



## 2008Hun-Ka23

22-1(A) KCCR 36

**Country:** South Korea

**Region:** Asia

**Year:** 2008

**Court:** Constitutional Court

**Health Topics:** Prisons, Public safety, Violence

**Human Rights:** Freedom from torture and cruel, inhuman or degrading treatment, Right to bodily integrity, Right to liberty and security of person, Right to life

### Facts

The petitioner was charged with murder of four people and the sexual assault of three women. The Gwangju District Court sentenced the petitioner to the death penalty in accordance with Article 250 Section 1 of the Criminal Act and Article 10 Section 1 of the Former Special Act on Punishment of Sex Crimes and Victim Protection (SCPVA). Pending his appeal to the Gwangju High Court, the petitioner filed a motion seeking constitutional review of Article 250 Section 1 and Article 41 Item 1 of the Criminal Act. The Gwangju High Court granted the motion and referred the review to the Constitutional Court on grounds that there was substantial reason to question the constitutionality of the provisions.

The provisions under review were Article 41 Items 1 and 2 (setting out the death sentence and life imprisonment sentence respectively), Article 42 (excluding "imprisonment for a limited term" and "life imprisonment without forced labour"), part of Article 72 Section 1 (excluding "imprisonment for a limited term" and "life imprisonment without forced labor"), and Article 250 Section 1 ("shall be punished by death, or imprisonment for life"). Article 10 Section 1 of the SCPVA ("shall be punished by death, or imprisonment for life regarding murder and rape") was also under review.

The Constitutional Court dismissed the review of Article 72 Section 1 of the Criminal Act on grounds that it was not relevant to the petitioner's case and assented to the review of the other provisions.

### Decision and Reasoning

The Majority opinion dismissed the petition for constitutional review. The Court held that the decision to maintain or abolish lied with the legislature as to whether the statutes recognising capital punishments should be abolished.

It further stated that Article 110 Section 4 of the Constitution expressly recognised capital punishment as it stated, "even in the case of a military trial under an extraordinary martial law, the criminal dependant who is sentenced to death must be guaranteed the right to appeal in the judicial system." It also stated that fundamental rights and freedoms are subjected to limitations in the interest of national security, public order or public welfare and the death penalty has serves several legislative purposes such as crime deterrence.

The Court held that capital punishment did not violate the principle of proportionality. It found that the purposes of the death penalty, namely deterrence, achieving justice through retribution, and permanently protecting society from the offender, were legitimate objectives in pursuit of the public interest. The Court held that the death penalty did not violate the principle of proportionality for heinous crimes because it appropriately balanced the offender's right to life and the right to life of innocent people, and in the case of sexual assault.

The Court held that the death penalty did not violate the principle of least restrictiveness because the severity of the crime and its impact on the public interest warranted the most serious penalty with the strongest deterrence effect. It held that any misapplication of the sentence was indicative of a problem within the judicial system and not a problem with the sentence itself.

The dissenting opinion stated that Article 110 Section 4 should not be read to recognise death penalty. It was drafted in order to respect human rights of persons who have been sentenced to death penalty. Further, the purpose of the Constitution is to protect human dignity and death penalty should be recognised as a means

to achieve legislative purposes. Moreover, life imprisonment without the possibility of parole can achieve the same effect as capital punishment hence the latter violates the principle of least restrictive means.

### **Decision Excerpts**

“We not consider whether the death penalty, as a penalty that takes the criminal’s life, violates Article 10 of the Constitution that provides human dignity and value. As discussed above, capital punishment is at least implicitly recognized under the Constitution as is inferred from the text of the Constitution. Moreover, in so far as its imposition is limited only to heinous crimes, we do not see that it violates the principle of proportionality required by the Constitution. Because capital punishment does not exceed the scope of the constitutional restraint set out in Article 27 Section 2 of the Constitution, we conclude that the mere fact that the death penalty takes the criminal’s right to life does not automatically make it a violation of human dignity and value prescribed in Article 10 of the Constitution.” (Section IV Sub A Para 6)

“As for the most heinous crime such as killing of many people by cruel means, the degree of infringement on the victims’ legal interest and the offender’s responsibility on that crime are so enormous that it goes beyond what we can measure. Considering the indescribable sorrow, pain, and anger of the victim’s family and the apprehension, fear, and resentment that the general public feels because of the heinous crimes, the imposition of a strong punishment corresponding to the extent of illegality and responsibility that the constitutional order allows is necessary in order to bring justice.” (Section IV Sub B Para 2)

“Even assuming that the number of innocent lives saved by adopting the death penalty over life imprisonment is not substantially great because their deterrence effects between capital punishment and life imprisonment are not materially different, we shall never abandon protecting innocent victims, however big or small the number may be.” (Section IV Sub C(1) Para 4)

“The protection of the innocent ordinary people’s lives shall take priority over that of the criminal’s life when those two rights to life conflict with each other.” (Section IV Sub D Para 2)

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