



## CONSTITUTIONAL INTERPRETATION IN THE REPUBLIC OF KOREA'S CONSTITUTIONAL ADJUDICATION: DECISIONS OF THE CONSTITUTIONAL COURT OF KOREA

Jongseok LEE\*

### I. Introduction

Excellencies, my name is Jongseok Lee, and I serve as Justice at the Constitutional Court of Korea. On behalf of our Court and myself, I would like to express congratulations on the 60th anniversary of the Constitutional Court of Turkey. It is my great pleasure to be in this valuable occasion with distinguished colleagues and guests across the globe to share my experiences and thoughts on constitutional adjudication.

Exploring the meaning of the Constitution is a precondition to applying the Constitution. In this context, it would be suitable to mention that constitutional interpretation is the initial step as well as the basis for constitutional adjudication. In my presentation, I would like to introduce the Constitutional Court of Korea's approaches to interpreting the Constitution in cases where the issue at stake was the meaning of constitutional provisions.

### II. Significance and Modes of Constitutional Interpretation

The Constitution speaks of wide-ranging matters compared with other legal norms, yet it provides only a limited number of provisions to cover these matters. Consequently, constitutional interpretation plays an important and influential role.

The interpreters of the Constitution are the Legislature, the Executive, and also the Judiciary. Nevertheless, since the Constitutional Court of Korea is the final decision maker as to the constitutionality of legal norms and exercise of state power, and holds an exclusive jurisdiction over the adjudication on the constitutionality of statutes in particular, it is most appropriate to say that the Constitutional Court serves as the "final

\* Justice of Constitutional Court of Korea.

interpreter” of the Constitution. Hence, constitutional interpretation by the Constitutional Court assume a special significance.

There have been extensive discussions and suggestions as to the modes of constitutional interpretation in the Republic of Korea. The generally accepted view is that while a constitutional provision should be interpreted based on the plain meaning of its text, other considerations –its correlation with the other constitutional provisions and the entire Constitution, the purpose of constitutional law, the intent of the framers of the Constitution, and the historical background of the Constitution– need to be factored in as well. Still, in applying such modes of interpretation, answers to the question of setting the priority among different modes and managing the modes in conflict have not been clearly established.

### **III. Relevant Major Decisions of the Constitutional Court of Korea**

**(i) Decision on the legal provision that prescribes detention in a guardhouse as a disciplinary measure to enlisted personnel in active service (Const. Court, 2017Hun-Ba157, 24 September 2020).**

Military Personnel Management Act allowed detention in a guardhouse (for a short period within 15 days in a military unit) as a disciplinary measure to enlisted personnel in active service. As to this matter, the Constitutional Court found that the legal provision at issue of the Act goes beyond its scope as disciplinary action by detaining people from the outside world and causing deprivation of bodily freedom, and that the grounds and standards for the detention measure are excessively broad in content and unclear. In consideration of the above, the Court held this legal provision unconstitutional on the ground that it violates the rule against excessive restriction (Verhältnismaßigkeitsprinzip) (7:2).

Further to the rule against excessive restriction, whether the legal provision has violated the warrant requirement was another issue of discussion in this case. Constitutional provisions were differently interpreted by different Justices, and accordingly, the Justices were divided in their opinion regarding the violation of the warrant requirement.

Four of the seven Justices who found the legal provision unconstitutional presented a concurring opinion that the provision runs contrary to the warrant requirement. In the Constitution, Article 12 Section 1 states “All citizens shall enjoy bodily freedom. No person shall be arrested, detained, seized, searched or interrogated except as provided by Act. No person shall be punished, placed under preventive order or subject to involuntary labor

except as provided by Act and through lawful procedures,” and Article 12 Section 3 states “Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search.” According to interpretation of the four Justices, bodily freedom is a basic right that is not only protected at the stages of criminal proceedings when considering the plain meaning of Article 12 Section 1 of the Constitution and the nature of bodily freedom as a natural right. The Justices further viewed that criminal proceedings is prescribed in Article 12 Section 3 of the Constitution is because the need for *ex ante* control by a judge in criminal proceedings is particularly high, and the provision does not intend to exclude the application of the warrant requirement to state actions other than criminal proceedings.

On the other hand, two Justices presented a dissenting opinion that the legal provision at issue does not run contrary to the warrant requirement. According to the two Justices, whilst the first sentence of Article 12 Section 1 of the Constitution was not exclusively intended for criminal proceedings, it should be taken into account that special circumstances that may jeopardize one’s bodily freedom as well as the ways to protect bodily freedom in such circumstances are specifically listed and guaranteed from the second sentence of Section 1 throughout Section 7 of Article 12. Therefore, in cases where a constitutional provision is clearly applicable to criminal proceedings only, in consideration of its plain meaning or the characteristics of the particular way of its guarantee of bodily freedom, the Justices interpreted that the constitutional provision is exclusively applicable to criminal proceedings.

This case is viewed to have illustrated divided views of the Justices over whether to put emphasis on the purpose of constitutional law or on its structure and plain meaning in the course of interpreting the Constitution.

**(ii) Decision on the legal provision that allows for the search of a suspect in another person’s dwelling when necessary for executing an arrest warrant (Const. Court, 2015Hun-Ba370, 26 April 2018).**

It is stipulated in the Criminal Procedure Act that while executing an arrest warrant, investigative agencies may, if necessary, investigate a criminal suspect in the dwelling of another person without a warrant. The subject matter of review in this case was whether the above legal provision violates the warrant requirement as provided in Article 16 of the Constitution.

Article 12 Section 3 of the Constitution prescribes "Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: *Provided*, That in a case where a criminal suspect is an apprehended flagrante delicto, or where there is danger that a person suspected of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an *ex post facto* warrant," and acknowledges an exception to the *ex ante* warrant requirement. However, Article 16 of the Constitution merely prescribes "All citizens shall be free from intrusion into their place of residence. In case of seizure or search in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented," and does not stipulate an exception to the warrant requirement.

The Constitutional Court found that: although Article 16 of the Constitution does not stipulate an exception to the warrant requirement, it does not mean the warrant requirement is unexceptionally applicable in cases of seizure or search in a residence; since exceptions to the warrant requirement in cases of bodily freedom is acknowledged in Article 12 Section 3 of the Constitution, such exceptions in cases of the freedom of residence, to which greater restrictions are allowed, should be acknowledged under certain conditions; and that the exceptions to the warrant requirement in cases of flagrant offenders or emergency arrest is provided in Article 12 Section 3 of the Constitution because an emergency situation in times of arrest makes it impracticable to obtain a warrant for seizure, search or investigation in advance. Considering the above, the Court viewed that exceptions to the warrant requirement as provided in Article 16 of the Constitution should be acknowledged, while such exceptions should be interpreted to be applied in limited cases when (1) there is a probability that evidence that can prove the charges or a suspect exists in the place of interest, and (2) an emergency situation makes it impracticable to obtain a warrant in advance. However, the above legal provision allows the search of another person's dwelling without a search warrant regardless of whether an emergency situation makes it impracticable to obtain a search warrant to arrest a suspect for whom an arrest warrant has been issued, as long as there is a probability that the suspect resides in another person's dwelling. Therefore, the Court unanimously held that the legal provision violates the warrant requirement under Article 16 of the Constitution.

This decision could be viewed as an example of concretizing matters that have not been provided by the Constitution in writing through harmonious and structural interpretation of constitutional provisions.

**(iii) A decision acknowledging foreigners as the subject of fundamental rights.**

The Constitution of the Republic of Korea enumerates fundamental rights in “Chapter II: Rights and Duties of Citizens” from Articles 10 through 39. The chapter prescribes “citizens” as the subject of fundamental rights provided by the Constitution, and the legislative documents made in times of drafting the founding Constitution reveal that the intention behind using the expression “citizens,” not “the people,” was to deny foreigners as the subject of fundamental rights. However, in circumstances where a type of fundamental right is beyond the right of ‘a citizen’ and could be regarded as that of a ‘human being,’ the Constitutional Court acknowledged foreigners as the subject of fundamental rights. Notwithstanding the possible conflict with constitutional texts and intents of the framers of the Constitution, the Constitutional Court has broadened the subject of fundamental rights in reflection of the purpose of constitutional laws and the respect for international law.

A foreigner of Sudanese nationality who applied for recognition of refugee status upon arriving in Korea was denied to enter the land by the head of the immigration office, and filed a suit to annul the decision thereafter. Meanwhile, the foreigner filed a constitutional complaint when the request for visitation by counsel has been denied, claiming that the refusal infringed upon one’s right to receive assistance of counsel. In this case, the Constitutional Court acknowledged foreigners as the subject of the right to receive assistance of counsel and thereby confirmed unconstitutionality of the refusal to attorney visitation (Const. Court, 2014Hun-Ma346, 31 May 2018). In other types of cases as well as this case, the Court recognized foreigners’ status as subject to various fundamental rights.

**(iv) Reference from international human rights norms, foreign laws and case-laws.**

During the process of constitutional interpretation, the Constitutional Court takes reference from various international human rights norms, foreign laws and case-laws that are relevant to issues at stake. Most case reports include the research and analysis by Constitutional Researchers on such international human rights norms etc.

In the case where the Constitutional Court declared that applying only some parts of Labor Standard Act to foreign trainees of industrial technology is an infringement on the right to equality, the Court referred to Article 2(2) of the International Covenant on Economic, Social and Cultural Rights "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and stated that "in the course of interpreting our constitutional provisions, what has been prescribed in the Covenant such as the 'right of everyone to the enjoyment of just and favourable conditions of work which ensure fair wages and equal remuneration for work of equal value without distinction of any kind (Article 7)' should be taken into consideration" (Const. Court, 2004Hun-Ma670, 30 August 2007).

In another case where the Constitutional Court declared unconstitutional a provision of Military Service Act that did not provide alternative service program for conscientious objectors, the Court referred to the right to freedom of thought, conscience and religion provided in Article 18 of the International Covenant on Civil and Political Rights, as well as a wide range of other materials including interpretations from the Human Rights Committee, resolutions by the UN Commission on Human Rights, motions by the UN Human Rights Council, case-laws from the European Court of Human Rights, and laws and regulations from across the world (Const. Court, 2011Hun-Ba379, 28 June 2018).

#### **IV. Conclusion**

As illustrated throughout this paper, the Constitutional Court of Korea interprets a constitutional provision based on the plain meaning of the text while taking into account several factors such as its correlation with the overall structure of the Constitution and other constitutional provisions and the purpose of constitutional law. Constitution is a text of uniformed system of values, in which the Preamble and provisions therein are closely interrelated with one another. Accordingly, the Constitutional Court strives to examine the overall relevancy of constitutional law in interpreting the Constitution and thereby preserve the uniformity and optimum performance of the Constitution.

On a separate note, the importance of comparative law cannot be overlooked when interpreting the Constitution. During the course of

constitutional interpretation, one may take reference from international human rights norms, foreign laws and regulations and also case-laws from countries worldwide. Owing to the recent trend of the universality of constitutional law and spirit, growing similarities in the practice of constitutional adjudication and active exchange of ideas between constitutional adjudicatory institutions across the world, the significance of comparative legal analysis is ever-growing. On this account, I hope that this highly valued conference will serve as a cornerstone for constitutional adjudicatory institutions from all over the world to actively engage with one another and exchange experiences about constitutional interpretation.