State Practice of Asian Countries in International Law

Korea

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HUMAN RIGHTS – TERRORISM – DOMESTIC MEASURES

Decision of Constitutional Court Concerning on ‘Constitutionality of Additional Security Screening of Airline Passengers, Constitutional Court Decision 2016Hun–Ma780 (Decided on February 22, 2018)

In this case, the complainant, an airline passenger was subjected to the usual security screening procedure while going through immigration at Incheon Airport on the way to boarding a US-bound flight. He/She, however, was subject to secondary security screening before boarding by the request of the US Transportation Security Administration. The additional screening was conducted by a security screening officer, who took out his/her belongings for visual identification and gave the complainant a pat-down. Then the complainant filed a constitutional complaint claiming that his/her fundamental rights, especially related to the right to personality and the security of person, was infringed by Article 8.1.19 of the National Aviation Security Plan, which is against the constitutional rule prohibiting excessive restriction.

The Republic of Korea is a party to the Convention on International Civil Aviation and Article 2.4.1 of Annex 17 (Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference) to this Convention stipulates that “Each Contracting State shall ensure that requests from other Contracting States for additional security measures in respect of a specific flight(s) by operators of such other States are met, as far as may be practicable.” The Aviation Security Act, along with the obligation of air transport operators to observe international conventions, prescribes basic matters concerning the standards and procedures of security screening, and that the Minister of Land, Infrastructure and Transport shall formulate and execute a “national aviation security plan” to perform aviation security-related affairs. In other words, the National Aviation Security Plan was established with the purpose to observe

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international conventions regarding civil aviation security, and to guarantee the safety and security of aircraft. Therefore, the legitimacy of its legislative purpose and its appropriateness of means is justified. Furthermore, the relevant provisions provide specific standards and methods for security screening, with an aim to minimize the infringement of fundamental rights. Thus, *the rule of minimum restriction* is satisfied.

The Court also highlighted that due to the rising number of safety-related accidents or threats of terrorism concerning aircraft in the domestic and international arenas, the public interest of securing the safety of civil aviation is significantly grave, while the restriction on the fundamental rights of passengers incurred by additional security screening is not as large. Therefore, “the National Aviation Security Plan” does not violate *the rule against excessive restriction*.

Overall, the Court held that the provision of the “National Aviation Security Plan,” does not violate the constitutional principle against excessive restriction, and therefore does not infringe upon the fundamental rights of the complainant, an airline passenger.

TREATIES – INTERPRETATION – MUNICIPAL LAW

Decision of Supreme Court Concerning on the Petition for Return of a Child (The Hague Convention on the Civil Aspects of International Child Abduction), Supreme Court Order 2017Seu630 (Decided on April 17, 2018)

One of the main issues, in this case, was the interpretation of relevant provisions of the Convention on the Civil Aspects of International Child Abduction. This Convention and its domestic implementation legislation, ‘the Act on the Implementation of the Hague Child Abduction Convention’ clearly provide that a person whose right to custody under the Convention has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea may file with the court a petition seeking the return of the child, and in such case, the court is obliged to act expeditiously with the welfare of the child as its top priority. But, at the same time, the court may dismiss the petition seeking the return of a child even where the right of custody has been breached as a result of a wrongful removal of a child, if “there is a *grave risk* that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” And such an exception to return of the child under this Act is designed to prevent any harm

against welfare of a child, as a result of prompt return of the child. Thus, the Court maintained that it is important to place priority on the rights and interests of a child before the right to custody of either parent or the promptness of the procedure. In the same vein, a *grave risk* means not only the harmful effects on a child's mind and body because of the petitioner's direct violence or abuse against the child, but also the risk of psychological harm due to frequent violence committed against the other parent including cases where the child may suffer severely by deprivation of appropriate protection or care upon his/her return to the State of habitual residence.

The lower court rendered its judgment by considering the facts that first, the petitioner had verbally and physically abused the counterparty multiple times, which caused the psychological suffering of Principal 1 (child in concern) who witnessed such abuse, and second, in a case where only the principals or only Principal 2 (the other child in concern) is returned to Japan, such separation is likely to cause psychological suffering on the principals in the instant case. As a result, the lower court rejected the petition for the return of the principals, and the petitioner re-appealed to the Court.

Similarly, the Supreme Court emphasized the elements that should be examined comprehensively when receiving the petition for the return of a child as below: "the entirety of circumstances, including the degree of the harm and whether there are concerns of a recurrence of the harm, the specifics of the environment in which the child is brought up both before and after his/her return, and the psychological and physical impact of the return on the child."

Overall, the re-appeal is dismissed by the Supreme Court because the lower court did not err in its judgment by misapprehending the legal principle regarding a grave risk.

HUMAN RIGHTS – REFUGEES – CONSTITUTION

Decision of Constitutional Court Concerning on the Right to Counsel of a Refugee Detained for Repatriation, Constitutional Court Decision 2014HunMa346 (Decided on May 31, 2018)

The complainant is a foreigner of Sudanese nationality. Upon arriving at Incheon International Airport on 20 November 2013, the complainant applied for recognition of refugee status and was confined in a repatriation waiting room at Incheon International Airport until the decision to refer the request for refugee recognition review has been made. The respondent, the head of the Incheon Airport Immigration Office, refused to refer the

complainant for refugee status screening and the complainant was continuously confined in the waiting room for repatriation at Incheon International Airport. On 28 November 2013, the complainant filed a lawsuit for the annulment of the decision not to refer to the refugee status screening procedure and filed a writ of habeas corpus petition seeking release from confinement. While these two lawsuits were pending, the complainant's counsel requested the respondent to allow a meeting with the complainant on 25 April 2014, but the respondent refused. The complainant filed this constitutional complaint on 30 April 2014, claiming that the respondent's refusal of visitation by a counsel infringed upon the right to counsel prescribed in Article 12(4) of the Constitution and the right to trial.

The Court decided that "detainment" prescribed in Article 12(4) clearly is not limited only to that of a criminal proceeding but should be read to incorporate measures imposed by administrative procedures. In other words, the right to counsel prescribed in Article 12(4) of the Constitution is should be immediately guaranteed to persons in administrative detention. In the same vein, the repatriation waiting room at Incheon International Airport is a confined space with an iron gate and access to the room is controlled by the Incheon International Airport Airline Operators Committee. Therefore, the complainant could not leave the waiting room to venture into the transit area and had no way of communicating with the outside world aside from via a payphone. The complainant had been detained in the repatriation waiting room for approximately five months by the time the respondent refused visitation by the counsel, and could not have expected to leave the waiting room at his/her discretion until the lawsuit on the revocation of the non-referral decision to refugee recognition review was completed.

Overall, the complainant was being "detained," as prescribed in the main text of Article 12(4) of the Constitution, when disallowed visitation by the counsel. It further restricted the complainant's right to counsel without legal grounds, and thus infringed upon the complainant's right to counsel. Also, it is not likely that allowing the complainant to meet with his/her counsel would interfere with either guaranteeing national security, maintaining order, or seeking public welfare.

There is a concurring opinion of two justices on the issue of the right to trial. They emphasized that the right to a trial, in this case, is an essential human right for effectively guaranteeing physical freedom. Thus, the complainant is a bearer of the right to a trial, despite being a foreigner. The disallowance of visitation by an attorney restricts the complainant's right to counsel, as part of the right to trial.

HUMAN RIGHTS – MUNICIPAL LAW – CONSCIENTIOUS OBJECTORS

Constitutional Court Decision Concerning on Conscientious Objectors, Constitutional Court Decision 2011HunBa379 and 27 Other Cases (Consolidated), (Decided on June 28, 2018)

Here, the Constitutional Court found the Categories of Military Service Provision nonconforming to the Constitution on the ground that it stipulated only five categories of military service excluding Alternative service. The Categories of Military Service Provision has the purpose of ensuring national security by equally imposing military duty and retaining and efficiently allocating military service resources. Therefore, the provision itself is an adequate means to fulfill a reasonable legislative purpose. Since receiving military training is a precondition for all types of military service stipulated in the Categories of Military Service Provision, it may cause conflict with the conscience of conscientious objectors if such duty is imposed on them. As such, the possibility of Alternative service has long been examined. If the introduction of the Alternative service does not have a significant influence on national defense and not reduce the effectiveness of the military service system, reserving or preventing the introduction of the Alternative service program for reasons of the unique security situation of the nation cannot be justified. Therefore, the Categories of Military Service Provision runs against the minimal impairment rule for categorizing military service that entails military training only and excluding the Alternative service program.

Although public interests like “national security” and “equity or fairness in the allocation of military duties” are significantly important, adding the Alternative service program to the Categories of Military Service Provision would still enable the accomplishment of such interests. By contrast, the Court maintained that if the program is not stipulated in the Provision, “conscientious objectors have to be imprisoned for at least a year and a half and are left to suffer immense disadvantages, such as dismissal and restriction from working as public officials; loss of patent rights, permission, approval, licenses, etc. issued by the Government; disclosure of personal information; implicit and inadvertent bias upon ex-convicts; and difficulties in finding jobs, etc.”

Provided that conscientious objectors are assigned to public service work, it will be more beneficial in terms of realizing national security and public interest than just imprisoning the objectors for punishment. Also, by tolerating and incorporating them as members of our community would surely enhance the level of integration and diversity at the national and societal level. Thus, it is

considered that the Categories of Military Service Provision does not fulfill the requirement to balance interests.

As a result, the Court decided that the Categories of Military Service Provision, which failed to stipulate the Alternative service program for conscientious objectors, infringes on objectors' freedom of conscience by violating the anti-over restriction principle.

After the Court's decision, active and heated discussion over introducing an Alternative service program for conscientious objectors has increased. The media reported that setting an objective and fair preliminary examination and a strict post-management procedure regulated by the Government, determining an adequate duration, and the level of difficulty that can ensure equity between active military service and alternative service are the primary concerns of the public.

In the same vein, the Supreme Court has dealt with this issue, regarding conscientious objection and the Military Service Act on November 1, 2018 (Supreme Court Decision 2016Do10912, Violation of the Military Service Act). The Court maintained that the refusal to perform the duty of military service on moral or religious grounds (so-called "conscientious objection") refers to an act of refusing to participate in military training or bear arms based on a conscientious judgment established by a religious, ethical, moral, and philosophical motive. And based on Article 88(1) of the Military Service Act providing that any person who fails to enlist in the military shall be punished by imprisonment with labor for not more than three years, the judiciary uniformly sentences a conscientious objector to imprisonment with labor for at least one year and six months in actual trials without considering the individual circumstances of the conscientious objectors. Having materialized the citizen's duty of national defense through the Military Service Act, the duty of military service ought to be faithfully performed, and military administration should be fairly and rigidly executed. Therefore, whether to permit conscientious objection brings about a normative clash, which further requires coordination between constitutional provisions, i.e., Article 19 (provision on basic rights such as the freedom of conscience) and Article 39 (provision on the duty of national defense). Overall, the Court ruled that the lower court had convicted the Defendant without examining whether such conscientious objection constitutes a 'justifiable cause' under Article 88(1) of the Military Service Act, while there was room to deem the act of refusal to enlist by the Defendant(a Jehovah's Witness), grounded on his genuine conscience, as a 'justifiable cause.' In other words, the Court found that the lower court erred by misapprehending the legal doctrine and remanded the case to the lower court.

JURISDICTION – SOVEREIGN IMMUNITY – TREATIES

Decision of High Court Concerning on Sovereign Immunity and the Act of U.S. Army Military Government in Korea, Busan High Court Decision 2017Na52583 (Decided November 13, 2018)

After the defeat of Japan in the Second World War, the Commanding General of the United States Army Pacific established a military ruling body known as the United States Army Military Government in Korea (hereafter 'USAMGIK') to govern Korea south to the 38th Parallel North and has been ruling the southern part of Korea under Proclamation No. 1 of 7 September 1945, declaring that the legislative power such as the making of proclamations, ordinances, regulations etc. vests in the USAMGIK; accordingly, the Defendant USAMGIK had been executing its legislative power until it was replaced by the government of the Republic of Korea (co-Defendant). USAMGIK enacted USAMGIK Ordinance No.57 ("the Ordinance") in February 1946. The Ordinance ordered all natural and judicial persons within Korea South of 38th North Latitude to deposit until March 7, 1946 inclusive in one of the financial institutions among the seven designated by the UNAMGIK, all notes of the Bank of Japan. It also prohibited the persons from engaging in any transaction concerning any such currency once the deposit has been made.

At that time, the father of the Plaintiffs deposited banknotes of Japan, a sum of 4,570 Yen, to the designated financial institution. Now, in this case, the Plaintiffs made a claim against the U.S. Government arguing that the Defendant enacting the Ordinance allowed them to confiscate the banknotes of the deceased (Plaintiffs' father) which is a violation of international humanitarian law including the international treaty, Convention Respecting the Laws and Customs of War on Land, (hereafter 'the Hague Convention'), to which the Defendant is a party. And the Plaintiffs who are the inheritors of their father's property demanded compensation since the Defendant is liable under the Hague Convention. However, the Defendant protested that Korean Courts could not exercise jurisdiction over the lawsuit made against the U.S. Government as the enactment of the Ordinance should be guaranteed sovereign immunity as it was a sovereign act of a foreign State.

The Court decided that the lawsuit made against the Defendant should be dismissed due to the following reasons. Firstly, the enactment of the Ordinance by the Defendant through USAMGIK is a sovereign act of a State (*acta jure imperii*) both in nature and purpose since it is a highly public act of the USAMGIK, a ruling body of the southern part of Korea then, intended to abolish the old currency system based on banknotes of Japan and to create

a newly established currency system in Korea. Secondly, whereas customary international law on sovereign immunity has developed from an absolute doctrine granting unconditional jurisdictional immunity to a sovereign State, to a restrictive theory that distinguishes sovereign acts and commercial acts, the disputed sovereign act can be granted immunity even from the currently predominant view of the restrictive approach. Thirdly, even if Foreign Sovereign Immunity Act of the United States may exclude the application of sovereign immunity to such acts as the enactment of the Ordinance by the USAMGIK, the Act is the law of the Defendant's which can only be used as a reference, but not as a generally recognized rules of international law having the same effect as the domestic laws of the Republic of Korea. In other words, it is difficult to decide that the Korean Court can exercise jurisdiction over the lawsuit filed by the Plaintiffs resorting to the provisions of the Foreign Sovereign Immunity Act. Finally, the Plaintiffs appealed to the High Court, but the Court dismissed the appeal on the same grounds.

INTERNATIONAL DEVELOPMENT – LEGISLATION

Framework Act on International Development Cooperation (Partial Amended Dec. 24, 2018., by Act No.16023)

The Framework Act states that its purpose is to ensure policy coherence and to enhance aid effectiveness. It sets out the purposes, definition and basic principles of Korea's development cooperation, and specifies, among other things, the role of the Committee for International Development Cooperation (CIDC) and the framework for implementation of aid. In particular, the law emphasizes the functions of the CIDC as an apparatus intended to create a consolidated ODA delivery system in Korea. The passage of the Framework Act enabled Korea to pursue its goal of enhancing development effectiveness based on a more systematic ODA policy and framework domestically. It at the same time sent a signal to the international community that Korea is committed to continuing its development cooperation.

First, 'youth' is added as the target actor for IDC as the Article 3(1) states: "the basic ideas of international development cooperation is to reduce poverty, improve the human rights of women, children, people with disabilities, and youth achieve gender equality, realize sustainable development and humanitarianism in developing countries, promote economic cooperation relationship with partner countries and pursue peace and prosperity in the international community".

Second, the objectives of international development cooperation is amended as the Article 3(2) para.4–2 states, “Contribution to the achievement of internationally agreed goals related to the sustainable development (referring to 2030 Agenda for Sustainable Development adopted at the United Nations Summit on Sustainable Development in September 2015 and others).”

Lastly, in order to enhance publicity campaigns encouraging public participation, the Article 15(2) newly inserted as below: “To increase public participation under paragraph (1), a supervising agency shall prepare and implement various programs in a comprehensive and systematic manner for the public to have an easier access in their daily lives.”