 249 through 253 of the Criminal Procedure Act and Articles 291 through 295 of the Military Court Act and the prescription for execution of judgment of the guilty provided for in Articles 77 through 80 of the Criminal Act.

The crime of torture in this case should be an act related to the “widespread or systematic attack directed against any civilian population”. The violence and torture in this case, though inhumane, is deemed difficult to be regarded as a crime against humanity under the Statute. The Constitutional Court has not articulated the crime in the case not applicable to torture as a crime against humanity. The crimes enumerated in Article 7(1) of the ICC Statute do not require occurrence during armed conflicts or on a massive scale. Even one crime, if occurred on a large scale or as part of a systematic attack, could be recognized as a crime against humanity.⁵⁷

⁵⁶ Constitutional Court [Const. Ct.], 2004Hun-Ma889, Dec. 14, 2004.

⁵⁷ It was agreed at the diplomatic conference held in Rome to adopt the ICC Statute that to be established as a crime against humanity the requirement that the crime should take place on a massive scale was deleted. YOUNGSUK KIM, GUGJE HYEONGSA JAEFANSO BEOB GANG-UI [LECTURE ON INTERNATIONAL CRIMINAL COURT] 58 (2d ed. 2014).

Taking into account Korea's situation in which torture is not provided for as an independent crime, the Human Rights Committee, in its concluding observations⁵⁸ on the fourth periodic report in 2015, recommended that:

The State party should amend the Criminal Code to include a definition of torture that is fully in line with Article 7 of the Covenant and internationally established norms, preferably by codifying it as an independent crime. It should ensure that all cases of torture and ill-treatment are properly investigated by an independent mechanism and that the law adequately provides for the prosecution and conviction of perpetrators and accomplices of such acts, in accordance with the gravity of the acts, before ordinary criminal courts, as well as for remedies of victims and their families, including rehabilitation and compensation.

The Committee, in its general comment in 1982,⁵⁹ reiterated that to ensure the right not to be tortured, "[c]omplaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation," and in the general comment in 1992 noted that:

Some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁶⁰

In this case, the claimant attempted to invoke the provision of the ICC Statute because punishment was impossible due to the expiry of statute of limitations under municipal law. It was decided by the court that the crime concerned was not a crime against humanity and thus the application of prescription was appropriate. The ICC Statute provides for the non-applicability of statute of

58 U.N. Human Rights Comm., *supra* note 22, ¶ 27.

59 U.N. Human Rights Comm., Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, art. 7, U.N. Doc. HRI/GEN/1/Rev.1, at 7 (July 29, 1994).

60 *Id.* at 30.

limitations with respect to crimes against humanity. The type of crime that belongs to this constituent element seems to be considerably narrow and will not be easy to prove. It is desirable to achieve justice and exclude the application of prescription for crimes involving a state organ, however there must be limitations to its realization in consideration of the exceptions to prescription prescribed by the state.⁶¹

Meanwhile, the dissenting opinion of three justices concerning the provision of the Special Act of the May 18 Democratization Movement which suspends the statute of limitations retroactively, holding that the objection to adjudication infringes not only the Constitution, but international human rights norms.⁶²

g *Right to Assistance of Counsel*

A claimant who was detained on suspicion of violation of the National Security Act made a constitutional appeal on the infringement of the right of an accused to an attorney in the Constitution. Interpreting that the right of access to an attorney without the presence of prison officials was guaranteed under Article 12 of the Constitution includes the right to assistance of an attorney, the Court held that the provision of the Criminal Administration Act was unconstitutional. The Act required the presence of concerned public officials in a meeting of pretrial detainee with attorney. In the decision, the Court referred to the UN principle of detainee protection making it supplementary to the decision of unconstitutionality. The Court held that:

61 Mijung Hwang, *Gugga Gigwan-ui Ingwonchimhae Haeng-wiwa Gongsosihyo* [Violations of Human Rights by the State Organ and Statute of Limitations], in HUMAN RIGHTS LAW CASES 415, 422–24 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

62 The UN confirmed that statute of limitations does not apply to war crimes and crimes against humanity in international law by adopting the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" in the General Assembly on November 26, 1968 in its resolution no. 2391(XXIII). The provisions of the Convention apply to "representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspires to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission." States parties pledged to abrogate the laws which provide for statute of limitations on those crimes. It is to be interpreted, therefore, that the prescription of a public prosecution proceeds only if there are no legal and systematic obstacles to the effective exercise of prosecutorial rights by the prosecuting authorities.

Constitutional Court [Const. Ct.], 96Hun-Kaz, Feb. 16, 1996 (8 KCCR, 51, 75–76).

As Article 18(4) of a 'body of principles for the protection of all persons under any form of detention or imprisonment' adopted by the UN General Assembly resolution 43/173 of December 9, 1988 provides that 'Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official,' concerned public officials must not be placed within the distance of making them possible to listen to or record the conversation between the detainee and attorney, and must not disrupt free interview, while taking photos and causing other uneasy atmosphere for safe custody or on other pretexts.⁶³

h *Prohibition of Torture*

Article 12(2) of the Constitution provides that "[n]o citizen shall be tortured or be compelled to testify against himself in criminal cases." Article 12(7) states that "In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession." Article 309 of the Criminal Procedure Act provides for similar content. The principle of the prohibition of torture is established in municipal and international law.

In a case of torture that resulted in the death of a criminal suspect during investigation by prosecuting authorities, the Seoul High Court, in its decision of 2005,⁶⁴ held that the defendant has the obligation to pay damage to the plaintiff with state compensation due to illegal act attributable to the performance of duties of public officials. It took note of the UDHR and the ICCPR which provide for the absolute prohibition of torture and was the result of the endeavors of all human beings to make clear inhuman act of torture by state authorities and public officials and to prevent its harmful effects. This decision did not accept the argument of self-defense with respect of the act of torture and pointed out no possibility of reducing damages in case of death caused by torture.

The decision of the Seoul High Court, though invoking the ICCPR and other international human rights law, did not directly mention the Convention Against Torture and did not accept the argument of self-defense against torture by recognizing the absolute prohibition of torture. The possibility of a

63 Constitutional Court [Const. Ct.], 91Hun-Ma111, Jan. 28, 1992 (4 KCCR, 51, 59–60).

64 Seoul High Court [Seoul High Ct.], 2004Na13610, Apr. 13, 2005.

reduction in compensation was not deemed to conform to the provision of the Convention in case of harm due to torture.⁶⁵

i *Prohibition of Discrimination and the Right to Equality*

Article 11(1) of the Constitution provides that “[a]ll citizens shall be equal before the law, and there shall be no discrimination in religion or social status,” and in Article 11(2) that “[n]o privileged caste shall be recognized or ever established in any form,” establishing the right to equality and the principle of prohibition of discrimination. Article 31 provides for the right to education and Article 36 for gender equality.

1 Qualification of Membership for Women in Meeting of a Family Association with Same Clan

Plaintiffs argued that women are naturally qualified for membership in the meeting of a family association with the same clan. The basis of the argument was that the regulation of a family association does not confine qualification of membership to men only. The court of first instance dismissed the plaintiffs’ claims holding that considering the family association as a natural grouping composed of the same clan whose members are men for the purpose of the care of the ancestral graveyard, holding of memorial service for ancestors and promotion of friendship among the members of the association under the customary law, individuals not of the familial bloodline and women are not qualified for membership of the meeting of the family association.

In the appeal filed by the plaintiffs, the Supreme Court quashed the original decision holding that in light of the changed perception of society in general toward the family association and the changed legal order of society, there was a mistaken legal reasoning about the effect of customary law that led to error in the original decision. The original decision gave effect to customary law which limited the qualification of membership in the meeting of the family association to adult males only to the exclusion of females.⁶⁶ The majority opinions⁶⁷ raised the point of argument with regard to the change of legal

65 Jongho Song, *Gomun-e Daehan Gugga Baesang-Uimu* [*The Obligation of State Compensation for Torture*], in HUMAN RIGHTS LAW CASES 460, 469 (Int’l Human Rights Law Research Soc’y ed., Parkyoung-sa, 2017).

66 Supreme Court [S. Ct.], 2002Da1178, July 21, 2005.

67 The Constitutional Court decided: “In the light of the CEDAW and other international conventions, provisions of the Constitution, and legal system, the prohibition of discrimination and the protection in respect of women and disabled people is deemed as a definitively established basic order within Korea’s legal system at the present.” Constitutional

order in this society. It recognized that CEDAW had the same effect as municipal law from January 26, 1985. It provides for the term “discrimination against women” which means “any distinction, exclusion or restriction made on the basis of sex” and obliges the states parties “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” and “imposes the obligation to take appropriate measures with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

Concerning the mode of the application of CEDAW by the Supreme Court, the opinions diverge in line with the theory of direct application and theory of indirect application. The opinion which argues for indirect application holds that the Convention takes the form of imposing duties to pursue policies conforming to the Convention upon the states parties which are the subjects of the Convention in consideration of its text, rather than providing for concrete and specific rights of individuals. Meanwhile, the argument supporting direct application is that as the Convention provides for the obligation to take all appropriate measures inclusive of legislation, the measures undertaken by the Court would be included.⁶⁸

Holding that previous customary law on the qualification of members of a family association does not conform to the changed legal order, the decision of the Supreme Court referred to the provisions of the CEDAW for its rationale. This decision is the first precedent which invoked CEDAW. Whether it represents direct application is not clear, but it is significant that the Convention abolishes existing custom that constitute discrimination against women in pursuance of the obligation imposed upon the state party by the Convention, and obliges the state party to undertake measures to correct the social and cultural mode of action of men and women.⁶⁹

II Discrimination against Women by Private Groups

In the case in which Seoul YMCA claimed damage for the action that has not recognized the qualification of members of family association for women, the

Court [Const. Ct.], 93Hun-Ma363; Constitutional Court [Const. Ct.], 98Hun-Ba33, Dec. 23, 1999; Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000.

68 Jinsoo Yoon, *Yeo-seong Chabyeol Cheolpye Hyeobyak-gwa Hanguk Gajokbeop* [CEDAW and Korean Family Law], 46 SEOUL NATIONAL UNIVERSITY BEOB HAK 76, 83–84 (2005).

69 Juil Lee, *Yeo-seong-ui Jonghoe Hoewon Hwagin* [Membership of Women in the Meeting of Family Association with Same Clan], in HUMAN RIGHTS LAW CASES 139, 145 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

Seoul High Court decided that the payment of damage should be made for the delict, admitting discrimination against women referred to in Article 1 of the CEDAW. The court ruled that:

The realization of the right to equality, as the foundation for the guarantee of all basic human rights manifested in the Constitution, is the indispensable premise for the guarantee of human dignity and basic human rights, and especially the discrimination due to gender, together with racial discrimination, is an essential area for the protection of human rights that requires special attention and efforts internationally. In this context, the CEDAW which has the same effect as municipal law from January 26, 1985 has a great implication. In consideration of Article 1 of the Convention which provides that the term 'discrimination against women' shall mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, civil or any other field,' the restriction on the qualification of membership of the family association for women is apparently applicable to the definition of the Convention.⁷⁰

j *Rights of the Child*

In the case in which a child was physically, emotionally and sexually abused and left untreated without being provided basic protection and that led to death, the court of first instance⁷¹ declared the defendant guilty of the crime of accidental death and a crime in violation of the Child Welfare Act. The second original decision⁷² reduced the penalty slightly with regard to the crime in violation of the Child Welfare Act and the Act on Special Cases Concerning the Punishment etc. of Sexual Crimes. The appellate court, the Daegu High Court, increased the penalty combining the two original decisions.⁷³

The appellate court held that the child is elevated as an active subject of rights from the passive object of protection based upon the Child Welfare Act on the concrete guarantee of the rights of the child. This is mainly because the fundamental spirit of the rights of child can be drawn from Article 10 of the Constitution on human dignity and value and Article 34(4) on the policy

70 Seoul High Court [Seoul High Ct.], 2007Na72665, Feb. 10, 2009.

71 Daegu District Court [Dist. Ct.], 2013Go-Hap461, Apr. 11, 2014.

72 Daegu District Court [Dist. Ct.], 2014Go-Hap218, 434, Nov. 17, 2014 (combined).

73 Daegu High Court [Daegu High. Ct.], 2014No214, 2014No699, May 21, 2015 (combined).

concerning the improvement of adolescent welfare. The CRC states the enhancement of four rights such as the rights of livelihood, protection, development, and participation on a basis of the highest priority for the interest of the child, non-discrimination, respect for life and guarantee of development, and the principle of respect for opinions. The court decided that the responsibility of protecting children from all forms of violence and mistreatment should be carried out applying a firm and rigorous punishment against the perpetrator.

This decision is significant, in the sense that the child is declared as the active subject of rights on the basis of the Constitution, the Child Welfare Act and other municipal law and the CRC. Looking into relevant provisions of the CRC, Article 5 of the CRC provides for the rights and duties of parents to provide direction and guidance, and Article 18 for the primary responsibility of parents or guardians for the upbringing and development of the child and the state's assistance to parents or guardians. Accordingly, parents can exercise the right to upbringing, direction and guidance of the child ahead of the state and the state should respect these rights. Article 19 of the CRC states the obligation of "states parties to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation," despite the priority right of parents to the upbringing, direction and guidance of children. In sum, the child possesses the rights to receive direction, guidance and upbringing of parents or guardians and in case of abandonment or mistreatment by parents, has the right to demand the protection of the state which has a secondary responsibility.

Since the rights of child in the CRC in general are provided for with the state as the main subject of obligation to respect and protect the rights of child, the Convention is deemed difficult to be directly applied through judicial norms. However, some articles like Article 7 on the right to registration, life, acquisition of nationality, and upbringing by parents; Article 16 on private life and the right not to be interfered with in family, home or communication; and Article 30 on the intrinsic right of racial, religious, or linguistic minority or indigenous child to enjoy culture, religion, and language are provided for with the child as the subject of the rights with concrete and specific contents and can be directly applied.⁷⁴ Even in case of no direct application of the Convention, it can be indirectly applied, being used as subsidiary means or guidance for the interpretation of provisions of municipal law.

74 Jisung Kang, *Bumo Mich Bohoja-ui Hagdaelobuteo Bohobad-eul Adong-ui Gwonli* [*The Right of Child to Protection from Maltreatment of Parents and Guardians*], in *HUMAN RIGHTS LAW CASES* 235, 258 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

This decision recognizes that the child is an active subject of rights rather than a passive object of protection of the rights on the basis of the CRC, and in case of any maltreatment of the child by parents or guardians who have primary responsibility, the rights of the parents are restricted and on the premise that the state, on behalf of parents, has the responsibility to protect the rights of the child. In such cases, the court enforces the obligation by punishing parents who mistreat their children.

k *Status of Refugees*

Korea acceded to the Refugee Convention and the Refugee Protocol in 1992. The Immigration Act was subsequently amended as part of domestic implementing measures for accession to the treaties and entered into force on July 1, 1994. Thereafter, the Act on the Status and Treatment of Refugee was enacted and has been enforced from July 1, 2013.

In the case in which a plaintiff, a Myanmar national who was working without a relevant stay visa, was caught and received a penalty notice disposition, the plaintiff applied for refugee status. After his application was rejected, he filed an objection and received permission for a stay extension. While working in the same company, he received a compulsory eviction order for breach of the Immigration Act. The court of first instance cancelled the compulsory eviction order and protection order.⁷⁵ It held that the plaintiff violated the Immigration Act while working without a relevant visa. The reason for the compulsory eviction order was admissible, but the disadvantage the plaintiff suffered was determined to be greater than the public interest achieved through the compulsory eviction order, thus causing the illegality due to deviation from and abuse of the discretionary power contravening the principle of proportionality. The defendant appealed in protest against the original decision, but the Seoul High Court dismissed it, for reasons that the order was deemed illegal and contravened the principle of proportionality, considering that the disadvantage of the plaintiff was greater than the public interest achieved by means of the compulsory eviction order.⁷⁶

The appellate court held that Korea legislated the Refugee Act with concrete provisions for a refugee recognition procedure and the treatment of refugees on February 10, 2012 with the goal of speediness, transparency, and fairness in the refugee recognition procedure and help to maintain the minimum livelihood of refugee applicants and seek reconciliation between the Refugee Convention and other international and municipal law. Though the plaintiff, who

75 Seoul Administrative Court [Seoul Admin. Ct.], 2013Gu-Hap13624, Nov. 14, 2013.

76 Seoul High Court [Seoul High. Ct.], 2013Nu52638, Oct. 7, 2014.

applied for refugee status, has not received a refugee recognition decision, a stay should be permitted during the period of consideration on the refugee application, as far as the refugee recognition procedure or lawsuit appealing the refugee rejection decision is underway and the application is not explicitly abused. It was decided that the plaintiff, as part of a minority who has been treated discriminately by the Myanmar government, should not be considered an economic refugee, and the compulsory eviction order, while the administrative suit is underway regarding refugee status, is deemed to cause greater disadvantage of applicants than the public interest achieved by the order.

The main issue in this case is whether the compulsory eviction order in regards to the refugee applicant violates Articles 32 and 33 of the Refugee Convention which prohibits deportation or repatriation. Article 32(1) of the Convention provides that “[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” Article 33(1) indicates that “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” which makes it clear that the prohibition on the expatriation or repatriation of refugee is the obligation of states parties. If the refugee applicant who filed a lawsuit against the administrative authorities with regard to a refugee rejection received a compulsory eviction order because he violated Articles 18(1) and 20 of the Immigration Act and was employed without permission, and the compulsory eviction order is issued by the perfunctory application of the law, then the applicant would be deprived of the opportunity of a court proceeding concerning his refugee rejection decision. If in consequence of a court hearing, it is adjudged that the refugee applicant satisfies the conditions for refugee status, it would result in violation of Article 33 of the Convention on the basis of the *non-refoulement* principle which constitutes the minimum obligation of protection irrespective of how the state party regulates the legal status of refugees in municipal law.⁷⁷

In consideration of the above, Articles 3 and 2(c) of the Refugee Act provides for the prohibition on the compulsory repatriation of applicants against their will while the administrative proceedings on the denial of refugee status is underway which settles the issue legislatively. The decision in this case gives priority consideration to the interest of refugee applicants, as far as no evidence is offered regarding a significant public interest such as national security

77 Mirim Yoon, *Nanmin Sincheongja-e Daehan Gangje Toegeo Myeonghyeong* [Compulsory Eviction Order to Refugee Applicants], in HUMAN RIGHTS LAW CASES 297, 303 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

and public order necessary for a compulsory eviction order for an applicant for refugee status.

Meanwhile, in the decision of a Côte d'Ivoire national who applied for refuge on account of a well-founded fear of persecution upon return to Côte d'Ivoire, which has been in a state of war, the Supreme Court held, admitting the possibility of persecution, that:

The harm the plaintiff suffered, even though having occurred during the civil war, is not deemed to amount to simply the level of agony or danger ordinary Ivorians suffered in terms of degree and severity, and the allegation of the plaintiff can be sufficiently admitted that the attack against the plaintiff is attributable to the fact that the plaintiff was involved in the activities of FPI political party as a member of Betha tribe who took power. . . . [T]aking into account all the circumstances, if the plaintiff is repatriated to Côte d'Ivoire, it is reasonably admitted that he is likely to be persecuted on account of his tribal relationship or political activities, and it will be difficult to be sufficiently protected by the home state.⁷⁸

In the decision on a Nigerian national who applied for refugee status for being persecuted due to religion, the Seoul Administrative Court referred to the Refugee Convention, the UDHR, and the ICCPR. The decision articulated that:

The rights to freedom of thought, conscience, and religion which are declared by the UDHR and the ICCPR contain the right to change religion, or to express one's religion in education, faith, worship, and ceremony, whether public or private. . . . [i]n considering the above admitted facts and the special circumstances under which the plaintiff is placed, the well-founded fear of persecution is applicable to the plaintiff who as a devout Christian faced the danger to his life, body, and freedom caused by the traditional religious adherents.⁷⁹

4 Main Features of Korean Court Decisions

Seldom in the past have the decisions of the Supreme Court or the Constitutional Court dealt with cases invoking international human rights laws. The positions of the highest courts in Korea, similar to other countries, have been

⁷⁸ Supreme Court [S. Ct.], 2010Du27488, Apr. 26, 2012.

⁷⁹ Seoul Administrative Court [Seoul Admin. Ct.], 2012Gu-Hap218, Aug. 16, 2012.

that human rights treaties regulate relations among states and therefore have no direct effect upon individuals. The courts have ruled that treaties, to be implemented in Korea, need to be implemented into municipal law.

The reasons for this include; first, not many cases are found in which human rights treaties have been invoked. In comparison with the number of human rights treaties Korea has ratified or acceded to, including the ICCPR, the ICESCR, the CAT, the CEDAW, the CERD, the CRC, the CRPD etc. the decisions invoking human rights treaties amount to only 30 cases or so except for cases dealing with conscientious objection to military service.⁸⁰ In the past, the ICCPR has been invoked predominantly, and since 2005, other treaties have been cited beginning with the CEDAW, the CERD, the CAT, and the CRC, which demonstrates the tendency that the range of treaties that have been looked to has increased gradually. In the decisions of the highest courts, only rarely have human rights treaties been invoked in dissenting opinions, and seldom in majority opinions.

Second, in the event human rights treaties are invoked, they are used as a supplementary means for the interpretation of municipal law. Treaties are considered to be norms that regulate relations among states in terms of rights and duties and are not considered to be judicial norms to be applied directly to individuals. This perspective of treaties was clearly shown in the *Sohn Jongkyu* damage claim case in which the Supreme Court decided that the provisions of human rights treaties do not create rights for an individual to claim damages against the state.⁸¹

Third, in the case of a conflict between municipal and international law, municipal law is interpreted in such a way as to be consistent with international law. Concerning the punishment of conscientious objectors to military service, the Supreme Court interpreted that the punishment did not violate the ICCPR.⁸² There is concern that failure to interpret municipal law to be consistent with international law, the converse, that international law is to be interpreted and adapted to municipal law would downgrade the effectiveness of human rights treaties.⁸³

80 Gwanpyo Hong, *Beobwon Pangyeol-eul Tonghae Salpyeobon Gugje Ingwonjoyag-ui Gugnae Ihaeng* [Domestic Implementation of International Human Rights Treaties in View of Court Decisions], 32 BEOB HAK NON CHONG 81, 94 (2015). Professor Hong's article covers court decisions in the period from December 1994 to June 2014.

81 Supreme Court [S. Ct.], 96Da55877, Mar. 26, 1999.

82 Supreme Court [S. Ct.], 2007Do7941, Dec. 27, 2007.

83 Seungjin Oh, *Gugje Ingwonjoyag-ui Gugnae Jeog-yong-gwa Munjejeom* [Domestic Application of International Human Rights Treaties and the Issues], 56 KOREAN JOURNAL OF INTERNATIONAL LAW 113, 127 (2011); Seungjin Oh, *INGWONBEOB GANG-UI* [INTERNATIONAL HUMAN RIGHTS LAW] 34 (Jinwon-sa, 2d ed. 2014).

Fourth, the references were made to treaties inexactly. For example, the abbreviated names of treaties were utilized as opposed to their formal designations, and in some cases, no provisions of treaties were referred to or the dates for the entry into force or accession and ratification were mistaken.

Fifth, in the decisions of courts, the interpretation of international human rights institutions has been disregarded or not respected due to their decisions and opinions having only aspirational effect. In making an interpretation of human rights treaties, courts tended not to refer to the views of human rights institutions or even making reference to them, disregarded them since they have no binding force.

However, in contrast with the highest courts, the courts of lower instance have made more frequent reference to human rights treaties. Within the courts, the international human rights law research society has been organized to enhance the understanding of judges regarding human rights law. Moreover, in the research articles written by member judges of the society, the arguments have been made as to the necessity for the direct application of human rights treaties or to use them as for judicial norms.

5 Feasible Remedies in Korea and Suggestions

a *National Plan for Human Rights Policy*

Since joining international human rights covenants in 1990, Korea has in earnest exerted administrative and judicial efforts to realize international human rights domestically. Administratively, the first national plan for human rights policy started to be implemented in 2007 for a period of 5 years. The national plan was the work to implement the task of the National Plan of Action for Promotion and Protection of Human Rights which was proclaimed at the World Conference on Human Rights in 1993 in Vienna.

The basic plan for national human rights policy is drawn up and adopted by the national human rights policy consultative committee chaired by the Minister of Justice. Beforehand, the National Human Rights Commission makes a recommendation to the government about the basic plan; then the Ministry of Justice considers the opinion of the National Human Rights Commission and the advice of the international human rights institutions and selects policy tasks and sets up implementation objectives and refers them to the consultative committee for final adoption.

Human rights treaty committees make recommendations to provide effective remedies including compensation to victims in response to individual communications. In addition, other measures such as prevention of recurrence, restitution, restoration of honor, and apology and other satisfaction

have been recommended. With regard to the recommendations of the human rights treaty committees, the task force within the Korean government composed of officials from the ministries of justice, foreign affairs, health and welfare, and family and gender equality etc. discuss and formulate implementation measures.⁸⁴

Currently, the third national plan for the period of 2017–2021 is underway. The national plan is mainly composed of the protection of the socially weak and vulnerable and the establishment of infrastructure for the promotion of human rights.⁸⁵

b Feasible Remedies in Korea

In Korea, there exists a practical restriction on remedies for human rights violations due to the passive position of judicial organs toward human rights treaties. Narrowing down the discrepancy between international and municipal law remains a complex task. Therefore, filling in the gap that exists between municipal and international law continues to be challenging.

The feasible means of providing for legal remedies consistent with international law in Korea will be suggested and analysed with the context of the following: due process by means of human rights treaties in criminal proceeding; the protection of human rights in proceedings that seek the annulment of administrative decisions; the use of international law in damage claims; and the settlement of disputes through the invocation of international law.⁸⁶

First, a defendant can seek the rejection of prosecution by invoking human rights treaties in a criminal case.⁸⁷ In criminal proceedings, human rights treaties to which Korea is a party to can be invoked to form favorable circumstances

84 JUHYUNG LEE, THE ROLE OF THE ADMINISTRATIVE FOR DOMESTIC INCORPORATION OF INTERNATIONAL HUMAN RIGHTS LAW 109–10 (2013).

85 See MINISTRY OF JUSTICE OF REPUBLIC OF KOREA, JE-3CHA GUGGA INGWON-JEONGCHAEG GIBONGYEHOEG [THE THIRD NATIONAL HUMAN RIGHTS PLANS OF ACTION] (2018), <http://www.moj.go.kr/moj/334/subview.do?enc=Zm5jdDF8QEB8JTJ-GYmJzJTJGbW9qJTJGMTIxJTJGNTAxNDYzJTJGYXJ0Y2xWaWV3LmRvJTNGcGFzc3dvc-mQlMoQlMjZyZ3NCZ25kZVNociUzRCUyNmJicoNsU2VxJTNEJTl2cmdzRW5kZGVtdHIL-MoQlMjZpciZpZXNdNaW5lJTNEZmFsc2UlMjZwYWdlJTNEMSUyNmJicogwZW5XcmRTZXEElMoQlMjZzcmNoQ29sdW1uJTNEJTl2c3JjaFdyZCUzRCUyNg%3D%3D>.

86 Chanwoon Park, *Gugje Ingwonjoyag-ui Gugnaejeog Hyolyeoggwa Geu Jeog-yong-eul Dulleossan Myeochgaji Gochal* [Study on Domestic Effect and Application of International Human Rights Treaties], 609 KOREAN LAWYERS ASSOCIATION JOURNAL 141, 174–77 (2007); Miyoung Oh, *Gugjebeob-ui Gugnaejeogyong-e Gwanhan Ilbon-ui Beobchegyewa Gyeongheom* [Implementation of International Law in National Legal System: Japanese Legal System and Experience], 28 INTERNATIONAL LAW REVIEW 67, 74–75 (2008).

87 Park, *supra* note 86, at 174–75; Oh, *supra* note 86.

for criminal defendants. According to Article 327 (Judgment rejecting Public Prosecution) of the Criminal Procedure Act, "Where the procedure for instituting public prosecution is void by reason of its having been contrary to the provisions of Acts," the rejection of prosecution or judgment on the reversal of an original judgement can be sought by appealing to a rule of *jus cogens* or the ICCPR. In case a warrant is issued without examination by judges in the process of the issuance of a warrant against a detained suspect, the illegality of detention examination can be invoked in the spirit of Article 9(3) of the ICCPR which requires compulsory warrant examination. In a similar vein, the Constitutional Court recognized the domestic effect of the WTO Agreement in imposing an aggravated penalty ruling that it would not deviate from *nulla poena sine lege*.⁸⁸

Second, the annulment of an administrative decision or judgment that is in violation of human rights treaties can be sought.⁸⁹ If an administrative proceeding is instituted seeking the annulment of an administrative decision, the aggrieved party can seek a broader remedy by including a petition that invokes human rights treaties. For example, the annulment of a forced eviction order can be requested based upon a decision to deny refugee status because it conflicts with the principle of non-extradition of political offenders as it violates obligations under international human rights covenants and the Refugee Convention. Recently as arguments have been put forth that the decision on the admission of refugees does not rest merely upon the substantive law, but should also be based on procedural fairness, the applicability of international law is thought to have widened.⁹⁰

Third, a damage claim could be filed based upon an allegation of a violation of a human rights treaty.⁹¹ The range of remedies could be expanded if the damage suit is filed which includes that public officials intentionally or negligently failed to meet their obligations under human rights treaties. In such a claim, the public official's intent or negligence would be at issue. The claimant could prove the intention or negligence of such a public official by pointing out that the act of the public officials violates human rights treaties while the

88 Constitutional Court [Const. Ct.], 97Hun-Ba65, Nov. 26, 1998 (10 KCCR, 685, 685). Recognizing direct applicability of a treaty, the Court ruled as follows:

As the Maraakesh Agreement has the effect identical to municipal law as a treaty concluded and promulgated in accordance with the Constitution, constituting a new offence or imposing aggravated punishment upon offenders by the provisions of the Agreement would be equivalent to punishment by municipal law.

89 Park, *supra* note 86, at 174; Oh, *supra* note 86, at 74–75.

90 Oh, *supra* note 86, at 74–75.

91 Park, *supra* note 86, at 175; Oh, *supra* note 86, at 75.

defendant, state institution, would attempt to prove the legality of public official's action.

Fourth, in various legal proceedings, courts could utilize human rights treaties as a supplementary means for the interpretation of municipal law.⁹² With regard to the treatment of prisoners, Article 14(1) of the ICCPR could be utilized in the interpretation of the Constitution, the Criminal Act, and the Criminal Administration Act. For improving the human rights of prisoners, relevant municipal law could be interpreted by making reference to the ICCPR and the CAT to create a lawful environment for prisoners. In the case in which the plaintiff, who had not been convicted, argued that his "right to assistance of an attorney" in Article 12 of the Constitution was violated by the presence of prison officials as he met with his attorney, the Constitutional Court confirmed the principle of "within sight, but not within the hearing" according to international human rights law and declared the provision of the Criminal Administration Act as unconstitutional. Articulating the ground for the principle of "within sight, but not within the hearing," the Constitutional Court referred to the principle mentioned in Principle 18(4)⁹³ of the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by the General Assembly Resolution 43/173 of December 9, 1988.

c *Suggestions and the Way Forward*

It is acknowledged that a main function of the judiciary is to provide remedies for violations of human rights and realize legal justice through the decisions rendered by the independent judgment of a judge. If the function of the court is confined to the interpretation and application of municipal law, it is feared that the realization of justice remains much to be desired. In connection with this, as international law evolves, many states have implemented international law into their municipal legal systems. Both international law and municipal law act upon each other, contributing to the guarantee of human rights.

As the systems of municipal and international law are different, there are realistic impediments that exists in accepting and applying international law domestically which can be viewed with respect to the approach of the judiciary to interpretation of treaty and the structural aspect of the judiciary. In regards to the structural aspect of the judiciary, as the main work of judges is

92 Park, *supra* note 86, at 176–77.

93 Principle 18(4) provides: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing of a law enforcement official."

focused upon the interpretation and application of municipal law, problems such as the low degree of understanding and familiarity about international law; limitations of lawsuits; and structural restrictions in judicial administration are present. In regards to the interpretation of international law, the impact of the special political and security environment of the divided Korea is of importance.⁹⁴

First, the low degree of understanding and familiarity of judges about international law is an issue.⁹⁵ Judges conduct trials by primarily interpreting and applying municipal law. In doing so, the knowledge and understanding of judges about international law turns out to be limited as a result. Not only is knowledge about international law limited, but judges are also known to have perspectives about role of international law in contrast to municipal law.⁹⁶ Based upon the perception that international law has the character of mainly regulating the relations among states, and that municipal law is to regulate relations between the state and individual and relations between individuals, judges have a low familiarity with international law about its importance within the domestic legal system based on their view that the two legal systems are of different character. Human rights treaties aim to protect the human rights of individuals and provide a foundation that underpins the basic human rights of municipal law. While in keeping with the purpose of the Constitution, human rights treaties function as guidelines to complement the provisions of the Constitution and other municipal law. In the era of a borderless world, in recognizing that precedents of the human rights of certain states affect other states and the uniform standard of human rights needs to be made, it is necessary to move to enhance the understanding of international law and raise the protection of human rights.⁹⁷

94 Minjin Kim et al., *Hanguk Beobwon-ui Ingwon Gyujeong-ui Jeogyonggwa Baljeon Banghyang: Gukje Ingwonjoyageul Jungsimeuro* [A Study on Current Situation and Development of Human Rights Instruments in Korean Courts : Focused on International Human Rights Treaties], 22 KOREAN CRIMINOLOGICAL REVIEW 153, 175–79 (2011); INT’ L HUMAN RIGHTS LAW RESEARCH SOC’ Y, *supra* note 11, at 85–88.

95 Kim et al., *supra* note 94, at 176–77.

96 Yongwhan Cho, *Teugjib : Heonjeong 60juneongwa Ingwon Bojang ; Je 2-bu Heonjeong 60-nyeongwa Ingwon : Joyag-ui Gugnaebeob Suyong-e Gwanhan Bipanjeog Geomto* [Symposium : “The 60th Anniversary of Constitutional Government in Korea and the Protection of Human Rights” ; Symposium 2 : “The Sixty Years of Constitutional Government and Human Rights” : Critical Analysis of Cases regarding Domestic Effect of International Treaties], 34 KOREAN JOURNAL OF LAW AND SOCIETY 89, 133 (2008); Kim et al., *supra* note 94, at 176–77.

97 In Japan, the necessity for education of judges on international human rights law has been raised and special lectures in international human rights law have been conducted in the judicial training institute or in the education program of judges. It is said that the education itself is not enough and due to the heavy workload of judges, it is hard to give

Second, in terms of obstacles to court proceedings, the requirement of appeals to the court of upper instance to contest the decision of lower courts is decided by the application and judgment of municipal law.⁹⁸ Appeals based on a violation of international law is not expressly stipulated in the text of the law. Apart from the indirect application of international law, the effect would be different in case of a textual stipulation on international law for the requirement of an appeal. Even though the Constitution provides for the domestic effect of treaties to which Korea is a party, their practical effect would hardly come into being if their self-execution is not recognized by judges or treaties are not directly applied in the case.⁹⁹ It has been suggested by some scholars that a study needs to be made of amending the Procedure Act to expressly recognize appeals made on the basis of human rights treaties.¹⁰⁰

Third, the limitations in the structure of judicial administration are present. In principle, the judge performs the tasks of delivering judgments fairly in pursuance of law and conscience in an independent manner. In reality, however, judges are influenced by the diverse political and social environment and are also restricted by the structure of the organization as they work within the organization of courts. The promotion, reappointment, assignment and other personnel administration of the court can affect the work of judges as constraining factors.¹⁰¹ The existing viewpoint of judges about human rights treaties can influence them to follow in the footsteps of precedents and make it

priority to the education of human rights law. It is suggested that judges can pay more attention to the study of human rights and enhance knowledge about it as a result under the circumstance where human rights lawyers make argument about international human rights law in court proceedings. Higashijawa Yasushi, *International Human Rights Law as Adjudicatory Norms: Toward the Actualization of International Human Rights Law by the Judiciary*, 13 SEOUL INTERNATIONAL LAW JOURNAL 69, 85 (2006).

98 In the case of Japan, it has been pointed out that the biggest obstacle to the utilization of international human rights law by the court is that the Supreme Court does not have an obligation to make judgments on the issue relating to customary international law or human rights treaties. In civil, criminal and administrative lawsuits, the cause of appeals to the Supreme Court is limited to the unconstitutionality and judgment on the issues of human rights treaties is left to the discretion of the Supreme Court. To settle this problem, it has been argued that the Supreme Court needs to make judgments on human rights more actively or should be legally obligated to adjudicate on the issues of human rights treaties. Higashizawa, *supra* note 97, at 83–84; Kim et al., *supra* note 94, at 178–79.

99 To make sure that human rights treaties are applied by the court in recognition of their self-execution, the best way is to make an implementing act, unlike trade treaties which are directly applied in Korea by the Supreme Court. However, domestic legislation of human rights treaties might be very complex.

100 Kim et al., *supra* note 94, at 175–79; Higashizawa, *supra* note 97, at 83–84.

101 Kim et al., *supra* note 94.

difficult for them to play a pioneering role in the protection of human rights of defendants or victims. Naturally, this observation can be criticized as being extremely superficial and incidental, but it should be recognized as a substantive factor in certain cases.

Turning to other areas of judicial administration, the facilities of the court should be geared to strengthening and guaranteeing the rights of minorities to trial to protect their rights not just in the process of the trial, but also the trial procedure and make-up of the judiciary. Efforts toward publicizing and utilizing human rights in trial proceedings should be exerted without ceasing to create diversity and improve facilities for the protection of minorities.¹⁰²

Next, there are problems in the interpretation of human rights treaties. Basic human rights and freedoms may be restricted by law when necessary for national security, maintenance of law and order and public welfare pursuant to Article 37(2) of the Constitution. The human rights of an individual are not guaranteed beyond the limits of the welfare and security of the whole society and restrictions on individual human rights to achieve the greater legal interest is an unavoidable necessity of maintaining a communal society. Where individuals live together in a community and their interests collide against each other, restricting the interest of an individual is to be tolerated to preserve the interests of the community and thus, the maintenance of law and order can prevail against individual interests. Even in restricting the basic rights of an individual, the limits to the restriction are provided to protect the essential content of human rights. The restriction of basic human rights of an individual must be consistent with a legitimate objective, adequacy of means, minimum harm, and balance of legal interest. This requirement is based on the principle of excess prohibition.¹⁰³ It is true that human rights treaties may be disregarded in court proceedings. This phenomenon is exemplified in cases where the right of expression has been played down for reason of national security in the context of the confrontation between the two Koreas.¹⁰⁴ Additionally, the comments or recommendations of international organizations concerning freedom of conscience or the rights of labor have not been accepted by Korean courts.

With regard to the means of overcoming these constraining factors, the invocation of human rights treaties as judicial norms, raising awareness of the public about human rights through education and promotional activities, and

102 INT'L HUMAN RIGHTS LAW RESEARCH SOC'Y, *supra* note 11, at 88.

103 Kim et al., *supra* note 94, at 175.

104 *Id.* at 176.

legislation and amendment of municipal law relevant to the restriction of human rights need to be considered. Specifically, legislation of domestic acts to implement human rights treaties is encouraged, which will make clear the domestic effect of treaties. Also, the court has held on to a passive and cautious attitude in accepting and invoking human rights treaties due to limitations in the knowledge and understanding of international law. When human rights treaties are not invoked as a judicial norms, this reveals the limits in the elevation to a more advanced state in human rights in terms of foreign policy, and furthermore, a gap between foreign policy and domestic reality is evidenced. A more active attitude is required of the court in protecting human rights through the application of human rights treaties as judicial norms given that Korea has acceded to most major human rights treaties. Having witnessed more cases of human rights treaties being applied directly by the courts of lower instance, in contrast with the highest courts, and where more attention to and research on international human rights law by setting up the international human rights law research society within the court, it is expected that the understanding and familiarity about human rights law will increase and lead to the direct application of treaties.

Second, as society has democratized and national income has increased, the awareness of human rights has been raised accordingly. While political rights having been realized and increased, in socio-economic areas more effort is required to narrow down the gap between the rich and poor and protect the rights of minorities and the disabled. To conform to diversified human rights, Korea has striven to accede to human rights treaties actively that have been codified in the international community. For respect and protection of human rights, each person should assert his or her own rights based on the knowledge of human rights. To this end, the awareness of human rights should be raised and deepened through education and promotional activities on human rights in all walks of life. More specifically, the active role of the National Human Rights Commission, which is responsible for increasing awareness, is required. The education of law enforcement officials who are in the position to potentially infringe upon human rights needs to be conducted, in addition to the public in general.

Third, with regard to treaties to which reservations have been made due to a possible conflict with municipal law, it is necessary to consider enacting and amending relevant municipal law actively to improve the environment of human rights. The achievement of gender equality by eliminating various forms of discrimination in the Civil Act and the Nationality Act that have existed for a long time due to convention and practice is deemed to be the outcome of the accession and enforcement of human rights treaties.

6 Conclusion

The role of courts as the final bulwark of human rights cannot be underrated. In the implementation of human rights treaties, the approach of courts in the interpretation of treaties and the structural aspect of courts need to be considered. The low degree of understanding and familiarity of judges about international law is at issue, as the main function of judges is focused upon the interpretation and application of municipal law. Judges are also known to have perspectives about international law different from municipal law. Judges are influenced by the diverse political and social environment and are also restricted by the structure of the judicial organization.

Under these circumstances, unlike the conservative and inactive attitude of the highest courts, lower courts have shown some tendency to hand down decisions which apply international human rights law directly in a forward-looking and progressive manner. It seems that this trend will likely change the perspective about the domestic acceptance of international human rights law. Following the establishment of the international human rights law research society which is comprised of many junior judges, the enhanced awareness and understanding of international law through their research activities will likely lead to the reflection of international law in the decision of courts.

It needs to be borne in mind that because of the administrative structure of the court, there are currently limits to potential pioneering role of judges in the protection of human rights of victims or defendants in accordance with international human rights law. In principle, the judge carries out the tasks of making judgments in pursuance of law and conscience in an independent manner. In reality, the prevailing perspective of human rights treaties influences and induces them to follow in the footstep of precedents, and thus makes it difficult for them to have a more active role in the protection of human rights.

In conclusion, the hurdles for the protection of human rights need to be sorted out legally and administratively. The direct application of human rights treaties as judicial norms, legislation and amendment of municipal law relevant to the restriction of human rights, and raising of awareness about human rights through education and promotional activities are to be advocated and reiterated.