

DEATH PENALTY LESSONS FROM KOREA : GRADUAL MOVE FROM MORATORIUM TO ABOLITION*

KUK CHO**

I. INTRODUCTION

The Republic of Korea (*hereinafter* Korea or South Korea) has been a retentionist nation since its establishment. Korea is one of three members of the Organization for Economic Co-operation and Development that still retain the death penalty, the other two countries being Japan and the United States. The Korean Penal Code and special criminal Acts currently prescribe capital punishment for more than offenses. Since liberation from the Japanese Occupation in 1945, 998 convicts have been executed in Korea.¹ Execution is by hanging for civil offences,² while shooting is prescribed for capital violations of the Military Penal Code.³

The death penalty was seriously abused in South Korea during the Korean War and by the authoritarian military regime which governed the country for many years thereafter. For instance, a number of innocent people and anti-regime political activists were executed because they were alleged to have aided or aligned with North Korea.⁴ Even after political democratization, it has been retained for the ostensible purpose of deterrence of crime despite strong calls for its abolition by civic and religious organizations throughout the nation. Public sentiment also appears to support the death penalty. The constitutionality of the death penalty was confirmed by the Korean Constitutional Court in 1996.⁵ The 2003 survey by the National Human Rights Commission indicated that 65.9% of South Koreans believe that capital punishment still has its uses.⁶

However, there has been an “unofficial moratorium” on executions since President *Kim Dae-Jung* took office in February 1998. Former President Kim himself was sentenced to death in 1980, after the military coup of 12 December 1979, but he was not executed. Presently, 58 prisoners are on death row, all males convicted of murder.

Korean courts have been very cautious in imposing the death penalty. The Korean Supreme

*This Article is an update of the author’s previous article, “Death Penalty in Korea: From Unofficial Moratorium to Abolition?”, 3 *Asian Journal of Comparative Law* 1(2008).

** The Author is Professor of Law, Seoul National University School of Law and Commissioner of the National Human Rights Commission of Korea. He received an LL.B. in 1986 and an LL.M. in 1989 from Seoul National University College of Law; an LL.M. in 1995 and a J.S.D. in 1997 from the University of California at Berkeley School of Law; was a Visiting Scholar, University of Leeds Centre for Criminal Justice Studies, U.K. (1998); a Visiting Research Fellow; University of Oxford Centre for Socio-Legal Studies, U.K. (1998), and a Visiting Scholar, Harvard-Yenching Institute (2005-2006). His email address is kukcho@snu.ac.kr.

¹ “Report of 63 Convicts in Death Row” *Kookmin Daily* [*kookmin ilbo*] (22 February 2006).

² Korean Penal Code [*hyeong beop*] (Law No 293, 18 September 1953, last revised on 29 July 2005 as Law No 7623), art 66. For an introduction to the Code, see Kuk Cho, “Korean Criminal Law: Moralism Prima Ratio for Social Control” (2001) 1 *J of Korean L* 77.

³ Korean Military Penal Code [*kunhyeong beop*] (Law No 1003, 20 January 1962, last revised on 2 January 2006 as Law No 7845), art 3.

⁴ See *infra* notes 74-79 and accompanying text.

⁵ Decision of 28 November 1996, 95 Hun Ba 11 [Korean Constitutional Court]. See *infra* notes 103-111 and accompanying text.

⁶ The result of the survey is available in Korean on the website of the Commission <<http://www.humanrights.go.kr/index.jsp>>.

Court has applied strict requirements for imposing the death penalty.⁷ The Korean Constitutional Court declared unconstitutional several death penalty provisions in special criminal Acts on the ground of disproportionality.⁸ There have also been continuous attempts to abolish the death penalty in the Legislature. Since 1999, five bills to abolish the death penalty have been submitted in the National Assembly, although they failed to be passed.⁹ In 2005, the National Human Rights Commission recommended that capital punishment be abolished.¹⁰

This Article is to briefly review the international commitment to abolish the death penalty and the stubborn retentionism of a majority of Asian nations, and to introduce the unique situation of Korea as an Asian nation that has been gradually moving to abolish the death penalty.

II. INTERNATIONAL COMMITMENT VS ASIAN VALUES

The death penalty is a hotly contested issue on the international plane. While abolitionists are convinced that the death penalty is a violation of fundamental human rights, retentionists firmly believe it is no more than a national crime policy that a sovereign State can choose, based on its political, religious or cultural values. It is necessary to review briefly both the increasing international trend of abolitionism and the strong retentionist trend in many Asian countries before examining the Korean case.

A. The Strengthening International Commitment to Abolish the Death Penalty

The United Nations has strongly suggested that the abolition of the death penalty is desirable for the enhancement of human dignity ever since the United Nations General Assembly (*hereinafter* UNGA) adopted the Universal Declaration of Human Rights (*hereinafter* UDHR) in 1948.¹¹ The UDHR establishes an individual's right to life¹² and proclaims that no person shall be subjected to cruel, inhuman or degrading punishment.¹³

In 1966, the UNGA adopted the International Covenant on Civil and Political Rights (*hereinafter* ICCPR),¹⁴ which provides more specific requirements regarding the death penalty. Article 6(1) of the ICCPR affirms that “every human being has the inherent right to life.”¹⁵ Article 6(2) provides that “[i]n countries which have not abolished the death penalty, sentence of death [sic] may be imposed only for the *most serious crimes* in accordance with the law in force at the time of the commission of the crime.”¹⁶

As a definition of what constitute the most serious crimes was not given, the phrase “most serious crimes” can be interpreted differently according to the cultural, religious, and political values of different societies. Nonetheless, the United Nations Human Rights Committee stated in a General Comment on Article 6 that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure,”¹⁷ and interpreted the term to include “only

⁷ See *infra* notes 84-88 and accompanying text.

⁸ See *infra* notes 99-97 and accompanying text.

⁹ See *infra* notes 128-134 and accompanying text.

¹⁰ See *infra* notes 135-140 and accompanying text.

¹¹ GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

¹³ *Ibid*, art 3.

¹⁴ *Ibid*, art 5.

¹⁴ GA Res 2200A, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966) 52.

¹⁶ *Ibid*, art 6(1).

¹⁷ *Ibid*, art 6(2) [Italics added].

¹⁷ The Human Rights Committee, *Report of the Human Rights Committee*, UN GAOR, 37th Sess, Supp No 40 UN Doc

intentional killings or attempted killings, and perhaps the intentional infliction of grievous bodily harm.”¹⁸ In 1984, the Economic and Social Council of the United Nations, interpreting this restriction in its Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, declared that the death penalty may only be imposed for intentional crimes.¹⁹ The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considered that the term “intentional” should be “equated to premeditation and should be understood as deliberate intention to kill.”²⁰

Article 6(5) states that the death sentence should not be imposed on offenders below 18 years of age or on pregnant women.²¹ Article 6(6) states that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.”²² It is also necessary to note that in 1992, the United Nations Human Rights Committee, in its General Comment on Article 6 of the ICCPR, made an important comment about acceptable methods of execution, providing that “when the death penalty is applied by a State party for the most serious crimes, ... it must be carried out in such a way as to cause the least possible physical and mental suffering.”²³

In December 1989, the UNGA adopted the Second Optional Protocol to the ICCPR (*hereinafter* the Second Optional Protocol),²⁴ which aims to strengthen international commitment to the abolitionist movement. It provides for the abolition of the death penalty,²⁵ only allowing State parties to retain the death penalty “*in time of war* pursuant to a conviction for a most serious crime of a military nature committed during wartime” if they made a reservation to that effect at the time of ratifying or acceding to the Protocol.²⁶ The “most serious crimes” exception in the ICCPR was removed. The “wartime” exception in the Second Optional Protocol is a much more limited exception – the death penalty is prohibited in peacetime, even for “most serious crimes.” Forty-six nations have ratified the Second Optional Protocol and eight nations have signed it.²⁷

In April 1998 the United Nations Human Rights Commission adopted a resolution against the death penalty, calling for States to “establish a moratorium on executions, with a view to completely abolishing the death penalty.”²⁸

Several regional international treaties are further evidence of this international abolitionist trend. In December 1982, the Council of Europe adopted Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (*hereinafter* Protocol No 6).²⁹ Protocol No 6 provides for the abolition of the death penalty,³⁰ only allowing State

A/37/40 (1982) 94.

¹⁸ Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights*, 2d ed (Oxford: Oxford University Press, 2004) at 167.

²⁰ ESC Res 1984/50, UN Doc E/1984/84.

²⁰ UN Econ & Soc Council, Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Mr Bacre Waly Ndiaye, submitted pursuant to Comm Res 1997/61 21, UN Doc, E/CN.4/1998/68/Add.3 (22 January 1998).

²¹ GA Res 2200A, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966) 52 (is this correct, as text is on art 6(5) of ICCPR).

²² *Ibid*, art 6(6).

²³ *Supra* n 14.

²⁴ GA Res 44/128, UN GAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 207.

²⁵ *Ibid*, art 1.

²⁶ *Ibid*, art 2(1) [Italics added].

²⁷ Amnesty International, *Ratification of International Treaties* (last updated: 25 July 2007), online: Amnesty International website <<http://web.amnesty.org/pages/deathpenalty-treaties-eng>>(last visited 21 September 2007) [Amnesty International].

²⁸ Office of the Human Rights Commissioner for Human Rights, Res 1998/8 (3 April 1998).

²⁹ Eur TS No 114.

³⁰ *Ibid*, rt 1.

parties to retain the death penalty for crimes “in respect of acts committed in time of war or of imminent threat of war.”³¹ In 1994, the Council of Europe made it a precondition that any country that wished to join it should agree to implement an immediate moratorium on executions and then sign and ratify Protocol No 6.³² Forty-six nations have since ratified Protocol No 6, and the Russian Federation has signed it.³³

In 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.³⁴ The Protocol calls for the abolition of the death penalty (*hereinafter* Protocol to the American Convention),³⁵ allowing nations to reserve their right to use the death penalty only “in wartime in accordance with international law, for extremely serious crimes of a military nature.”³⁶ Eight American states have since ratified the Protocol, and two others have signed it.³⁷

In 2002, the Council of Europe adopted Protocol No 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (*hereinafter* Protocol No 13),³⁸ which provides for the *complete* abolition of the death penalty in all circumstances.³⁹ The “wartime” exception (similar to the one found in the Second Optional Protocol, Protocol No 6 and the Protocol to the American Convention) was removed. Thirty-nine nations have since ratified Protocol No 13, and six have signed it.⁴⁰

These international “norms” toward the abolition of the death penalty do not as treaty law bind nations that have not signed and ratified them. They are limited in this respect. However, they certainly show a growing international conviction that the abolition of the death penalty contributes to the progressive development of human rights. According to Amnesty International, two-thirds of all the countries in the world have abolished the death penalty in law or in practice. The death penalty has been abolished in every Western democracy except in the United States, and in the past decade, an average of over three countries a year have abolished the death penalty in law or, having done so for ordinary offenses, have gone on to abolish it for all offenses.⁴¹

B. Asia Running Counter to the Global Trend

In striking contrast, the death penalty is widely supported by a majority of Asian countries irrespective of their ideological, religious or cultural differences. It has been kept in the portfolio of the criminal justice systems of Asian countries despite criticism from international organizations such as Amnesty International.

In China,⁴² a communist country, the death penalty may be imposed on those convicted for

³¹ *Ibid*, art 2.

³² Renate Wohlwend, “The Efforts of the Parliamentary Assembly of the Council of Europe” in *The Death Penalty: Abolition in Europe* (1999) at 57.

³³ Amnesty International, *supra* note 28.

³⁴ OASTS No 73 (1990), adopted 8 June 1990.

³⁵ *Ibid*, art 1

³⁶ *Ibid*, art 2(1).

³⁷ Amnesty International, *supra* note 28.

³⁸ Eur TS No 187.

³⁹ *Ibid*, art 1 and preamble.

⁴⁰ Amnesty International, *supra* note 28.

⁴¹ Amnesty International, *Facts and Figures on the Death Penalty* (last updated: 19 September 2007), online: Amnesty International website <<http://web.amnesty.org/pages/deathpenalty-facts-eng>> (last visited 21 September 2007); Amnesty International, *Abolitionist and Retentionist Countries* (last updated: 19 September 2007), online: Amnesty International website <<http://web.amnesty.org/pages/deathpenalty-countries-eng>>(last visited 21 September 2007).

⁴² The death penalty was abolished in Hong Kong under British administration in 1993, and has not been reintroduced after

murder as well as for a number of crimes which do not involve killing. Among these are “counter-revolutionary” crimes, tax fraud, embezzlement, drug offenses and official corruption. Although the authorities have continued to keep national statistics on death sentences and executions secret,⁴³ Amnesty International estimated that at least 1,010 people were executed and 2,790 people were sentenced to death in 2006.⁴⁴ These numbers are the highest in the world, showing that China executes more people (in absolute terms) each year than all the other retentionist countries put together.⁴⁵

Furthermore, the Chinese government makes use of public sentencing rallies. Upon conviction, those who are sentenced to death face public humiliation for their crimes. Death sentences are announced in front of large crowds. Placards are placed around the necks of those who are to be executed indicating their names and crimes, and they are sent in open trucks to the place of execution with their arms and legs bound.⁴⁶ It is also reported that organs are transplanted from the bodies of executed prisoners in some cases.⁴⁷

Despite its wealth and high standard of living, Singapore has the highest per capita execution rate in the world.⁴⁸ Accused of being a “theme park with the death penalty”⁴⁹ the Singapore government has played the role of a vanguard in an ideological defense of the death penalty. In spite of a series of attempts by the United Nations to support resolutions calling for a worldwide moratorium on executions, the Singapore government has often criticized such resolutions, arguing that they were attempts to dictate “a particular set of values from countries which have abolished capital punishment on those which have not,” and maintaining that “capital punishment is not a human rights issue.”⁵⁰ These abolitionist resolutions are considered a “diktat based on false claims of universality.”⁵¹

Singapore imposes a *mandatory* death penalty for murder and a range of drugs and firearms offenses. This has invited criticism from the international community. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has criticized the mandatory death sentence.⁵² In his 2005 report, he stated that mandatory capital sentencing “makes it impossible to take

its sovereignty was transferred to China in 1997. See John F Galliher and Mark S Gaylord, “Death Penalty Politics and Symbolic Law in Hong Kong” (1994) 22 Int J Soc L 19.

⁴³ Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3d ed (Oxford: Oxford University Press, 2002) at 54 [Hood].

⁴⁴ Amnesty International, *Amnesty International Report 2007: China*, online: Amnesty International website <<http://thereport.amnesty.org/eng/Regions/Asia-Pacific/China>> (last visited 21 September 2007).

⁴⁵ During 2006, at least 1,591 people were executed in 25 countries. In 2006, 91 per cent of all known executions took place in six countries: China, Iran, Pakistan, Iraq, Sudan and the USA. Iran executed 177 people, Pakistan 82 and Iraq and Sudan each at least 65. There were 53 executions in 12 States in the USA. See Amnesty International, *Death Sentences and Executions in 2006*, online: Amnesty International website <<http://web.amnesty.org/pages/deathpenalty-sentences-eng>>(last visited 21 September 2007).

⁴⁶ See John T Boxer, “China’s Death Penalty: Undermining Legal Reform and Threatening National Economic Interest” (1999) 22 Suffolk Transnat’l L Rev 593 at 606-607.

⁴⁷ Amnesty International, *People’s Republic of China, The Death Penalty in 2000*, AI Index: ASA 17/032/2002, 1 July 2002, online: Amnesty International website <<http://web.amnesty.org/library/index/ENGASA170322002>>(last visited 21 September 2007).

⁴⁸ Amnesty International, *Singapore, The Death Penalty: A Hidden Toll of Executions*, AI Index: ASA 36/001/2004, 15 January 2004, online: Amnesty International website <<http://web.amnesty.org/library/index/engasa360012004>>(last visited 21 September 2007). Regarding death penalty issues in Singapore, see Michael Hor, “The Death Penalty in Singapore and International Law” (2004) 8 SYBIL 105.

⁴⁹ John Clammer, “Framing the Other: Criminality, Social Exclusion and Social Engineering in Developing Singapore” (1997) 31 *Social Policy and Administration* 136 at 142.

⁵⁰ Hood, *supra* note 44 at 18-19.

⁵¹ VG Menon(‘s) (Singapore) comments in “Commission approved six measures on economic, social and cultural rights”, Press Document (16 April 2004), online: United Nations <<http://www2.unog.ch/news2/documents/newsen/cn04052e.htm>>(last visited 21 September 2007).

⁵² Statement by Special Rapporteur on extrajudicial, summary or arbitrary executions regarding Singapore (17 November

into account mitigating or extenuating circumstances and eliminates case by case determinations of an appropriate punishment in light of all the circumstances of the case.” He argued that the mandatory death sentence is inconsistent with accepted standards of international human rights law.⁵³ However, the government of Singapore responded to the criticism, arguing that “consensus in the international community is not a question of 50% plus one”, and that there is “no international consensus either for or against death penalty”.⁵⁴ The death penalty, it asserted, “is primarily a criminal justice issue, and therefore is a question for the sovereign jurisdiction of each country.”⁵⁵

Asian countries with a strong Islamic element have also adhered to the death penalty. For instance, Malaysia not only retained the death penalty but went further by introducing the *mandatory* death penalty for drug trafficking with the Dangerous Drugs (Amendment) Act of 1983, thus emulating Singapore.⁵⁶ Even before the amendment, the Malaysian judiciary had created a *de facto* mandatory death penalty.⁵⁷ Notwithstanding the Malaysian Bar resolution of March 2006 calling for a moratorium on all executions and eventually the abolition of the death penalty, capital punishment continues to be routinely used.⁵⁸

The Indonesian government has argued that the death penalty has been mischaracterized by its critics as being only about the right of the convicted prisoner to life. Instead, it argues that “this [the death penalty] must be weighed against the rights of the victims and the right of the community to live in peace and security.”⁵⁹ Therefore, the question of whether to retain or abolish the death penalty must essentially be within the domestic jurisdiction of any State.⁶⁰

In India, the death penalty is retained in the statutes and has survived constitutional challenge in the Supreme Court. The Indian Supreme Court has not found the death penalty to be *per se* unconstitutional, stating that “in the face of these indications of constitutional postulates [in the Indian Constitution] it will be very difficult to hold that capital sentence was regarded *per se* unreasonable or not in the public interest.”⁶¹ However, it is necessary to note that the Court upheld the constitutionality of the death penalty on the condition that it is applied only to the “rarest of rare cases.”⁶² Accordingly, the death penalty is relatively scarce in India in comparison with other Asian countries.

Although the Indian Penal Code provides for a mandatory death penalty in cases where a

2005) (available from <http://www.unhcr.ch>)

⁵³ *Ibid.*

⁵⁴ Letter from the Permanent Representative of Singapore to the United Nations Office at Geneva addressed to the Chairperson of the Commission on Human Rights (6 April 2001) E/CN.4/2001/153, (b).

⁵⁵ *Ibid.*, (c).

⁵⁶ Sidney L. Harring, “Death Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs” (1991) 29 *Colum J Transnat’l L* 365 at 374-375.

⁵⁷ *Ibid.* at 379.

⁵⁸ Amnesty International, *Amnesty International Report 2007: Malaysia*, online: Amnesty International website <<http://thereport.amnesty.org/eng/Regions/Asia-Pacific/Malaysia>> (last visited 21 September 2007).

⁵⁹ Letter from the Permanent Representative of Indonesia to the United Nations Office at Geneva addressed to the Chairman of the Commission on Human Rights (26 April 2000) E/CN.4/2000/162, (d).

⁶⁰ *Ibid.*, (e).

⁶¹ *Jagmohan Singh v State of Uttar Pradesh*, AIR 1973 SC 947 at 952 cited in Ariane M. Schreiber, “States That Kill: Discretion and the Death Penalty - A Worldwide Perspective” (1996) 29 *Cornell Int’l LJ* 263 at 309.

⁶² The Court stressed that: “[t]he normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so.... While considering the question of sentence ... the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence” (*Bachan Singh J*, AIR 1980 SC 898 at 936, cited in Schreiber, *supra* note 62 at 313, fn 276).

convicted offender who is already serving a sentence of life imprisonment commits murder,⁶³ the Indian Supreme Court declared this provision to be unconstitutional.⁶⁴ The Court held that “[t]he scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatized as arbitrary and oppressive.”⁶⁵

Japan, which is the most economically developed country in Asia, has not abolished the death penalty.⁶⁶ The Japanese Penal Code provides for the death penalty for several offenses but, in practice, it is imposed only in cases of murder. Each year, only a handful of offenders are sentenced to death and the number of executions carried out is small.⁶⁷ No executions were carried out in the periods between November 1989 and March 1993, and between 16 September 2005 and 25 December 2006. This was partly because the Ministers of Justice then in office were personally opposed to the death penalty, and also partly because of an active abolitionist campaign.⁶⁸ Yet, a bill to stop executions and to replace it with life imprisonment without parole could not even be introduced in the Diet, and there is no indication that executions will stop in Japan in the near future.

This general Asian retentionist trend in support of the death penalty overshadows the abolition of it in Bhutan, Cambodia, Nepal, Timor Leste and the Philippines.⁶⁹ At the moment, belief in the death penalty is sometimes seen to be an “Asian value.”⁷⁰ International initiatives to abolish it are sometimes considered to be no more than a “Western” invention unsuitable to “Asian culture.”

C. Conclusion

The international “norms” that promote the abolition of the death penalty probably do not have a binding effect on retentionist nations. Legal claims against Asian retentionist nations for breach of international law are not likely to succeed. Despite the growing abolitionist trend, the ICCPR does not condemn the death penalty itself but allows the death penalty to be imposed for the most serious crimes. The increasing abolitionist trend in the world does not deprive States of the right to decide for themselves whether and when to abolish the death penalty. Campaigns against the death penalty in Asia

⁶³ David Pannick, *Judicial Review of the Death Penalty* (London: Duckworth, 1982) at 111-112.

⁶⁴ *Mithu v State of Punjab*, AIR 1983 SC 473. See Subhash C Gupta, *Capital Punishment in India* (New Delhi : Deep & Deep Publications, 1986) at 200.

⁶⁵ *Ibid.*

⁶⁶ Regarding death penalty issues in Japan, see Shigemitsu Dando, “Toward the Abolition of the Death Penalty” (1996) 72 Ind LJ 7; Petra Schmidt, *Capital Punishment in Japan* (Leiden: Brill Academic Publishers, 2002); David T Johnson, “Japan’s Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings” (2006) 7 Asian Pac L & Pol’y J 62.

⁶⁷ Joachim Herrmann, “The Death Penalty in Japan: An ‘Absurd’ Punishment” (2002) 67 Brook L Rev 827 at 830, 845 [Herrmann].

⁶⁸ See Amnesty International, *Japan, The Death Penalty: Summary of Concerns*, AI Index: ASA 11/001/1997 (1 March 1997), online: Amnesty International website <<http://web.amnesty.org/library/Index/engASA220011997>>(last visited 21 September 2007); Amnesty International, *Amnesty International Report 2007: Japan*, online: Amnesty International website <http://thereport.amnesty.org/eng/Regions/Asia-Pacific/Japan>>(last visited 21 September 2007). Executions can only take place after the Minister of Justice has signed an execution order in Japan (Herrmann, *supra* note 68 at 844).

⁶⁹ On the positions of these abolitionist countries, see Hood, *supra* note 44 at 43-45. In 2007, the Constitution Drafting Assembly has removed any reference to the death penalty from its draft charter. See “Charter drafters pave way for end to death penalty”, online: The Nation website <http://www.nationmultimedia.com/2007/06/13/politics/politics_30036701.php> (last visited 21 September 2007).

⁷⁰ Regarding the Asian value debates, see Michael C Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 Harv Hum Rts J 109; Karen Engle, “Culture and Human Rights: The Asian Values Debate in Context” (2000) 32 NYUJ Int’l L & Pol 291.

also will not be able to achieve its goal if they disregard national and regional particularities and, in particular, the varied historical, cultural and religious contexts.

On the other hand, stubborn advocacy for the retention of the death penalty without a conscientious attempt to reflect on the current abolitionist trend concerning the death penalty will hamper the advancement of human rights in Asia. The least that each Asian retentionist nation can do is to make a serious self examination as to whether or not its criminal laws use the death penalty too generously. The fact that individual mitigatory circumstances of the convicted are ignored by the mandatory death penalty ought to be taken seriously.⁷¹ Furthermore, the process of capital sentencing should be compatible with standards of a mature and civilized society. Retentionist nations need to sincerely seek an acceptable alternative to the death penalty because the death penalty inevitably entails the deprivation of life, which is arguably the most fundamental of human rights. In the climate of the current international trend against the death penalty, it can be anticipated that pressure from the international community on retentionist nations will keep increasing.⁷²

III. A BRIEF HISTORY OF THE DEATH PENALTY IN KOREA

In the pre-modern period of Korea, the death penalty was an essential element of the criminal justice system. The Penal Codes of several ancient kingdoms and unified feudal kingdoms in Korea, such as the *Koryo* Dynasty (918-1392) and the *Chosun* Dynasty (1392-1910), included the death penalty. The *Hyeongbeop Daecheon* [The Great Penal Code] of 1905, which was enacted after the *Kab-O* Reforms of 1894 with the aim of the institutional “modernization” of Korean society, also provided for the death penalty. Under the Japanese Occupation (1910-1945), the death penalty was still applied in Korea under the jurisdiction of the Japanese Penal Code. Since the liberation from Japan in 1945, the Korean Penal Code, which was enacted in 1953, has retained the death penalty.

After liberation from the Japanese Occupation, Korea went through a fierce ideological struggle and a bloody civil war which lasted until 1953. During this tragic period of “Hot War,” the death penalty was seriously abused to get rid of the “reds” or their sympathizers. For instance, 320 people were falsely sentenced to death by the military court in the April 3 Incident in *Cheju* Province.⁷³

Although the Korean War ended in 1953, a state of affairs, comparable to a “Cold War” continued in the Korean peninsula. Authoritarian regimes and their dictators misused the death penalty to oppress political dissidents and to maintain an anti-North, anti-communist ideology and system. The death penalty was applied not only to murderers but also to political “criminals” including those who were convicted for violating the National Security Act,⁷⁴ which strictly prohibited any leftist or anti-

⁷¹ In a series of decisions issued between 1999 and 2001, the Inter-American Commission on Human Rights found that the mandatory death penalty in several Caribbean states was incompatible with the right not to be arbitrarily deprived of life, the right to humane treatment, and the right to due process under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. See Brian D Tittmore, “The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protection” (2004) 13 Wm & Mary Bill Rts J 445.

⁷² Professor Michael Hor states that “there might well come a time when custom crytallizes leaving [the retentionist nations] in the cold.” (Hor, *supra* note 49 at 117).

⁷³ The April 3 Incident happened in 1948 when the army controlling *Cheju* Province suppressed armed uprising in the southern area of the Korean peninsula. In March 2007, the Committee for Truth-Finding and Restoring the Honor of the April 3 Incident in *Cheju* Province, which was established by the Special Act for Truth-Finding and Restoring the Honor of the April 3 Incident in *Cheju* Province (Law No 6117, 12 January 2000), acknowledged that 320 persons were falsely accused as “reds” and should be considered as victims of the military authority.

⁷⁴ National Security Act [*gukgaboan beop*] (Law No 3318, 31 December 1980, last revised on 13 December 1997 as Law No 5454). For more discussion regarding this Act, see Kuk Cho, “Tension between the National Security Law and

regime activities. Some high-profile cases of politically-motivated use of the death penalty will illustrate how it was abused.

Cho Bong-Ahm, who was the first Minister of Agriculture under the *Rhee Syng-Man* government, was accused of spying for North Korea and was executed after he received phenomenal support from the public as a social democrat presidential candidate of the opposition party in the 1956 presidential election. *Cho Yong-Soo*, who was a CEO of a progressive newspaper, *Minjok Ilbo*, was accused of receiving money from North Korea and was executed after the May 16 coup of 1961 led by General *Park Chung-Hee*.⁷⁵ Under the *Park* regime, members of the “People’s Revolution Party Rebuilding Committee” [*inmin hyeokmyeong dang jaekeon wiwonhoe*, hereinafter PRP] were accused of pursuing a communist revolution through their connection with North Korea. Eight of them were immediately executed just a day after their conviction was confirmed by the Supreme Court in 1975.⁷⁶

During the late 1970s, leaders of the “National Liberation Front of South Korea” [*namchoseon minjokhaebang cheonseon*] (hereinafter NLF), who had vigorously fought against the authoritarian military regime with an anti-America and anti-capitalism agenda, were sentenced to death. Before execution, some of them died in jail after being tortured, and those who survived torture were executed.⁷⁷ *Kim Dae-Jung*, then a liberal democrat dissident and a strong presidential candidate, was sentenced to death in a military court for inciting the anti-junta *Kwangjoo* Uprising of 1980 after the December 12 coup of 1979.⁷⁸

After the nationwide June Struggle of 1987 against the authoritarian regime, South Korea rapidly moved towards democracy.⁷⁹ The civilian government was finally resurrected in 1993 after 32 years of military rule. Since then, only murderers have been sentenced to death. The new Korean democracy was determined not to use the death penalty on political dissidents.

Yet, Korean democracy has still chosen to retain the death penalty. President *Kim Young-Sam* and his government, from 1993 to 1997, did not seriously intend to abolish the death penalty at all but used executions as a tool to show their will to fight crime. Abolitionist movements *from the ground* during both the authoritarian rule and the transition period from authoritarian rule to democracy were weak, although the Association for the Abolition of the Death Penalty was formed in 1989. Even political activists for democratization in general were not so active in advocating the abolition of the death penalty. Since then, the last set of executions in South Korea took place under the *Kim Young-Sam* government in December 1997 when 23 convicts (18 men and 5 women) were executed.

Since President *Kim Dae-Jung* took office in February 1998, there has been an “unofficial

Constitutionalism in South Korea: Security for What?” (1997) 15 Boston U Int'l LJ 125.

⁷⁵ In November 2006, the Truth and Reconciliation Commission, which was formed by the 2005 Basic Act for Coping with Past History for Truth and Reconciliation (Law No 7542, 31 May 2005), found that his conviction was wrongfully made and that it needed to be re-examined.

⁷⁶ In January 2006, the Review Committee, which was formed by the 2000 Act for Restoring the Honor of Those Involved in the Democratization Movement and Providing Compensation for Them (Law No 6123, 12 January 2000, last revised on 27 March 2005 as Law No 7214), decided that the conviction of 16 PRP members was based on evidence extracted by severe torture on the part of the KCIA, and that the genuine reason was that they had actively developed an anti-regime movement. On 23 January 2007, the Seoul Central District Court overruled the convictions.

⁷⁷ In March 2006, the Review Committee for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them acknowledged 29 members of the NLF to be “democratization movement involvers.”

⁷⁸ This is popularly known as the case of *Kim Dae-Jung*'s conspiracy of rebellion. His sentence was commuted to life imprisonment in 1981, then to a 20-year jail term in 1982. In February 2004, Kim's conviction was overruled by the Seoul High Court after the 1995 Special Act Concerning the May 18 Democratization Movement (Law No 5029, 21 December 1995) was passed to give a right to have a special retrial to a person who had been punished because of his engagement in the May 18 Uprising or because of his opposition to crimes against the constitutional order (*Ibid*, art 4).

⁷⁹ James M West & Edward J Baker, “The 1987 Constitutional Reforms in South Korea: Electoral Process and Judicial Independence” in William Shaw ed, *Human Rights in Korea* (Cambridge: Harvard University Press, 1991) at 221, 232.

moratorium” on executions that has now lasted for more than ten years. This may have something to do with the fact that *Kim* was put on death row in 1980, something which resulted in his opposition to the death penalty. The advocacy of religious groups has also contributed significantly to the moratorium. In 2001, the Catholic Church, the National Council of (Protestant) Churches, the *Jogye* Order of Buddhism, and the Order of Won Buddhism organized an abolitionist coalition aimed at pursuing serious anti-death penalty campaigns. President *Roh Moo-Hyun*, formerly an active human rights lawyer, maintained the “unofficial moratorium” during this term.

Newly elected President *Lee Myung-Bak* was the only retentionist candidate in the last presidential race. After his government was established, the ruling Grand Korea Party (*Hannara Dang*) expressed its opinion in favor of resuming execution in a meeting with the Ministry of Justice and the National Policy Agency in 2009. Civic organizations and opposition parties including the conservative Party for Liberty and Advancement (Jayu Sunjin Dang) strongly objected to the resumption of the death penalty.

IV. LEGAL ASPECTS OF THE KOREAN DEATH PENALTY

A. Requirements of Imposing the Death Penalty

The Korean Supreme Court has consistently supported the death penalty, but has emphasized that it “should be an extremely exceptional punishment.”⁸⁰ It set the conditions for the imposition of the death penalty, stating that:

The death penalty is a grim and ultimate punishment that permanently deprives the offender of human life itself. It should be applied only when the life of the offender cannot be saved. The death penalty is only allowed when it is inevitable and justified by the degree of responsibility for the criminal act and only after considering all particulars that goes into weighing the seriousness of the offense, such as the motive, feature, nature of the crime, the persistence and cruelty of the means and method of killing, the severity of the consequence, the number of victims and the emotional trauma they must have suffered, the age of the offender, his or her criminal record and behavior since the commission of the crime, the circumstances surrounding the crime, and the level of education of the offender.⁸¹

The Korean Supreme Court has added the requirement of a deeper investigation before the death penalty may be imposed, stating that:

Courts should go beyond merely examining the sentencing factors presented in the documents. They should rely on objective data in order to judge the subjective factors of the offender, such as character, background, intelligence, likelihood of repeating, and possibility of correction. They should go further to inquire into the mental condition and state of mind of the offender before, during, and after the commission of the offense, consulting and listening to expert psychiatric and psychological testimony. All these must be taken into account before the death

⁸⁰ Decision of 13 June 2003, 2003 Do 24 [Korean Supreme Court]; Decision of 3 September 2004, 2004 Do 3538 [Korean Supreme Court].

⁸¹ Decision of 11 June 1985, 85 Do 926 [Korean Supreme Court]. See also Decision of 13 October 1987, 87 Do 1240 [Korean Supreme Court]; Decision of 14 August 1992, 92 Do 1086 [Korean Supreme Court]; Decision of 13 January 1995, 94 Do 2662 [Korean Supreme Court].

penalty may be imposed.⁸²

The Korean Supreme Court has often struck down the imposition of the death penalty on the ground that the trial or appeal court did not adequately review the requirements for sentencing the offender to death.⁸³ The approach of the Korean Supreme Court brings to mind the “rarest of rare cases”⁸⁴ requirement of the Indian Supreme Court. The attitude of the Supreme Court has made trial and appeal courts very cautious in imposing or affirming the death penalty. This probably accounts for the decrease in the number of offenders who have had their death sentence eventually confirmed.

B. Some Procedural Matters

Article 463 of the Korean Criminal Procedure Code provides that the death penalty shall be executed upon an order of the Minister of Justice⁸⁵ and that this order shall be given within six months after the final judgment.⁸⁶ Where there is an appeal or a request for pardon or a retrial, the six months period is suspended.⁸⁷ It is necessary to note that the six months requirement in Article 465(1) has not been observed in practice. The Minister of Justice has not often followed the requirement. Even under the previous authoritarian regimes, some Ministers of Justice did not comply with it because of their personal conviction against the death penalty. Although this non-observance is technically against the law, no official reason has been given for the non-observance, and no complaint has been made by law enforcement authorities. In particular, the moratorium on executions after 1998 has made Article 465(1) virtually dead.

On 1 November 2002, 33 members of the National Assembly submitted a bill to revise Article 465 of the Criminal Procedure Code. The bill would have extended the execution date from six months to ten years after the judgment has become final,⁸⁸ but it was not passed.

The method of execution is by hanging,⁸⁹ while those who are sentenced to death under the Military Penal Code are executed by shooting.⁹⁰ Unlike the United States, in Korea, there has been no discussion of alternative methods of execution. The Korean Constitution does not have a provision similar to the Eighth Amendment to the United States Constitution which prohibits cruel and unusual punishment. Executions are to be carried out within five days of the ministerial warrant.⁹¹ If a person sentenced to death is found to be mentally ill or pregnant, the Minister of Justice may grant a stay of execution.⁹² Execution is to be carried out in an execution facility in a prison,⁹³ and may not take place

⁸² Decision of 13 June 2003, 2003 Do 924 [Korean Supreme Court]. See also Decision of 11 June 1999, [Korean Supreme Court]; Decision of 8 February 2002, 2001 Do 6425 [Korean Supreme Court].

⁸³ Decision of 11 June 1985, 85 Do 926 [Korean Supreme Court]; Decision of 14 August 1992, 92 Do 1086 [Korean Supreme Court]; Decision of 13 January 1995, 94 Do 2662 [Korean Supreme Court]; Decision of 13 June 2003, 2003 Do 924 [Korean Supreme Court].

⁸⁴ See *supra* note 63 and accompanying text.

⁸⁵ Korean Criminal Procedure Code [*hyeongsasosong beop*] (Law No 341, 23 September 1954, last revised on 19 July 2006 as Law No 7965).

⁸⁶ *Ibid*, art 465 (1).

⁸⁷ *Ibid*, art 465 (2).

⁸⁸ Bill to Revise the Criminal Procedure Code [*hyeongsasosongbeop joong kaecheong beopryulsan*], submitted on 1 November 2002 (Bill No 161931).

⁸⁹ Korean Penal Code, art 66.

⁹⁰ Korean Military Penal Code, art 3.

⁹¹ Korean Criminal Procedure Code, art 466.

⁹² *Ibid*, art 469.

⁹³ Prison Act, art 57(1).

on national holidays, public holidays and Sundays.⁹⁴

V. CONSTITUTIONAL REVIEW OF THE DEATH PENALTY

A. Confirmation of Constitutionality of the Death Penalty by the Constitutional Court in 1996

The Korean Constitution does not have an explicit provision regarding the right to life or the death penalty. However, Korean jurisprudence is agreed that the right to life is guaranteed by Article 10 and Article 37(1).⁹⁵ Article 10 provides that “[a]ll citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”⁹⁶ Article 37(1) provides that “[f]reedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.”⁹⁷ Article 37(2) also provides that “freedoms and rights of citizens may be restricted by laws only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no *essential* aspect of the freedom or right shall be violated.”⁹⁸

The constitutionality of the death penalty was challenged on the basis that it violated Article 10 and Article 37(1) and (2). However, in 1996 the Constitutional Court held that the death penalty was constitutional.⁹⁹

Although acknowledging that the death penalty is “institutional killing by the state under the name of law,”¹⁰⁰ the majority opinion maintained that the death penalty is “a punishment that has a public purpose to prevent crimes by deterring others from committing those crimes, and thereby defending the public by removing sources of social evil.”¹⁰¹ The majority were also of the view that the death penalty is “a ‘necessary evil,’ and that it was a manifestation of [the] instinctive fear of death and the desire [of the society] to retaliate against crimes.”¹⁰² They declared that as the right to life is not an *absolute* right, it may be abridged by law in certain circumstances. They explained the nature of the exception in this manner:

The right of life is indeed legally preserved by Article 37(2) of the Constitution. Even so, due to the fact that restriction of the right results in a total deprivation of life, the death penalty does not violate the Constitution only when it is applied in the most exceptional cases where it is absolutely necessary for protecting other lives or the public interest, and it is within the principle of proportionality. ... The crime of murder, prescribed by Article 250(1) of the Penal Code, stipulates the criminal act of negating human life. Among these there may be particularly atrocious murders that can be categorized as inhumane because of the method used and the

⁹⁴ *Ibid*, art 57(2).

⁹⁵ Chong Jong-Sup, *The Principles of the Constitution [heonbeophak wonron]* (2006) at 364; Kim Tscholsu, *The Principles of the Constitution [heonbeophak kaeron]* (2005) at 405; Kwon Young-Sung, *The Principles of the Constitution [heonbeophak wonron]* (2005) at 407; Sung Nak-In, *The Principles of the Constitution [heonbeophak]* (2005) at 319. See also Decision of 28 November 1996, 95 Hun Ba 1 [Korean Constitutional Court].

⁹⁶ The Korean Constitution [*heon beop*] (Law No 1, 17 July 1948, last revised on 29 October 1987 as Law No 10), art 10.

⁹⁷ *Ibid*, art 37(1).

⁹⁸ *Ibid*, art 37(2) [*Italics added*].

⁹⁹ Decision of 28 November 1996, 95 Hun Ba 1 [Korean Constitutional Court]. Before this decision, the Korean Supreme Court has presented a brief opinion that the death penalty is constitutional. See Decision of 8 September 1987, 87 Do 1458 [Korean Supreme Court]; Decision of 26 October 1991, 90 Do 2906 [Korean Supreme Court].

¹⁰⁰ *Ibid* at 3, Na, (5).

¹⁰¹ *Ibid* at 3, Na, (3).

¹⁰² *Ibid* at 3, Na, (4).

graveness of the result. Thus if we are to deem the death penalty constitutional as a type of punishment then the reason for it is that there is no choice but to negate the life of the one who has negated another person's life which is equally valuable. This does not violate the principle of proportionality and thus is constitutional.¹⁰³

Here, the majority established two requirements for the death penalty to be considered constitutional. First, the death penalty should be absolutely necessary for the protection of other lives or for public interest. Second, it should be proportionate to the nature of the crime and the responsibility of the offender.

Two dissenting opinions were presented. First, Justice *Kim Jin-Woo* maintained that the death penalty violated the call for respect and protection of human dignity as enumerated in Article 10 of the Constitution, stating:

The call for respect and protection of human dignity in Article 10 of the Constitution is applied to all areas of criminal law, from legislation to application and enforcement. Therefore it constitutes a violation of Article 10 if the legislators take away life or restrict liberty with an unjust law that overruns human dignity, or which adopts an unnecessarily cruel and inhuman punishment. It means that even those who have given up their humanity by committing atrocious crimes are still human beings with human dignity and value, so inhuman punishment shall not be applied to them to fulfill the retaliatory feeling of victims, their family or society or to achieve the purpose of preventing similar crimes. Different from imprisonment, the death penalty as a punishment does not allow for the moral liberty of those sentenced to death to repent and reform, and it treats the life of the individual only as a means or method to advance the interests of the state or society. Thus it violates the human dignity and value of the convicts.¹⁰⁴

Here, the emerging international "norms" regarding the abolition of the death penalty are fully accepted. Justice *Kim* also pointed out that "the death penalty not only forces the judge to impose the sentence of death against his or her conscience, but also infringes upon the freedom of conscience and human dignity of the executioners who have to carry out the death penalty as a duty."¹⁰⁵

The other minority Justice *Cho Seung-Hyung* began by pointing out that human life cannot be taken away by any authority except the Creator, and that human life is a right given *a priori* by natural law.¹⁰⁶ He said that the death penalty could not be justified because it was a total abandonment of the possibility that the offender could be rehabilitated.¹⁰⁷ He was also concerned with the real risk of executing the innocent,¹⁰⁸ and the speculative deterrent effects that the death penalty has in preventing crimes.¹⁰⁹

He further maintained that the death penalty violated Article 37(2) of the Constitution because it infringed the essential value of the right of life.¹¹⁰ He proceeded:

Even if it did not infringe the essential value of the right of life, given that the purpose of

¹⁰³ *Ibid* at 3, Na, (3), (Ka) & (4).

¹⁰⁴ *Ibid* at 5, Ka, (2).

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* at 6, Ka & Na.

¹⁰⁷ *Ibid* at 6, Ma, (1).

¹⁰⁸ *Ibid* at 6, Ma, (2).

¹⁰⁹ *Ibid* at 6, Ma, (3).

¹¹⁰ *Ibid* at 6, Ra.

punishment is retribution, general prevention, and correction, the death penalty as a punishment goes beyond what is permissible as a restriction to the right of life. It violates a myriad of principles such as the legitimacy of the end to be achieved, appropriateness of means, and minimization of harm.¹¹¹

Justice *Cho* also criticized the retentionist argument that public opinion supported the death penalty. He pointed out that such an opinion was no more than a reflection of the simple and uninformed consciousness of the public, and had been abused as a tool to oppose abolition.¹¹²

It is necessary to note, however, that although the majority approved of the constitutionality of the death penalty, they also emphasized that the individual provisions in criminal legislation which provide for the death penalty in an expansive manner should be reviewed. They requested that trial courts check whether they did maintain adequate proportionality between the severity of the crime and the punishment. Even if the death penalty is a possible punishment for a particular crime, courts should be very cautious to impose it.¹¹³

After the *Lee Myung-Bak* government was launched, the constitutionality of the death penalty was challenged again in 2009. The Constitutional Court is currently reviewing the case and is expected to make a decision in 24 December 2009. In November 2009, the Court held an open session for the parties' arguments, which was the first open session dealing with the unconstitutionality of the death penalty. During the session, Chief Justice *Lee Kang-Kuk* expressed his personal opinion that the death penalty should be abolished and life imprisonment without parole introduced instead. It is also reported that eight of the nine Justices watched a recently released film, "Executioners", which deals with the agony and pain of executioners. It is reasonably expected that the number of abolitionist votes will increase this time for Justices recognize the "unofficial moratorium" on executions has not resulted in a significant increase of serious crimes.¹¹⁴ There is a possibility that the Court will ask the National Assembly to repeal the death penalty in its decision of 24 December 2009 although not invalidating relevant provisions by declaring the unconstitutionality of the death penalty.

B. Death Penalty Provisions in Special Criminal Acts Held Disproportionate and Unconstitutional

After the Constitutional Court confirmed the constitutionality of the death penalty, it invalidated three provisions in special criminal Acts providing for the death penalty as being disproportionate to the nature of the crime.

First, Article 13 of the National Security Act was struck down. It stipulated that should a person, who has already been convicted for a violation of the Act, violate the Act again, he or she may be sentenced to death. The Constitutional Court emphasized that the punishment should be proportionate to the nature of the crime and the responsibility of the offender.¹¹⁵ In this case, Articles 7(1) and 7(5) of the Act were in issue. Under Article 7(1), "praising, encouraging, or aligning with an anti-state organization or benefiting by any other method an anti-state organization" is punishable by imprisonment of up to a maximum of seven years.¹¹⁶ "Production, import, duplication, possession, transportation, circulation, sale or acquisition of materials, including documents and pictures" is also

¹¹¹ *Ibid* at 6, Ma.

¹¹² *Ibid* at 6, Ma, (3).

¹¹³ *Ibid* at 3, Na, (5).

¹¹⁴ Six votes out of nine Justices are necessary to declare the unconstitutionality of death penalty.

¹¹⁵ Decision of 28 November 1996, 2002 Hun Ka 5 [Korean Constitutional Court] at 3, Na, (1)-(2).

¹¹⁶ National Security Act, art 7(1).

criminalized by Article 7(5).¹¹⁷ These two provisions are used to control leftist or radical activities and have been used to infringe the freedom of expression.

The Constitutional Court held that Article 13 was unconstitutional, for it could make repeated violators of Articles 7(1) and 7(5) face the death penalty, in these terms:

Although it is basically within the discretion of the legislator to determine the kind and extent of a punishment, this legislative discretion cannot be infinite. When establishing the kind and extent of the punishment of a crime, the call for respect and protection of human dignity from punishment in Article 10 of the Constitution must be answered. Also ... the extent of punishment should be determined so that the principle of individualization of punishment can be applied. And finally the punishment should match the nature of a crime and the criminal responsibility of the offender, maintaining adequate proportionality. ... If the repeated anti-state crime was a relatively insignificant one such as Articles 7(5) and 7(1) of the National Security Act, to allow the possibility of the death penalty just because it was a repeat of an anti-state crime is a case of egregious disproportion of punishment which cannot be justified. Even the call for protection of the state and its people would not be able to overcome this disproportion.¹¹⁸

In 2003, the Court held that Article 11(1) of the Act for Heavier Punishment of Specific Crimes¹¹⁹ was unconstitutional.¹²⁰ The Article provided that those convicted of the offense of purchasing or possession of drugs for the purpose of selling are to be sentenced to death, life imprisonment, or over 10 years' imprisonment. The Court held that this aggravated punishment was "an excessive abuse of state power to punish"¹²¹ and it "forbids the court from ordering probation, and unduly narrows the judge's discretion in choosing the appropriate punishment."¹²² Thus, the Court concluded that this punishment was unconstitutional. Needless to say, if the mandatory death penalty such as those that exist in Singapore and Malaysia were to be reviewed in Korea, it would undoubtedly be held unconstitutional.

In 2007, the Court held that Article 53(1) of the Military Penal Code was unconstitutional.¹²³ The Article provided the death penalty only as a punishment for the murder of a higher official. The Court held that the Article was against the principle of proportionality for "it does not consider the motive and background of the killing."

VI. THE INCREASING ABOLITIONIST TREND

While the judiciary has been trying to reduce the use of the death penalty, there have been legislative and administrative initiatives to abolish it.¹²⁴

¹¹⁷ *Ibid*, art 7(5).

¹¹⁸ Decision of 28 November 1996, 2002 Hun Ka 5 [Korean Constitutional Court] at 3, Na, (1)-(2).

¹¹⁹ Law No 1744, 23 February 1966, was last revised on 29 December 2005 by Law No 7767.

¹²⁰ Decision of 27 November 2003, 2002 Hun Ba 24 [Korean Constitutional Court].

¹²¹ *Ibid* at 4, Na, (3).

¹²² *Ibid* at 4, Na, (4).

¹²³ Decision of 29 November 2007, 2006 Hun Ka 11 [Korean Constitutional Court].

¹²⁴ The abolitionists in Korea have not argued that the method of execution by hanging inflicts unnecessary physical and mental pain, and so violates the Constitution. The current method of execution may provide another chance for them to challenge the constitutionality of the death penalty. When hanging was challenged in the State of Washington, one of the two remaining US states to use that form of execution (Montana being the other), it was held to be constitutional. Judge Stephen Reinhardt in his minority opinion argued that hanging is "a crude, rough, and wanton procedure, the purpose of which is to tear apart the spine" and is "needlessly violent and intrusive, deliberately degrading and dehumanizing"

A. Legislative Bills to Abolish the Death Penalty

Three bills have been submitted to seek the abolition of the death penalty. On 7 December 1999, 90 members of the National Assembly submitted a bill to abolish the death penalty and to replace it with life imprisonment.¹²⁵ On 30 October 2001, 92 members of the National Assembly submitted a bill to abolish the death penalty.¹²⁶ This time, the bill was different in that it called for the introduction of life imprisonment without parole, pardon or reduction of sentence before serving a term of at least 15 years.¹²⁷ On December 2004, 175 members of the last National Assembly, which consisted of a total of 273 members, submitted a similar bill, except that in place of the death penalty there was life imprisonment without parole.¹²⁸ After the *Lee Myung-Bak* government launched, on 12 September 2008, 39 members of the National Assembly again submitted a bill to abolish the death penalty and to replace it with life imprisonment.¹²⁹ On 8 October 2009, 53 members of the National Assembly submitted a similar bill.¹³⁰

None of these bills passed.¹³¹ However, they show that the movement in civil society to abolish the death penalty has succeeded in attracting the attention of lawmakers and in increasing support for the abolitionist cause in the Legislature. They are also evidence that the minority opinion of the 1996 Constitutional Court decision has been gaining political support. These bills in turn have stimulated public debate on the death penalty in Korea.

B. Opinion of the National Human Rights Commission of 2005 and 2009

On 6 April 2005, with one Commissioner dissenting, the National Human Rights Commission presented its opinion that the death penalty be abolished and that the National Assembly should consider adopting one of three alternative punishments such as life imprisonment without parole or reduction of sentence, life imprisonment without parole or reduction of sentence for a certain period, and retention of the death penalty only in time of war.¹³² The major reasons for the opinion were as follow:

[Cambell v Wood, 18 F 3d 662 at 701(9th Cir, 1994) (Reinhardt J, dissenting)]. Because the majority of the Korean Constitutional Court held that the death penalty itself is constitutional, abolitionists may need another way to challenge the death penalty.

¹²⁵ Special Bill to Abolish Death Penalty [*sahyeong pyechi e kwanhan teukbeol beopan*], submitted on 7 December 1999 (Bill No 152463).

¹²⁶ Special Bill to Abolish Death Penalty [*sahyeong pyechi e kwanhan teukbeol beopan*], submitted on 30 October 2001 (Bill No 161085), art 2.

¹²⁷ *Ibid* art. 3.

¹²⁸ Special Bill to Abolish Death Penalty [*sahyeong pyechi e kwanhan teukbeol beopan*], submitted on 9 December 2004 (Bill No 171129).

¹²⁹ Special Bill to Abolish Death Penalty [*sahyeong pyechi e kwanhan teukbeol beopan*], submitted on 12 September 2008 (Bill No 1800928).

¹³⁰ Special Bill to Abolish Death Penalty [*sahyeong pyechi e kwanhan teukbeol beopan*], submitted on 8 October 2009 (Bill No 1806259).

¹³¹ Even though the 2004 Bill had the support of the majority of law makers, it was not passed by the National Assembly. The reason was because the Bill stalled during discussion in the Standing Legislation and Judiciary Committee. All bills are required to be reviewed by the Committee before they are sent to the plenary session for voting. See The National Assembly Act [*kukhoe beop*] (Law No 4010, 15 June 1988, last revised on 28 July 2005 as Law No 7614), art 86. For this reason, the Standing Legislation and Judiciary Committee plays a crucial role in making laws in Korea.

¹³² The National Human Rights Commission of Korea, *The Opinion Regarding the Abolition of the Death Penalty* (6 April 2005) at 1. The opinion is available in Korean on the website of the Commission < <http://www.humanrights.go.kr/index.jsp> > (last visited 5 October 2007).

First, the death penalty infringed the right to life, which is based on Article 10 of the Constitution. Therefore the State is obliged to protect the right to life and the death penalty is contrary to that obligation. Furthermore, the right to life is an unconditional right, so it cannot be legally abridged by Article 37(2) of the Constitution. The death penalty results in the deprivation of life and this violates the essence of the right to life, so it is unconstitutional. Even without the death penalty, it is not difficult to preserve national security and to maintain law and order. Thus, it is against the principle of proportionality and therefore unconstitutional to use the death penalty.¹³³

Second, the death penalty infringes the freedom of conscience, human dignity, and the right to pursue happiness of those involved in the implementation of it. These include the judge who has to hand down the sentence and public service personnel who have to participate, directly or indirectly, in carrying out the execution.¹³⁴

Third, the deterrent effect of the death penalty is doubtful. There is no reliable empirical evidence for it. It has not been observed that murder has increased since the death penalty was abolished in former retentionist States. In Korea, the number of homicides including murder was 789 and 23 death row convicts were executed in 1997, but the number of homicides was 966 in 1998. Despite the executions, the number of homicide increased by 177 cases.¹³⁵

Fourth, the death penalty serves only the desire for retribution and vengeance, and abandons rehabilitation as an aim of punishment. Under the name of the death penalty, the State kills openly and legally, thus perpetuating a vicious circle of violence.¹³⁶ The death penalty could not be justified because there is a risk of executing the innocent even though the possibility may be small.¹³⁷

Fifth, the death penalty cannot be justified on the basis of public sentiment or opinion. Considering that law is a norm of “Sollen” (should be) as well as “Sein” (be), the abolition of the death penalty is permissible and justifiable even if it against the majority public opinion.¹³⁸

This pronouncement of the National Human Rights Commission is the first official expression by a State authority requesting the abolition of the death penalty. It shows that the Commission has adopted the abolitionist minority opinion of the Constitutional Court in its 1996 decision.¹³⁹ The reason for this abolitionist stance is that the majority of the Commissioners were professionals with a high sensitivity to human rights. Although the opinion of the Commission is not legally binding, it has drawn the attention of the public and mass media. It has made a significant contribution towards a favorable climate for the abolitionist movement.

Again, in August 2009, the National Human Rights Commission submitted its abolitionist opinion to the Constitutional Court, which is again currently reviewing the unconstitutionality of the death penalty.

VII. CONCLUSION

Korea is now a *de facto* abolitionist nation for the “unofficial moratorium” on executions has continued for more than ten years. It is not anticipated that the *Lee Myung-Bak* government will resume execution for it will attract political trouble. For Korea, as for perhaps other jurisdictions, the abolition of the death penalty is not only an issue of moral and legal principle but also an *issue of politics*. At the same

¹³³ *Ibid* at 9-10.

¹³⁴ *Ibid* at 11.

¹³⁵ *Ibid* at 15. See *supra* note 81 and accompanying table.

¹³⁶ *Ibid* at 12-13, 17.

¹³⁷ *Ibid* at 16.

¹³⁸ *Ibid* at 17.

¹³⁹ See *supra* notes 112-120 and accompanying text.

time, it would not be realistic to anticipate that the death penalty will be completely abolished solely through the initiative of politicians. Complete abolition of the death penalty is not a popular issue with voters and the current majority of assemblymen are retentionists.

However, it is certain that Korean society has been moving, if gradually, towards the abolition of the death penalty. Attention needs to be given to the fact that a moratorium on executions, which has already lasted for more than ten years, has not aroused the public's concern. The general public seems to accept the moratorium as a status quo although they do not support the complete abolition of death penalty.¹⁴⁰ It can be safely said that the words of former President and Noble Peace Prize Laureate *Kim Dae-Jung* have been gaining ground in Korean society.

Capital punishment goes against the foundation of democracy. Democracy regards the life of a human being to be the most cherished in the world, and to end a person's life even in the name of law clearly runs counter to the basic principle of human rights. ... Pushing ahead with capital punishment does not lead to the reduction of crime, even when the criminal has committed a morally unforgivable crime. Rather, the capital punishment should be downgraded to [a] life sentence so that the criminal can repent for his crime and become a new person.¹⁴¹

In this context, it may be said that Korea is a "vanguard"¹⁴² of abolitionist movement in Asia. This uniqueness of Korea compared to many other Asian countries is an outcome of strenuous efforts to abolish the death penalty: Civic organizations including major religious organizations have made a strong coalition to abolish the death penalty by consistently putting pressure on politicians. The abolitionist movement from below has grown strong enough to impact on the political and judicial process effectively. The National Human Rights Commission as a state authority has initiated abolitionist moves. The Constitutional Court, although not going as far as declaring the death penalty unconstitutional yet, has invalidated some provisions for the death penalty in special criminal Acts on grounds of disproportionality. Two liberal Presidents with abolitionist conviction adhered to the moratorium on executions even though some shocking serial murder cases occurred during their term.

Finally, influenced by the fear of crime, public opinion has retained its tendency to support the death penalty in Korea, like some other countries. Although the abolitionist movement in Korea has communicated with the public and made efforts to remove its concern, it has not been overwhelmed by the uninformed consciousness of the public. This is another lesson that the Korean case can give to its neighboring Asian nations.

¹⁴⁰ David T. Johnson & Franklin E. Zimring, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 184(2009).

¹⁴¹ Kim Dae-Jung "A Contribution to the Campaign of Amnesty International for the Abolition of Capital Punishment" (20 February 2006), online: Asia Death Penalty website, <<http://asiadeathpenalty.blogspot.com/2006/03/south-korea-kim-dae-jungs-call-for.html>>(last visited 21 September 2007).

¹⁴² Johnson & Zimring, at 147.