

# PART I

## General Comments

1. In its Concluding Observations after considering the second periodic report of the Republic of Korea, the Committee has stated that it “regrets that despite its comment that the initial report of the State party did not include sufficient information about implementation of the Covenant in practice, the second periodic report suffered from the same deficiency.”<sup>1</sup> However, the third periodic report of the government of the Republic of Korea (referred to as “the Government report” henceforth) also merely lists laws, ordinances and some decisions by the Supreme Court and the Constitutional Court related to the International Covenant on Civil and Political Rights (referred to as “the Covenant” henceforth), lacks a comprehensive and concrete account of how human rights are guaranteed, and hardly shows any explanation about the challenges and difficulties affecting its responsibility to implement the Covenant. In particular, the Government report does not provide enough information about cases where the Covenant has been violated, causing the misunderstanding that the Covenant has been well implemented.

2. The Government report reiterates what the government of the Republic of Korea (referred to as “the Government” henceforth) had insisted during the reviewing process of its initial and second periodic reports with regards to the concerns and recommendations made by the Committee which it has not implemented. For example, although in consideration of the second periodic report of the Government the Committee expressed its concern about the possibility of abuse of the National Security Law and recommended the Government to phase out the law, and in particular, urgently amend article 7 of the National Security Law,<sup>2</sup> the Government has not taken any of these measures. The Government report maintains the same position as that of the past,<sup>3</sup> stating “in view of the purpose of the law which is to protect the lives and liberties of citizens and to preserve the democratic system of the country from the threats of those within and outside country seeking to overthrow the liberal democratic system of the country, the Government is doing utmost to minimize the possibility of arbitrary interpretation and abuse of the law by investigative agencies.”<sup>4</sup> There is another example. In consideration of the second periodic report, concerning means to seek compensation from the government for those whose rights have been violated the Committee emphasized “rather than referring such cases back to

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<sup>1</sup> CCPR/C/79/Add.114, para. 2

<sup>2</sup> CCPR/C/79/Add.114, paras. 8-9

<sup>3</sup> CCPR/C/114/Add.1, paras 203-206

<sup>4</sup> CCPR/C/KOR/2005/3, para. 294

the domestic courts which have already pronounced on the matter, the State party should immediately proceed to give effect to the Views expressed by the Committee.”<sup>5</sup> Despite this, the Government report reiterates its opinion of the past stating that individuals should follow procedures provided in domestic laws such as the State Compensation Act.<sup>6</sup> This is the same explanation that was given in the initial periodic report about the matter.<sup>7</sup> This manner of explanation by the Government raises strong doubts about the government’s will to implement the concerns and recommendations expressed by the Committee.

3. Furthermore, in quoting statistical data the Government report provides too general figures and often fails to show comprehensive statistics that make it possible to understand concretely how much the rights of the Covenant are guaranteed. For instance, the figures related to legal aid programs just show the numbers of legal aid cases from 1998 to 2003,<sup>8</sup> and do not mention the total number of court cases. From this it is impossible to figure out the proportion of legal aid cases compared to total court cases, and to understand whether or not the present legal aid system guarantees the poor substantial access to justice.

4. Consequently, it can be pointed out that the Government report does not meet the criteria indicated in “Consolidated guidelines for State reports.”<sup>9</sup>

## **Relationship between Domestic Laws and the Covenant**

5. Article 6, paragraph 1 of the Constitution stipulates that “treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic law of the Republic of Korea.” Regarding this, the Committee in its Concluding Observations considering the second periodic report pointed out that “the status under domestic law of the rights provided for in the Covenant remains unclear” and that “The Committee is concerned that the article 6 of the Constitution, according to which international treaties ratified by the State party have the same effect as domestic laws, has been interpreted as implying that legislation enacted after accession to the Covenant has status superior to that of the Covenant.”<sup>10</sup> With regard to this, the Government report stresses that “it is mandatory that, during examinations by the Office of Legislation and during parliamentary

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<sup>5</sup> CCPR/C/79/add.114, para. 21

<sup>6</sup> CCPR/C/KOR/2005/3, para. 17

<sup>7</sup> CCPR/C/68/Add.1, para. 13

<sup>8</sup> CCPR/C/KOR/2005/3, para. 42

<sup>9</sup> CCPR/C/66/GUI/Rev.2

<sup>10</sup> CCPR/C/79/add.114, para. 7

deliberations, all draft laws be reviewed for possible conflicts between new legislation and international treaties that the Republic of Korea... has ratified” and “this leaves little possibility for any new legislation to come into conflict with the Covenant, thereby resolving the concerns of the Human Rights Committee.”<sup>11</sup> However, the possibility remains for newly enacted or revised laws to violate the Covenant. For example, article 12, paragraph 1 of the old Act on Assembly and Demonstration provided that chiefs of police stations, if they found it necessary for traffic flows, might prohibit or restrict assemblies and demonstrations with conditions to maintain traffic order in major roads of major cities specified in presidential decrees, and paragraph 2 of the same article also provided that if the hosts of assemblies and demonstrations marched along a road with those in charge of maintaining order, the prohibition in accordance with paragraph 1 should not be applied. Regarding this, the Committee stated that the prohibition of all assemblies on major roads in the capital would appear to be too broad and not meeting the standards of article 21 of the Covenant.<sup>12</sup> In spite of that, the Act on Assembly and Demonstration revised on the 29<sup>th</sup> of January 2004 not only maintained article 12, paragraphs 1 and 2 of the old act but also introduced a new proviso to paragraph 2 stating “but if they create obstacles to traffic flows of roads concerned or roads nearby and there is possibility of causing serious traffic inconvenience, assemblies and demonstrations may be prohibited.” This new act more seriously violates article 21 of the Covenant than the old one.

6. In particular, the Government report explains that “international treaties as multilateral agreements often serve as important criteria, along with the Constitution, for judicial decisions on the constitutionality of laws, thereby having de facto superior authority over domestic law.”<sup>13</sup> Nevertheless, there are hardly any court rulings invoking the Covenant along with domestic laws, and as the Government report admits, there have very few cases where the Covenant was invoked by the Constitutional Court or any other courts.<sup>14</sup> This is because not only the general public but also civil servants, judges, public prosecutors, lawyers, etc. do not know of the existence of the Covenant itself and even when they know it, they are not aware of the fact that it is to be legally binding. Accordingly, the notion that the Covenant has de facto superior authority over domestic laws is far from reality, and rather it is more honest and accurate to say that the Covenant has not yet been established as a legal norm in the Republic of Korea.

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<sup>11</sup> CCPR/C/KOR/2005/3, para. 11

<sup>12</sup> CCPR/C/79/add.114, para. 18

<sup>13</sup> CCPR/C/KOR/2005/3, para. 11

<sup>14</sup> CCPR/C/KOR/2005/3, para. 12

## **PART II**

### **Issues Concerning the National Human Rights Commission**

7. The activities of the National Human Rights Commission (referred to as “the NHRC” henceforth) are covered in the Government report.<sup>15</sup> Not only was the NHRC’s establishment itself a signal of human rights advancement in Korea, but the activities of the NHRC also have contributed considerably to improving the level of human rights. However, a few institutional problems are hindering the NHRC from fulfilling its role more effectively. Moreover, factors such as the NHRC’s passive performance and lack of cooperation from other government agencies are working against the NHRC’s success. For these reasons, the NHRC’s activities to this day have not been fully satisfactory.

#### **Composition of Members**

8. According to the ‘Principles relating to the status and functioning of national institutions for protection and promotion of human rights’ (referred to as “the Paris Principles” henceforth), the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of social forces (of civil society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of NGOs, experts, etc. From this perspective, it is difficult to say that the NHRC reflects such diverse representatives.

9. In regards to composition of members, the NHRC is composed of 11 commission members that are each nominated by the National Assembly, President, or the Chief Justice of the Supreme Court.<sup>16</sup> Except that nomination is restricted to those with expertise in the field of human rights, there is no procedural provision to either guarantee diverse representation, or enable effective cooperation with NGOs. Thus, there exists the danger of political influence in the composition of the NHRC’s personnel. Moreover, despite the law that restricts the personnel pool to “people with expertise in the field of human rights”, questions arise as to whether NHRC members truly embody the expertise and sensitivity necessary to promote human rights.

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<sup>15</sup> CCPR/C/KOR/2005/3, paras. 49-53

<sup>16</sup> Article 5 of National Human Rights Commission Act

## **Organization and Budget**

10. The Paris Principles stipulate that a national human rights institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding the purpose of which should be to enable the institution to have its own staff and premises, in order to be independent of the government and not subject to financial control which might affect its independence. Whether the NHRC is independent from the Government is ambiguous. The NHRC Act states that the Commission must perform its operations independently. However, there is a tendency to view the NHRC as an organ within the administration in terms of its structure and budget. According to the Korean law, organizations based on the constitution, such as the National Assembly, the Supreme Court, the Constitutional Court, the Board of Audit and Inspection, and the National Election Commission are stipulated as independent organizations. Accordingly, special procedures are needed to reduce the aforementioned organizations' estimated expenditure requests, and the head of each organization holds the power to appoint and dismiss each organization's officeholders. By contrast, the NHRC is not stipulated as an independent organization according to the Budget and Accounting Act, and officeholders above a certain rank are appointed by the President in consultation with the Minister of Government Administration and Home Affairs, the same as an average administration officeholder. For the NHRC to promote its independence from the Government, its structure and budget need to be guaranteed with the revision of relevant laws.

11. The Paris Principles declare that local or regional sections shall be set up to assist a national institution in discharging its function. The NHRC was established in November 2001. However, it was not until October 2005 that two regional offices opened to support the NHRC. Moreover, the two regional offices are insufficient to fulfill each region's needs for protection of human rights and remedies for victims.

## **Investigations and Remedies**

12. The NHRC performs two main activities. First, it investigates petitions received from victims and takes actions for remedies. Second, it researches and examines laws, policies, and current circumstances in the field of human rights and takes actions to make appropriate corrections (eg. recommendations, expressions of opinion etc.).

13. One of the problems in investigation and giving of remedies is that cases are frequently rejected without a substantial judgment to decide whether the petition amounts to a human

rights violation or discrimination. Even based on the Government report, the rate of rejection is above 75%, with the rate of cases closed without a substantial judgment soaring up to almost 80% when transferred cases and those closed by mutual agreement are added. Cases that are acknowledged as human rights violations or discrimination where it is recommended to prosecute, investigate, or take a disciplinary action are not more than 1% of all petitions.

14. The reason for this problem is that the NHRC Act has set the range of reasons for dismissal too broadly, and the NHRC acknowledges the reasons for dismissal set by the law very easily, thus showing a passive attitude in solving substantial problems. The NHRC Act stipulates 10 reasons for dismissal.<sup>17</sup> Among them, allowing case dismissal when “at the time of petition, the court’s or the Constitutional Court’s trial, investigation agency’s inspection, or other procedures for redress based on the law is already in process or completed,”<sup>18</sup> is especially problematic. Such regulations have allowed the NHRC to dismiss a case involving a suspicious death in the army only because the military investigation agency had already ended the investigation. In addition, if the prosecutor has decided not to prosecute a case where the petitioner claims human rights have been violated, the case should be dismissed based on the aforementioned regulations. However, the prosecutor’s decision itself not to prosecute a case involving a human rights violation can also constitute a human rights violation. In this case, further investigation and redress may be needed. Thus, broad dismissal is one of the obstacles before the NHRC in trying to protect human rights.

15. One of the problems in its investigation and redress is that too much time is taken; emergency cases are not effectively handled. In 2003, on average cases required 180 days to be closed, and in 2004, 124 days. Although in August 2005 the time required decreased to 104 days, considering the fact that these numbers only reflect the average time of all accepted cases, including those dismissed before substantial review (i.e., 80% of all cases), the actual time required to investigate cases of human rights violation is longer. Moreover, the NHRC is needed to take urgent actions. For example, on 15 February 2003, the NHRC recommended the prosecutor to investigate a female with a 1<sup>st</sup> degree disability under restraint. However, the action was taken a week after the petition was accepted (i.e., a week after the female was put under restraint). Thus, the female spent a week in confinement wearing a diaper and without a toilet designed for the disabled. She was forced to suffer pain as a person with disabilities, and shame as a woman. Especially in cases involving human rights violations within prisons or other detention facilities with many persons, the longer the delay of handling petitions, the

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<sup>17</sup> Article 32 of National Human Rights Commission Act

<sup>18</sup> Article 32, paragraph 1. 5. of National Human Rights Commission Act

harder it is to investigate because other prisoners and possible witnesses such as fellow prisoners may be transferred or released.

16. Insufficient investigative authority of the NHRC is also criticized as a problem. The NHRC has the authority to visit and investigate detention facilities, and such facilities are enumerated under the law and Presidential decree. Due to the method of enumeration by category, the NHRC does not have the right to visit nor investigate facilities that are not stipulated by the law such as barracks and unauthorized welfare facilities. Moreover, according to the NHRC Act, in principle petitions are to be investigated in written forms.<sup>19</sup> Only when documentary investigation is insufficient does the law authorize in-person-investigation. These systemic problems hinder the NHRC from grasping sufficient facts.

### **The Effectiveness of Recommendations and Expression of Opinion**

17. According to the NHRC Act, after investigation, the commission may only request investigation, recommend disciplinary action, or express its opinion. The NHRC does not have any authority to take any steps itself. Only the relevant authorities shall respect the NHRC's complaint, request investigation, recommend disciplinary action and report follow-up measures to the commission.<sup>20</sup> The NHRC may publicly announce recommendations made to relevant authorities and their actions.<sup>21</sup> The NHRC may also express its opinion or make recommendations in a human rights perspective on national policies.<sup>22</sup> However, such recommendations and expressions of opinion carry no legal force. For example, the NHRC made recommendations on 8 cases, including revision of article 52 of the Immigration Control Act, which bestows excessive authority on Immigration Officers, to the Ministry of Justice and Korean Immigration Bureau from May to June in 2005. However, the Ministry of Justice and Korean Immigration Bureau immediately refused openly to accept the recommendations on 5 cases and gave its opinion that the recommendations on the other 3 cases were just under consideration. The NHRC has also prepared a National Action Plan (NAP) and recommended it to the Government on January 2006, but the Government has not taken it seriously, even for discussion.

18. Even when the NHRC concludes that a case is a human rights violation or discrimination, the relevant authorities do not have legal responsibility to take any action. Further, there is no

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<sup>19</sup> Article 31, paragraph 4 of National Human Rights Commission Act

<sup>20</sup> Article 20 of National Human Rights Commission Act

<sup>21</sup> Article 25, paragraph 4 of National Human Rights Commission Act

<sup>22</sup> Article 25, paragraph 1 of National Human Rights Commission Act

way to react if a Government policy which is against the recommendation or expression of opinion of the NHRC is decided and carried out.

## **Negligence in Implementing Recommendations of the Committee**

19. On 23 August 2005, the Committee expressed its opinion to the Government that the Government's punishment on 'Hanchongnyeon' (Korean Federation of Student Councils) for being an "enemy-benefiting group" under the National Security Law violates the freedom of association under Article 22, paragraph 1, of the Covenant and recommended the author of the individual communication be given an effective remedy, including appropriate compensation.<sup>23</sup> However, the Constitutional Court and the Supreme Court have ruled that even when an international human rights institution has decided that this is a violation of the Covenant, punishing Hanchongnyeon for being an "enemy-benefiting group" by applying the National Security Law is justified.<sup>24</sup>

20. Since the Committee concluded that the so-called 'Son Jong Kyu Case' of 18 March 1994 was a violation under article 19, paragraph 2 of the Covenant to 3 August 2005 the Committee concluded that a total of six individual communications were violations of the Covenant by the Republic of Korea.<sup>25</sup>

21. The Government has not implemented the Committee's recommendations on any of the communications decided as violations of the Covenant. The reasons for failure to implement are understood to be because the recommendations of the Committee only have recommendatory effect. Thus, the Government has no responsibility to implement them. Moreover, the Committee's recommendations run counter to the previous judgements of the judiciary in the Republic of Korea.

22. Abolition of the "law-abidance oath system" is written as if the Government respected the views of the Committee in the 'Kang Yong Joo Case'.<sup>26</sup> However, while the views of the Committee on the 'Kang Yong Joo Case' were adopted on 23 July 2003, the Government gave advance notice about abolishing the "law-abidance oath system" on 30 April 2003, because

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<sup>23</sup> CCPR/C/84/1119/2002

<sup>24</sup> Supreme Court Decision, 30 August 2004, 2004DO3212; Constitutional Court Decision, 26 August 2004, 2003HEONBA85•102, etc.

<sup>25</sup> CCPR/C/54/D/518/1992; CCPR/C/64/D/574/1994; CCPR/C/64/D/628/1995; CCPR/C/78/D/878/1999; CCPR/C/80/D/926/2000; CCPR/C/84/D/1119/2002

<sup>26</sup> CCPR/C/KOR/2005/3, para. 16

when prisoners of conscience were granted amnesty they did not have to submit the “law-abidance oath”; its abolition was announced officially on July 7 of the same year. It is doubtful that the “law-abidance oath system” was abolished because the Government respected the views of the Committee on the ‘Kang Yong Joo Case’. Also, even after the abolition of the “law-abidance oath system”, so-called ‘dissidents’ residing abroad were required to give a pledge of allegiance similar to the “law-abidance oath system”. For example, philosophy professor Mr. Song Du Yul, residing in Germany, was forced to submit a pledge of allegiance when he returned to the Republic of Korea even after the “law-abidance oath system” was abolished.<sup>27</sup> Moreover, in cases related to the National Security Law, if the people concerned receive a stay of prosecution, they must submit a pledge of allegiance to the prosecutor in charge, embodying repentance for the past and promises to be loyal to the Republic of Korea, according to article 2, paragraph 2 of the Reserved Prosecution Observance Rule. Despite the abolition of the “law-abidance oath system”, systems and practices that force one to confess their thoughts and conscience still remain in the Republic of Korea.

23. The Government asserts that after the Committee was of the view that applying the National Security Law on the ‘Kim Keun Tae Case’ and the ‘Park Tae Hoon Case’ were infringements of the Covenant, the Government has deliberately acted to reduce the possibility of arbitrary interpretation and application of article 7 of the National Security Law.<sup>28</sup> However, the National Security Law still exists, and although the number of people under restraint by the National Security Law has decreased compared to the past, 78 people were put under restraint by the National Security Law in 2003 and 37 in 2004. Despite the Government’s assertion that the National Security Law is being applied more strictly, the majority of recent National Security Law offenders were put under restraint because they were suspected to have praised, encouraged, and joined an “enemy-benefiting group”. In short, article 7 of the National Security Law, which has been criticized by many international human rights institutions, including the Committee, is still in full force in the Republic of Korea. The discussion for revising the National Security Law has been suspended in the current Government and National Assembly, and reflecting on past discussions, it can be assumed that the Government is not aiming to completely abolish the National Security Law. However, if article 7 of the National Security Law, which is the main infringement of the Covenant, is not completely abolished and instead alternative legislation is enacted or only partial amendments are made, it is problematic because other factors violating the Covenant still remain. Thus, the National Security Law, including article 7, must be entirely abolished.

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<sup>27</sup> News Magazine, Hankyoreh 21, 13 November 2003

<sup>28</sup> CCPR/C/KOR/2005/3, para. 16

24. So the Government's claim that the Government is implementing and respecting the views and recommendations of the Committee is far from the truth.

25. The Korean judiciary says, in the 'Sohn Jong Kyu Case', "The views of the Committee are mere recommendations, entailing no basis for legal restraint".<sup>29</sup> Thus, it maintains the position that even if the Government takes no action following the Committee's recommendations, no legal problems exist. Therefore, in the Republic of Korea even when the Committee is of the view that the Covenant has been violated and has recommended effective remedies there is no mechanism to make the Government implement them.

26. We believe that the views of the Committee are not a mere diplomatic communique, and it is the minimum obligation of the concerned country to consider and respect the views of the Committee according to the Covenant and its Optional Protocols.

27. In 1994, in a case involving Barbados, the Committee announced as follows:

"While the Covenant is not part of the domestic law of Barbados which can be applied directly by the courts, the State party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective. To this extent, it is an obligation for the State party to adopt appropriate measures to give legal effect to the Views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol."<sup>30</sup>

Moreover, in the deliberation on the second periodic report submitted by the Government, the Committee found that, "Rather than referring such cases back to the domestic courts which have already pronounced on that matter, the State party should immediately proceed to give effect to the Views expressed by the Committee."<sup>31</sup>

28. Unlike the Republic of Korea, which does not take any action to implement the views and recommendations by the Committee, numerous states are making various efforts in their own way to implement the recommendations of international human rights institutions. Examples are as follows.

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<sup>29</sup> CCPR/C/KOR/2005/3 para. 17.

<sup>30</sup> CCPR/C/51/D/489/1992

<sup>31</sup> CCPR/C/79/Add. 114, para. 21

A. In the Republic of South Africa, article 39, paragraph 1(b) of its constitution stipulates that international law must be considered when courts interpret the Bill of Rights. Thus, courts depend on international law when interpreting the Bill of Rights, especially when terminologies used or similar to those used in the international human rights law are used in the constitution.

B. In Australia, article 31 of the Human Rights Act 2004 stipulates that international law involving human rights and judicial decisions made in international and foreign courts and arbitration tribunals can be considered. Also, the definition of international law embodies the general comments and views of the UN human rights treaty bodies. The Australian domestic court states that even if the views of the Committee are not acknowledged in Australian domestic courts as having the authority of precedent, they must be respected as the views of expert organizations established by international human rights bodies. Thus, it concludes that it is appropriate to respect the views of the Committee, as an expert organization interpreting a human rights covenant.

C. In Hungary and the Republic of Poland, the views of international human rights treaty bodies are stipulated as a reason for retrial under the criminal procedure law.

D. In addition, the Republic of Columbia enacted a special law to implement the views of the Committee and compensate victims. Even without similar laws, numerous states, including the Netherlands and Norway, are granting victims *ex gratia* compensation through administrative arrangements.

29. It is clear that the Committee has an authority to adopt interpretation of the Covenant for cases under consideration in order to review individual communications according to its Optional Protocols. If the views of the Committee are not implemented and ignored because it has only recommending force, questions rise as to why the Republic of Korea joined the Optional Protocol and allowed the Committee to review individual communications against it.

30. Especially in Asia, where a regional human rights body has yet to be set up, the UN human rights treaty bodies such as the Committee are the only passages to securing an international guarantee on human rights.

31. Thus, the Republic of Korea must rid itself of its attitude that the views of the Committee carry no legal force and that it cannot take any action because the views of the Committee are opposed to the decisions by domestic courts. Instead, it must establish laws and systematic

mechanisms that respect the views of the Committee to the maximum, as seen in the examples of other State parties to the Covenant, without delay.

## Reservations

### Paragraph 5 of article 14

32. The Republic of Korea once declared that paragraph 5 of article 14 shall be applied to be in conformity with the provisions of domestic law, including the Constitution.<sup>32</sup> Afterwards, the Government mentioned in its initial periodic report that paragraph 5 of article 14 has been reserved because the provision that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law is in conflict with paragraph 4 of article 110 of the Constitution and article 534 of the Military Tribunal Act<sup>33</sup> which deny rights of people convicted of certain crimes to appeal, except for those who are sentenced to capital punishment under a state of emergency declared by martial law.<sup>34</sup>

33. The Netherlands' government, nevertheless, explicitly declared its position against these grounds to reserve article 14, paragraph 5 of the Covenant as being incompatible with the object and purpose of the Covenant.<sup>35</sup> The government of the UK further expressed that such a position of the Government on reservation of article 14, paragraph 5 is in fact improper unless the effect of reservation as intended by the Government is demonstrated by sufficient grounds.<sup>36</sup> Even the Committee has strongly and consistently urged the Government to withdraw its reservation on paragraph 5 of article 14 throughout its two sets of concluding observations.<sup>37</sup> The Government argues that the matter of adopting the reserved provisions of six international standards, including the Convention on the Rights of the Child (referred to as "the CRC" henceforth) is currently being reviewed for ratification.<sup>38</sup>

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<sup>32</sup> [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)

<sup>33</sup> In an area of a state of emergency, a person provided below is not subject to chapter 3 of part II, except in the case of a death sentence.

1. a person provided in paragraph 1 or 3 of article 1 of military penal code
2. a person committed or attempted to commit a crime under paragraph 3 of article 13 of military penal code
3. a person committed a crime under article 42 of military penal code
4. a person committed a crime under article 54 or 78, or attempted to commit a crime under paragraph 2 of article 58 or paragraph 1 of article 59 of military penal code
5. a person committed or attempted to commit a crime under article 87 or 90 of military penal code

<sup>34</sup> CCPR/C/68/Add.1. para. 218

<sup>35</sup> [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)

<sup>36</sup> [http://www.ohchr.org/english/countries/ratification/4\\_2.htm](http://www.ohchr.org/english/countries/ratification/4_2.htm)

<sup>37</sup> CCPR/C/79/Add.6 para. 9; CCPR/C/79/Add.114 para. 20

<sup>38</sup> Ministry of Justice, 'Human Rights Vision 2006', 26 December 2005

34. The provision of paragraph 4 of article 110 of the Constitution is only applicable to an emergency situation under martial law. According to martial law, an emergency situation is defined as “an exigent circumstance of national level such as warfare, calamity, etc. in which the entire nation is engaged in a battle with enemy, or public order is extremely disturbed, preventing the administrative and judicial system from carry out its tasks, so that military intervention is required.”<sup>39</sup> Even though an individual’s right to appeal is denied on an exceptional ground according to the provision of the Constitution, such right of his or hers can be denied only on the ground of an emergency situation as defined under martial law. Such a situation is subject to paragraph 1 of article 4 of the Covenant, which gives exceptional grounds for an emergency situation involving public disorder. The Government may be excluded from carrying out its obligation if it involves a situation such as the one defined under paragraph 1 of the article 4. Paragraph 5 of article 14 is not subject to non-exclusion provided in paragraph 2 of article 4.

35. Nonetheless, even if one’s right to appeal is legitimately denied because of an emergency situation according to martial law, it needs to be carried out respecting the principle of proportionality “to the extent strictly required by the exigencies of the situation” as paragraph 1 of the article in the Covenant provides. Paragraph 4 of article 110 of the Constitution states that “military trials under extraordinary martial law may not be appealed in cases of crimes of soldiers and employees of the military, military espionage, and crimes as defined by law in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.” The purpose of this provision is closely related to the functional aspects of the military system in general, and any exigency in principle should be limited to a regional level instead of the national level. Further, even if the exigency is declared by the law, the individual whose right to appeal is denied in the military court system according to the provisions of paragraph 4 of article 110 of the Constitution still can appeal his or her case at civil courts.<sup>40</sup> Thus, since the contents of article 4 of the Covenant are similar to that of article 110, paragraph 4 of the Constitution and article 14, paragraph 5 of the Covenant is not in conflict with any domestic legal provisions in the Republic of Korea, the Government has no reason to maintain its reservation of article 14, paragraph 5 of the Covenant and should withdraw its reservation.

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<sup>39</sup> Martial law, paragraph 2 of article 2

<sup>40</sup> Article 3 of martial law states that “President must make a public announcement of its reason, type, date and area of enforcement and commander when martial law is declared.”

## Article 22

36. The Government asserts that article 22 of the Covenant shall be applied to be in conformity with the provisions of the local laws, including the Constitution.<sup>41</sup> The Government further stated in its initial periodic report that since article 33, paragraph 2, of the Constitution provides that “only those public officials who are designated by a law shall have the right to association, collective bargaining and collective action (referred to as “the three labor rights” henceforth) and the provisions of the Labor Union Law and the Government Officials Act<sup>42</sup> limit their right to association, collective bargaining and collective action. The Government hence argues that it reserved article 22 of the Covenant.<sup>43</sup>

37. The government of Germany responded that such reservation of article 22 of the Covenant does not signify that it restricts obligations stipulated under article 22 within the domestic legal system. The Netherlands expressed its position against the Republic of Korea’s reservation of article 22 for the same reason as its opposition against its reservation of article 14, paragraph 5, that such reservation is against the object and purpose of the Covenant.<sup>44</sup> The government of the UK argued that the Government’s reservation of article 22 is unacceptable unless the Government’s intended effect of the article 22 reservation is revealed.<sup>45</sup> Also, the Committee strongly recommended the Government to withdraw its reservation of article 22 in the Concluding Observations to the second periodic report.<sup>46</sup> The Government itself even mentioned that the reserved articles of six international human rights laws that it has signed so far, including the CRC, are currently being reviewed.<sup>47</sup>

38. The Government further mentioned its efforts in relation to article 22 in its report.<sup>48</sup> The

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<sup>41</sup> [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)

<sup>42</sup> Article 66, paragraph 1 of Government Officials Act, “Public officials shall not take collective actions for labor movement or other activities not related to official work. However, public officials involved in *de facto* manual labor are exceptions.”

<sup>43</sup> Public officials and national or public school teachers (article 66 of Government Officials Act, article 58 of Local Public Officials Act) and private school teachers (article 55 of Private Schools Act) shall not organize or join a labor union. However public officials involved in *de facto* manual labor (public officials involved in *de facto* manual labor at working sites of the Ministry of Information and Communication and the National Railroad Administration, and the National Medical Center (article 28 of Public Service Regulation) are not subject to article 66 of Government Officials Act and article 58 of Local Public Officials Act and may organize and join a labor union. Likewise, the meaning of restriction on the three labor rights lies in that: public officials have a special position to have responsibility for the whole people as servants for the people according to article 17 of the Constitution; they form the foundations of state operation and are last fort to support the right to life of the people; the result of their collective bargaining finally imposes a burden to the people. Therefore, allowing the three labor rights of public officials should be examined to keep pace with country situations and its degree of development.” CCPR/C/68/Add.1 para.276

<sup>44</sup> [http://www.ohchr.org/english/countries/raification/4\\_1.htm](http://www.ohchr.org/english/countries/raification/4_1.htm)

<sup>45</sup> [http://www.ohchr.org/english/countries/raification/4\\_2.htm](http://www.ohchr.org/english/countries/raification/4_2.htm)

<sup>46</sup> CCPR/C/79/Add.114 para. 20

<sup>47</sup> Ministry of Justice ‘Human Rights Vision 2006’, 26 December 2005, p.5

<sup>48</sup> CCPR/C/KOR/2005/3, para. 20

Government has made efforts to guarantee freedom of association for teachers and public officials. On 29 January 1999, the Act on Teachers' Organization and Management of Labor Unions was enacted to provide teachers the right to organize, the right to collective bargaining and the right to collective agreement from 1 July 1999.<sup>49</sup> Concerning the right of public officials to organize labor unions, the Act on Establishment and Operation of Public Officials' Workplace Associations was enacted on 20 February 1998, based on the agreement reached by the Tripartite Commission. Since 1999, a public official's Workplace Association has been organized in each administrative unit, in which working-level public officials (at ranks of grade 6, 7, 8 and 9) are allowed to participate. The Tripartite Commission held a discussion on public officials' unionization based on which the Government introduced to the National Assembly a draft Act on Public Officials' Organizations and Management of Labor Unions. However, the Government mentioned that it would restrict the right to collective action in light of the public nature of the work and special status of public officials.<sup>50</sup>

39. Since then, the Act on Public Officials' Organizations and Management of Labor Unions was officially pronounced on 27 January 2005 and put into effect on 27 January 2006. According to the Act, now it is possible to establish labor unions in the National Assembly, the Court, the Constitutional Court, the National Election Commission, the Administration, Special City, Metropolitan City, Do, Si, Gun, and Gu(autonomous district), and the Education Offices of Special City, Metropolitan City and Do.<sup>51</sup> It also regulates labor union membership of officials at the rank of grade 6 or less and prohibits officials at grades higher than 6 whose tasks involve supervision or commendation of other officials. Moreover, though the legislation allows for negotiation between the leaders of the public officials' labor unions and collective bargaining,<sup>52</sup> it forbids members from involving themselves in any political activities or going on a strike or slowdown that interferes with normal operation of the office.<sup>53</sup>

40. In spite of taking the reservation of article 22 of the Government into consideration, it is a clear infringement of the Covenant that a reservation to prohibit the three labor rights of public officials has also restricted those three rights of all private teachers. Therefore, it is no doubt a breach of the Covenant and irrelevant to the reservation that current legislation does not grant professors the right to establish labor unions even after the Government has acknowledged teachers' right to establish such labor unions. The Korean Professors Union filed a petition to

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<sup>49</sup> CCPR/C/KOR/2005/3, para.316

<sup>50</sup> CCPR/C/KOR/2005/3, para. 317

<sup>51</sup> Article 5, paragraph 1, of the Act on Public Official's Organization and Management of Labor Unions

<sup>52</sup> Article 8 of the Act on Public Official's Organization and Management of Labor Unions

<sup>53</sup> Article 4 and 11 of the Act on Public Official's Organization and Management of Labor Unions

the Ministry of Labor in October 2005 stating that it is a discriminatory practice without reasonable grounds against professors to deny them the right to form a labor union while granting primary, middle and high school teachers this right. The NHRC expressed its opinion to the Chairperson of the National Assembly that “legislative measures are needed to guarantee professors’ basic labor rights in conformity with the Constitution and International Human Rights Law. But the scope of the legal protection of professors’ three labor rights is contingent upon the issues involving particular characteristics concerning their occupation and other legal matters such as students’ right to education within the context of not violating professors’ rights in essence as it is guaranteed on the Constitution”.<sup>54</sup> This shows the Government has infringed on labor rights irrelevant to the reservation of article 22 of the Covenant.

41. The law guarantees an employee’s right to association, collective bargaining and collective action, for he or she often is placed in a position of weakness before his or her employer. The law protecting this right is intended to shield his or her equal right with the employer before the law. Thus, the Government’s requirement for public officials to receive endorsement from the public before exercising their right to association, collective bargaining and action in fact limits their equal rights. Also, since as an employer of public officials, the Government’s relationship with its employees is established at the expense of tax, the Government is not really affected by the collective actions of its employees. Therefore, this puts public officials into an even more vulnerable situation as employees. Finally, given that article 22, paragraph 2 of the Covenant generally regulates reasons to restrict the right to association, collective bargaining and action of public officials and that it elaborates reasons to restrict such rights of military personnel and policemen, the reservation of article 22 of the Government to restrict such rights of public officials in general is improper. It should be regarded as an inadmissible reservation against the object and the purpose of the Covenant.

42. Consequently, the Government’s reservation of article 22 does not have reasonable grounds. Now that public officials’ right to organize labor unions has been recognized, the fact that the reservation is not necessary should be emphasized.

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<sup>54</sup> Press release, National Human Rights Commission, 27 March 2006

## PART □

### Equal Rights of Men and Women

#### Improvement of family system under the Korean Civil Code

43. The Korean Civil Amendment Bill under the gist of abolishing the “*Hojuje*,” or the so-called Family Head System, was passed on 2 March 2005. Therefore, the Government has to prepare a new status registration system by January 2008 when the amended Korean Civil Code will be implemented.

Abolition of the “*Hojuje*” may be evaluated as one step taken towards the realization of the principle of equal rights of men and women in family relations. However, the amended Korean Civil Code stipulates that the father’s last name shall be taken when deciding a child’s last name; provided, however, that if it has been discussed otherwise at the time of registering ones marriage, or if the court has granted an approval for the benefit of the child, the child may take the mother’s last name (Article 781). Although this provision may be deemed as an improved provision compared to the previous Korean Civil Code which had been focusing on paternity without any exception, maintaining the principle of paternity that ‘places the father and the male in the center of the family and treats the position of women within the family as unimportant and inferior compared to that of men’<sup>55</sup> is against the principle of equal right of men and women.

#### Expansion of women’s participation in public offices and politics

##### Expansion of women’s participation in public offices

44. According to the 2005 statistics by the Ministry of Gender Equality & Family, female public officials throughout the administrative branch, legislative branch, judiciary branch, etc. amount to 298,352 women as of the end of December 2004.<sup>56</sup> This figure has increased by approximately 12,000 women compared to 286,074 women as of the end of 2002. Such increase in the number of women public officials may be explained by the following major

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<sup>55</sup> Press release, the Constitutional Court, 12 December 2005. The Constitutional Court of Korea also took the attitude that although it cannot say that stipulating the principle of paternity itself is in violation of the constitution, it is in violation of the constitution not to stipulate exceptions. The amended provision has reflected the foregoing position of the Constitutional Court to a considerable extent.

<sup>56</sup> 2005 statistics by the Ministry of Gender Equality & Family

reasons; (i) gender inequality related factor found at the employment stage was removed due to the abolition of the system, which gives additional points to those who served in the army, in accordance with the decision made by the Constitutional Court ruling that such system is in violation of the constitution (1999); (ii) implementation of the system that makes it a rule to hire certain percentage of women in public offices (1996 ~ 2002) followed by the system that sets the minimum employment ratio for both men and women in public offices (2003 ~ 2007); and (iii) number of women who prefer public offices that are relatively secure jobs and face less discrimination has increased along with the aforementioned factors.

45. However, it is hard to deem that women's actual status in public offices has improved in proportion to the number of women holding public offices. Number of high level women managers above Level 5 in over 48 central administrative institutions as of March 2005 amounted 1,203 women, which is only 7.4% out of the entire officials in the applicable position.<sup>57</sup> The rest serves in general positions below Level 6, which shows that the majority of women public officials still remain in low level positions despite the continuous increase in the number of women public officials.

46. We may not conclude that there is no room to deem that such phenomenon of women public officials' concentration in low level positions is a transient phenomenon accompanied by enforcement of systematic measures for expansion of women's participation in public offices. However, if we consider the fact that the women public officials are not free from the difficulties that women participating in other social and economical activities face (e.g., the existence of the glass ceiling in promotions, lack of systematic device for protecting maternity, and the social atmosphere that demand working women to play the role of traditional housewife), it is difficult to expect that simply securing the number of women at the employment stage will naturally rectify such abnormal tipping phenomenon. Therefore, it is necessary to amend the current Public Service Act, which is limited to the quota system at the employment stage, and to establish a system that enables women to actually participate in the policy making process such as quota system for promotion of women, etc.

### **Expansion of women's participation in politics**

47. The number of Congresswomen from the 2004 election for the National Assembly was 39 Congresswomen (including 29 proportional representatives, 13%), which is 2.5 times the number of Congresswomen in 2000, 16 Congresswomen. In addition, 85 women out of 733

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<sup>57</sup> 2005 statistics by the Ministry of Gender Equality & Family

wide area members (including 53 proportional representatives, 11.6%) and 473 women out of 2,888 basic local members (including 327 proportional representatives, 15.1%) were elected in the 2006 municipal election.

48. It is true that the quota system for women recommendation under the Public Official Election Act has contributed to the increase in the number of women politicians. However, at the time of the 2004 election for the National Assembly, major political parties recommended women for only 4~5% of the candidates for the members of the district electorates, and thus most of the elected women members were proportional representatives. The provision of quota for women candidates has only recommendatory effect under the current Public Official Election Act. It is urgent to establish a systematic device to improve the abnormal nomination method which allocates only proportional representative seats to women.

### **Systematic device for women's participation in labor activities**

#### **Childcare leave system**

49. According to the statistics by the Ministry of Labor, 3,763 people (female: 3,685, male: 78), 6,816 people (female: 6,712, male: 104), 9,303 people (female: 9,122, male: 181), and 10,700 people (female: 10,492, male: 208) were paid with childcare leave benefits in 2002, 2003, 2004, and 2005, respectively.<sup>58</sup> It is almost close to 0% for men, and the number of women has not increased to a great deal since 2002. In other words, let alone men workers, it is not a general practice in the Korean society for women workers to apply for childcare leave.

50. Major reasons why women workers do not take childcare leave are as follows; (i) existence of persons who may take care of the child on behalf of the mother (a member of the family or acquaintance in most cases); (ii) too little childcare leave benefit compared to the wage; (iii) concern for increase of workload of co-workers; and (iv) job insecurity.<sup>59</sup> The childcare leave benefit has increased from 200,000 Won (approximately 200 US dollars) per month to 300,000 Won (approximately 300 US dollars), and then from 300,000 Won to 400,000 Won (approximately 400 US dollars) over the past 5 years. The Ministry of Labor has a plan to increase the childcare leave benefit up to 40% of the wage in the future. However, as long as the current childcare leave benefit is not put into practice, it is definite that women workers will

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<sup>58</sup> [http://www.molab.go.kr/download/\\_20060220152113795.2\(statistics\).hwp](http://www.molab.go.kr/download/_20060220152113795.2(statistics).hwp)

<sup>59</sup> Ji Yeon Jang, 'Research of status relating to maternity leave and child care leave' (Ministry of Labor, research service, 2002)

search for an alternative plan upon using the wage that they receive rather than choosing to take the leave. Furthermore, in light of the wage differential between sexes, small amount of childcare leave benefit causes men to avoid applying for childcare leave more and more. As a result, the childcare portion, which must be solved with the social cost, is still left to individuals to take care of. Therefore, it is necessary to set up a specific plan to expand the portion to be borne by the society in terms of the childcare leave benefit and to raise the financial resource thereof.

### **Employer supported childcare facility and preferential usage of childcare facility**

51. 10% of women workers who took maternity leaves fail to receive sufficient childcare support, and 68% of women workers who resigned from their offices after childbirth present childcare difficulty as their reasons for resignation.<sup>60</sup> The Korean government made it mandatory to establish employer supported childcare facility for certain business establishments. However, there is no sanction against the employer even if an employer violates the obligation to establish childcare facility.

52. As of June 2005, out of 254 establishments having 300 or more full-time women workers that have to establish employer supported childcare facilities, only 84 business establishments are equipped with such facilities, and out of 637 establishments having 300 or more full-time women workers or having 500 or more workers that are obliged to establish employer supported childcare facilities since 30 January 2006, 530 business establishments neither establish such facilities nor pay childcare leave benefits.<sup>61</sup>

53. In addition, the Infant Care Act stipulates that employer may pay childcare benefits to employees instead of establishing childcare facilities. The amount of childcare benefit that the employer has to pay to the employee as of 1 January 2005 is 76,500 Won ~149,500 Won (approximately 76 ~ 150 US dollars). We cannot deny that it is more cost saving for the employer to pay the childcare benefit than to establish and manage the childcare facilities. Therefore, we cannot help but have doubts if the current law plays the substantial role for participation of labor activities by women workers with children.

54. The Korean government describes in the third report that the government engages in the

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<sup>60</sup> Press release by the Ministry of Labor dated October 25, 2005 'Research of status of nursery facilities in the working places'

<sup>61</sup> Attachments 1 and 2 of the foregoing press release

project of supporting childcare fee to low income earners, and supports expanding childcare facilities for infants or handicapped children and providing childcare service during nights and holidays.<sup>62</sup> However, we failed to find any specific data regarding the demand in need of such support and assistance actually provided.

### **Decline in effectiveness of maternity protection system due to increase in number of non-regular women workers**

55. As of February 2006, the number of non-regular women workers reaches 25.48% of the entire waged workers and reaches 60.4% of the entire women waged workers. 51.7% of women workers between the age of 25 and 34 who most likely give birth during such period are non-regular workers.<sup>63</sup>

56. General working environment of non-regular workers stays at a very low level compared to that of regular workers (e.g., 1,180,000 workers who are the majority among 1,250,000 workers who earn less than 2,840 Won (based on hourly wage), the minimum wage determined by the court, are non-regular workers as of November 2004. In addition, if we set a regular man worker's wage at 100, a non-regular woman worker's wage amounts to 43. 81~99% of regular workers are subject to retirement pay, bonus, allowance for overtime work, and paid leaves. However, only 14~19% of non-regular workers are subject to such issues.)<sup>64</sup> It is difficult to expect special protection for non-regular women workers who are at the status of before or after giving birth or have children in need of care. In reality, most of non-regular women workers are rejected when signing a renewal contract or experience termination of employment agreement due to pregnancy and giving birth. If the maternity protection system continues to be in force in the current form without taking special measures for non-regular workers who reach 60.4% of the total women workers, it is definite that the people will become very doubtful about the Korean government's will on the maternity protection system..

### **Wage differential between men and women**

57. As of June 2004, arithmetical monthly average total wage of women workers amounts to 1,296,490 Won, which is 59.73% of men workers. Monthly average wage of regular workers is

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<sup>62</sup> CCPR/C/KOR/2005/3, para. 326

<sup>63</sup> National Statistical Office, Research of economically active population, Statistics of the employed according to positions in profession\*gender (1982. 7. ~2006. 2.)

<sup>64</sup> Yu Seon Kim, 'Size and status of non-regular workers', 『Labor Society』 2004. 11.

61.45% of men, and monthly average wage of non-regular workers is 77.97% of men.<sup>65</sup> Monthly average wage that non-regular women workers receive is only 45.39% of monthly average wage of regular men workers. In light of the fact that non-regular women workers reach 60.4% of the total women wageworkers as of February 2006, the issue of wage differential between men and women is very serious.

58. Most of statistics regarding the wage differential released by the Ministry of Labor and the National Statistical Office stay at arithmetical average of the total amount of wages. Therefore, it is necessary that the Korean government presents statistics based on the ‘principle of equal pay for equal-value work’ so that the substantial wage differential between men and women may be evaluated. However, it is easy to acknowledge that the wage differential between sexes is at a very critical level even according to the statistical data based on arithmetical average. The wage differential between sexes is united with the issue of non-regular workers, and both of them must be solved based on the principle of equal pay for equal-value work. The Korean government must present a specific measure and schedule for the implementation of the principle of equal pay for equal-value work.

### **Scope of application of Equal Employment Act**

59. The Korean government describes in the third report that the amendment was made to the Equal Employment Act in August 2001, and accordingly, the said Act applies to any and all business establishments with 1 employee or more. However, the proviso clause of Article 3, Paragraph (1) of the said Act and Article 2, Paragraph (2) of the Enforcement Decree of the said Act stipulate that business establishments having 4 employees or less are not subject to the core provisions of the said Act. In other words, business establishments having 4 employees or less are not subject to prohibition of discrimination on grounds of sex in welfare of its employees (Article 9), prohibition of discrimination on grounds of sex in the education, assignment, and promotion of its employees (Article 10), prohibition of discrimination on grounds of sex in the age limit, retirement, and dismissal of its employees (Article 11) as well as equal pay for equal-value work (Article 8).

As of 2002, women workers working at business establishments of 4 employees or less reach 56% of the entire women employed. Accordingly, the majority of women workers is not subject to the core provisions of the Equal Employment Act, and consequently, lowers the effectiveness of this Act to a considerable extent. In order to correct such discrimination effectively,

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<sup>65</sup> Korea Labor Institute, 『Analysis of status of labor in business entities』, 2005. 8.

exceptional clause under the Enforcement Decree of the said Act must be deleted, and accordingly, all women workers must become subject to the said Act.

## **Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment**

### **Inhuman Treatment by Interrogating Officials, Including Torture**

60. The Committee expressed a Concluding Observation to the Government's second periodic report as follows: "The Committee takes note of the procedures for monthly monitoring of conditions in detention centers by prosecutors, but it is concerned that these and other mechanisms are not adequate to prevent instances of torture and cruel, inhumane and degrading treatment of detainee... The Committee is also concerned that non-compliance by the State party with the requirements of article 9 of the Covenant, and the seemingly widespread reliance of the prosecuting authorities and the courts on confessions by accused person and accomplices, facilitate acts of torture and cruel, degrading and inhumane treatment by interrogating officials."<sup>66</sup>

61. The Government report insists that self-regulatory efforts have been made to prevent and monitor torture and other infringements of human rights with the appointment as a human rights protection officer of a public prosecutor in each prosecutors' office, and a chief of investigation in each police station.<sup>67</sup> However, we are not convinced that the human rights protection officer system works effectively. Since the investigating system has been improved, there have still been reported cases of torture, some of which were acquitted by the courts. For example, on 26 October 2002 a prosecutor, prosecution officials and some policemen were charged with torturing 8 suspects for 4 days in the investigation room of the Seoul District Prosecutors Office during the interrogation process. The incident finally led to the death of one of the 8 tortured suspects (the so-called 'Jo Cheon-Hun death case'). An investigation discovered that those interrogators, after urgent arrest of the suspects on charges of murder, kicked a suspect's fifth rib, trampled them and had them do push-ups while in manacles and having their eyes covered with duct tape. Worse still, they were put through so-called 'water torture', inflicted by covering the nose and eyes of a suspect with a towel and pouring water on him for 10 minutes. The interrogation lasted all night. According to Korea Bar Association's annual human right report,

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<sup>66</sup> CCPR/C/79/Add. 114, para. 14

<sup>67</sup> CCPR/C/KOR/2005/3, para. 115

keeping a victim awake all through the night, beating, and intimidating suspects are still widely practiced by interrogators.

62. Thus, it is questionable as to how much effect self-regulatory efforts have had in reducing inhuman treatment during the investigating process and how those efforts can prevent recurring severe torture cases. The Government report says that overnight interrogation is prohibited in principle. However, overnight interrogation is still carried out in the name of necessity. Overnight interrogation is itself inhuman treatment and it leads to other inhuman treatment. Therefore, the use of overnight interrogation should be restricted.

### **Right to a Defence Counsel and Counsel's Right to Participate in Interrogation**

63. One of the most important issues in preventing inhuman treatment by interrogating officials is to guarantee the suspect's and the defendant's right to access to legal counsel. The Constitution and the relevant laws guarantee in principle the right to counsel of suspects and defendants. In fact, however, this right has been widely infringed on historically. It is because the investigative agencies are accustomed to use the arrest and the detention in order to compel the suspect to confess or to obstruct the defendant's preparation for trial. In the Republic of Korea, there are basically three ways that the right to a defense counsel is infringed on: 1. denial of the detainee's access to a lawyer by the investigative agency; 2. obstruction or delay of the contact between the defense counsel and the defendant by various methods; 3. infringement of the confidential communication between the detainee and the counsel or putting pressures or undue influence on both the detainee and the counsel during their meetings. Especially those interrogated in detention by the National Intelligence Service, the Defense Security Command or the Security Division of the National Police Headquarters for their alleged violation of the National Security Law have suffered the most serious infringements, which have not been disclosed in statistical data.

64. In the Republic of Korea, defense lawyers are not allowed to be present in the place of the interrogation of a suspect by the police or prosecutors. It is difficult for a suspect under oppressive conditions without counsel to make a reasonable choice by himself on (i) whether he should exercise the right of silence and (ii) (when he responds to the questions) what responses will be of help for his defense. In addition, the suspect under detention is vulnerable to torture and other mistreatment during the interrogation. The right of the defendant to review his written evidence, drawn up from his statements during the interrogation, is not usually well respected and therefore, on occasion, the claims of the accused that the written record on the interrogation

does not agree with his verbal statement during the interrogation are raised at trial. Nonetheless, according to the Criminal Procedure Law, the court may accept the content of the written record of the interrogation produced by the prosecutor in spite of the defendant's denial of its credibility as long as the thumbprint is verified as that of the defendant. (Legally written records produced by the prosecutor can be accepted as evidence against the accused when they satisfy two criteria: genuineness and voluntarily statement. The defendant has the burden of proof if he wants to contend that the statement was not made voluntarily. Thus, the only criterion in question is if the statement was really from the defendant. And that criterion is readily satisfied by the thumbprint, as mentioned above.)

65. In practice, investigators have so far refused participation of counsel during the interrogation process on the basis that there is no legal provision granting counselors the right to participation during the interrogation. The government report insists that the self-regulatory guidelines guarantee the rights of suspects. The self-regulatory guidelines have allowed the participation of counsel during interrogation from June 1999 (in the police department), and December 2002 (in the prosecution department).<sup>68</sup> However, the prosecutor refused the counselor's participation during interrogation in the case of Professor Song Doo-Yul under the National Security Law on 11 November 2003. Later, the Supreme Court reversed the prosecutor's decision.<sup>69</sup> The interrogating agency had refused counsel's right to participate in interrogation by insisting that there were no legal grounds. Since the courts recognized the right of counsel to participate during interrogation, the interrogating agency has adopted the principle of counsel's participation in interrogation. To guarantee the right of counsel in practice, the right of counsel's participation in interrogation should extend to the right of aggressive advice or the right of refutation.

66. Under the recent Criminal Procedure Law Amendment Bill, article 243, section 2, a counselor's participation in the suspect's investigation and interrogation is allowed so as long as the investigators have no justifiable reason not to allow counsel's participation. However, it is still questionable that the new amendment will fully guarantee a counselor's participation in the interrogation process of his or her client since the "justifiable reason to refuse counselor's participation" is an abstract concept, and relies on the discretion of the investigators.<sup>70</sup> In other

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<sup>68</sup> CCPR/C/KOR/2005/3, para. 229

<sup>69</sup> Supreme Court Decision 2003MO402. The Supreme Court stated regarding a counselor's participation in interrogations that "even though there is no clear provision in Criminal Procedure Law, the right to counselor's participation in interrogations can be recognized by inferring from the spirit of the Constitution and right to counsel of article 28 of Criminal Procedure Law.

<sup>70</sup> According to the recent Criminal Procedure Law Amendment Bill, the right to a counselor's participation in interrogations is allowed in principle. Investigators allow counselors' meeting with suspects when requested by suspects

words, the interrogation agency has restricted the counselor's participation in interrogation in spite of the self-regulatory guidelines that permit participation of the counselor. Interrogators will keep restricting counselors' participation in interrogations by stretching the meaning of "the justifiable reason" or by insisting on necessity for interrogation. Therefore, we should take further action to prevent interrogators from restricting counselors' participation in interrogations.

## **Right to Liberty and Security of Person**

### **Abuse of the Urgent Arrest System**

67. The Government mentions in its report with respect to article 9, paragraph 3 of the Covenant that the Constitution and the Criminal Procedure Code provide for firm adherence to the principle of issuing a warrant for arrest or detention as a way to assure everyone of the right to liberty and security of person and to prevent arbitrary arrest and detention. The principle is strictly applied to prevent possible violations of human rights.<sup>71</sup> However, it is continuously pointed out that the urgent arrest system has been abused in the Republic of Korea so as to make it possible for a suspect to be arrested or detained without judicial review. It is also pointed that there are not enough control mechanisms after urgent arrest.

68. The urgent arrest is a system under which investigators are enabled to arrest a suspect without an arrest warrant and detain him or her for up to 48 hours after the arrest in certain cases. The suspect against whom there is no suspicion after 48 hours of investigation will be released. The suspect can have a chance to have his case reviewed only if the investigator asks the court to issue a warrant after the 48-hour investigation, while the urgent arrest system under the current law deprives the suspect of the chance of investigating the legality or legitimacy of arrest if released within 48 hours.

69. Because the urgent arrest system authorizes the government agency to arrest and detain anyone for 48 hours, it is easily abused. Actually, the percentage of cases using urgent arrest is greater than that using arrest with a warrant in Korea. Given that most cases of torture and cruel acts by investigators are carried out at the time of arrest or immediately after the arrest, an

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or counsels and counsels' participation as long as investigators have no justifiable reason not to allow counsels' participation. In regard to this, investigators have to inform that suspects have right to veto of statement and right to counsels' assistance. After informing, investigators ask whether or not suspects will exercise those rights aforementioned. Suspects' response to this is to be recorded in their statement and their response is recorded by suspects' own handwriting or by investigators' dictation of suspects' response with suspects' signature.

<sup>71</sup> CCPR/C/KOR/2005/3, para. 133

urgent arrest without any outside monitoring, such as a court intervention, is tantamount to opening the way to torture or cruel treatment. Therefore, urgent arrest should not be allowed except in very exceptional cases. However, the statistics show that the number of urgent arrests far outnumbers that of arrests by warrant. Moreover, many urgent arrestees are released later due to a lack of grounds for suspicion. The recent government information shows that the percentages of arrestees with warrant are 0.83% (2001), 1.01% (2002), 2.00% (2003), 6.55% (2004), and 7.25% (2005), while the percentages of urgent arrestees are 16.22% (2001), 16.14% (2002), 14.16% (2003), 9.18% (2004) and 6.56% (2005).

▲ Arrests by Warrant as a Percentage of Total Arrests

Year	Total number of arrestees	Arrests by a warrant	Percentage
2001	726,902	6,064	0.83%
2002	712,653	7,180	1.01%
2003	711,813	14,212	2.00%
2004	730,539	47,883	6.55%
2005	639,668	46,384	7.25%
2006(Jan-May)	209,673	17,175	8.19%

<Source: Information of the Public Prosecutor's Office, 22 June 2006>

▲ Urgent Arrests as a Percentage of Total Arrests

Year	Total number of arrestees	Urgent arrests	Percentage
2001	726,902	117,938	16.22%
2002	712,653	115,030	16.14%
2003	711,813	100,768	14.16%
2004	730,539	67,095	9.18%
2005	639,668	41,994	6.56%
2006(Jan-May)	209,673	12,535	5.98%

<Source: Information of the Public Prosecutor's Office, 22 June 2006>

We can see that the percentage of urgent arrests has exceeded that of arrests with warrants, although the situation has improved recently. The percentages of released arrestees within 48 hours are approximately 30-40%, according to the same data: 25.6% (2001), 33.9% (2002),

45.5% (2003), 37.9% (2004), and 33.0% (2005).<sup>72</sup>

▲ Percentage of Urgent Arrestees Released Without Charge

Year	Total number of urgent arrestees	Number released without charge	Percentage
2001	117,938	30,157	25.6%
2002	115,030	39,020	33.9%
2003	100,768	45,827	45.5%
2004	67,095	25,431	37.9%
2005	41,994	13,856	33.0%
2006(Jan-May)	12,535	3,498	27.9%

<Source: Information of the Public Prosecutor's Office, 22 June 2006>

It is a serious systematic problem that the urgent arrest system is abused in such a way. Actually, most of the alleged torture cases are related with urgent arrest.

70. The recent Criminal Procedure Law Amendment Bill stipulates that a judge should, in principle, undertake an interrogation of a suspect in all cases where arrest warrants have been requested. However, when an investigator releases a suspect who is arrested and investigated under urgent arrest within 48 hours without any request for a warrant, the judge has no opportunity to examine the legality of the investigator's urgent arrest, which is still a problem under the Amendment Bill. Besides this, the Government dismisses the forward-looking policy in the revised criminal procedure law, which guarantees that all urgent arrest cases are subject to court review by mandating prosecutors to request warrants from the courts. The Government takes a mild position that an investigator should get a warrant within 48 hours "without any unnecessary delay" in detaining urgent arrestees, and that an investigator should submit a report to the court within 30 days when an urgent arrestee is released under no suspicion.

### **Abuse of Detention System**

71. Article 9, paragraph 3 of the Covenant states that it shall not be the general rule that persons awaiting trial shall be detained in custody. The Committee expresses its Concluding Observation to the Government's second periodic report that the excessive length of permissible

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<sup>72</sup> Information of the Public Prosecutor's Office disclosed at the request of MINBYUN-Lawyers for a Democratic Society, 22 June 2006.

pre-trial detention (30 days in ordinary cases and 50 days in cases involving the National Security Law), and the lack of defined grounds for such detention also raises questions of compliance by the State party with article 9.<sup>73</sup>

72. It has been reported that the number of detainees has steadily decreased since the introduction of the Judicial Review of Warrant in 1998. But as it is the number of detainees in the Republic of Korea is still considerably high as compared with those of other countries. The recent government report says that the percentages of detention cases are 4.2% (2001), 4.0% (2002), 3.7% (2003), 3.2% (2004), and 2.6% (2005). Considering that these numbers include misdemeanor cases too, physical detention is a major concern in the Korean criminal procedure law. Moreover, the law has kept 30 days (in general) or 50 days (in special cases) as a detention period before indictment, which was pointed out as excessive by the Committee.

▲ Percentage of Detainees out of Accused

Year	Total number of accused	Number of detainees	Percentage
2001	2,426,050	101,953	4.2%
2002	2,416,711	96,572	4.0%
2003	2,441,267	90,387	3.7%
2004	2,606,718	82,504	3.2%
2005	2,384,613	62,078	2.6%
2006(Jan.-May)	935,515	18,766	2.0%

<Source: Information of the Public Prosecutor's Office, 22 June 2006>

73. It is more than probable that such a high rate of investigation while in detention and long detention periods lead to a high occurrence of torture. The recent Criminal Procedure Law Amendment Bill introduces some measures, including conditional release at the stage of a court's warrant review, to prevent the abuse of detention. It needs to be carefully monitored as to how such proposed systemic improvements will affect for investigators' detention practices.

**Judicial Review of Arrest and Detention Cases**

74. Article 9, paragraph 3 of the Covenant stipulates that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

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<sup>73</sup> CCPR/C/79/Add.114, para. 13.

Release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. The Committee expressed its Concluding Observation to the Government's second periodic report that the law of criminal procedure under which the detention of a suspect is subject to judicial review only if the detainee lodges an appeal is incompatible with article 9, paragraph 3 of the Covenant, which provides that every person detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.<sup>74</sup> The Government report asserts that recognizing the concern the Government is now pursuing a revision of the Penal Procedure Code so as to make mandatory a court examination of the legality of an arrest warrant, regardless of a petition having or not having been filed.<sup>75</sup>

75. The recent Criminal Procedure Law Amendment Bill stipulates that a suspect is entitled to a legal counsel appointed by the Government when he is arrested or gets an arrest warrant. The Amendment also stipulates that judges should examine all arrested suspects who request issuance of a warrant without any delay (in general, no later than one day after issuing a warrant). The current law contains various release procedures, which include withdrawal of detention, bail, and review of legality of detention. The revised law classifies such release procedures into two categories: review of release of a defendant and review of release of a suspect. The revised law also provides that the court may order a conditional release at the time of a court issuing a warrant. The Government insists that the revised criminal procedure law is modified so rationally that the law makes it possible to control arrest and detention efficiently and the law can uphold the principle of non-detention trial by giving more chances of release to the suspect. Although the proposed amendment aiming for a better review system--especially interrogation of the suspect before detention--can be considered a positive change, close attention must be paid as to how this system is reviewed by the National Assembly and whether or not it becomes settled law.

76. We raise some concerns relating to this issue. As the requirements of both arrest or detention and release are abstract under the law (for example, a suspect should be released when there are no clear grounds for detention, when the reason for detention becomes void, or when the detention is not serious), in order to eradicate abuse of physical detention, it is crucial that those who run this system, such as judges and interrogators, should change their paradigm concerning arrest and detention (from "detention in principle" to "non-detention in principle). However, the reality in the Republic of Korea is that under the current legal system the

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<sup>74</sup> CCPR/C/79/Add. 114, para. 13

<sup>75</sup> CCPR/C/KOR/2005/3, para. 144

administrators/operators of the system lack any motives or reasons for changing their paradigm. In other words, we cannot find any sign or evidence that they have made efforts to establish the new system or improve the current system or show any indication of changing their attitude on the subject.

## **Right to Privacy of Family, Home & Correspondence**

### **Right to Privacy**

#### **Change of Gender of Transsexual on the Family Register**

77. On 22 June 2006, the Supreme Court made the first judgment relating to the ability of a transsexual to change name and designation on the Family Register.<sup>76</sup> Before the judgment, there was a large controversy about the right of transsexuals, because there was no administrative procedure in place for a transsexual's change of gender. Moreover, the decisions of the lower courts were not compatible with that of the higher courts on change of gender. This ruling carries an important meaning since it outlines a principle for a change of gender. It is also important because it recognizes not only the value and dignity of transsexuals as humans but also the right of transsexuals to fully exercise the right to pursue happiness and the right to all their civil rights. Based on this ruling, the special exemption law needs to be introduced in such a manner that transsexuals are able to change their gender when they want. Furthermore, the Government should give financial support for them to get a sex exchange operation, which is the first step of identifying themselves and coming out in society. The NHRC expresses its opinions in the National Action Plan for the Promotion and Protection of Human Rights (referred to as "the NAP" henceforth) that the principle of changing the gender should be established and the Government should phase a policy for sex exchange operations into the National Health Insurance Corporation.

#### **Regulation to Prohibit Homosexuality under the Military Penal Code**

78. Article 92 of the Military Penal Code stipulates that individuals found guilty of sodomy and other such indecent conduct shall be punished by imprisonment of up to 1 year, which means that homosexuality is a criminal act. Using the word "sodomy" shows that legislators have a discriminating view about homosexuality. The provision prohibits homosexuality rather than

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<sup>76</sup> Supreme Court Decision, 22 June 2006, 2004SEU42

sexual violence between people of the same gender. The Constitutional Court indirectly ruled the constitutionality of this discrimination on sodomy by rejecting a petition on 27 June 2002 that “an indecent conduct is an act that violates the legal interest of sound life of community and military discipline of the armed forces and that would be seen as indecent by an ordinary citizen. Sodomy is a representative and typical one.”<sup>77</sup> Since an individual with common sense and ordinary sensibilities subject to application of the Military Criminal Act could easily predict what conduct would be prohibited under the law, and since arbitrary interpretation of the law is not probable, the instant statutory provision does not violate the principle of clarity.

79. The NAP provision, however, encourages revision of the Military Penal Code, which predicates the biased view about homosexuals. The Constitutional Court’s decision is opposite to the position of the Committee which, in its views on the individual communication of *Toonen v. Australia*,<sup>78</sup> held that a prohibitive provision regulating homosexuality was an infringement of the right to privacy. The law needs to be revised from prohibiting homosexuality in general to punishing offenders or protecting victims and preventing crime.

### **Regulation Defining Homosexuals as Mentally and Physically Handicapped Persons**

80. Article 53 of Military Penal Code standardizes mandatory discharge from the army for homosexuals or others of such sexual preference on the basis that this sexual preference is a disorder. The regulation for physical examination upon conscription also uses sexual preference disorder in defining evaluating standards of disease or physical disorder of physical examinees. These regulations have become the legal grounds for denying homosexuals promotion within the army.

81. The regulation above, however, is against the universal trend that homosexuality be treated as a normal sexual preference. In 1974, the American Psychiatric Association crossed out homosexuals from the list of mental disorders in the DSM (Diagnostic and Statistical Manual of Mental Disorder) which is the statistics manual of mental disorders. In addition, the International Disease List ICD-10, published by the WHO (World Health Organization), in 1993 determined that sexual preference has nothing to do with mental disorder. However, the army of the Republic of Korea has been discriminating against homosexuals in promotion or draft by defining homosexuals as those with a personality disorder or behavior disorder while social

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<sup>77</sup> Constitutional Court Decision, 27 June 2002, 2001HEONBA70

<sup>78</sup> CCPR/C/50/D/488/1992

understanding has changed and homosexuality is accepted as a normal sexual preference, and that the rights of homosexuals should be protected has been accepted worldwide. This proves that discrimination against homosexuals remains as it was within the government system. The Military Penal Code and its annexed list 1 is a violation of article 30 of the NHRC Act, which prohibits discrimination based on sexual preference. Moreover, compulsory discharge on the ground of homosexuality is the same as dismissal without good reason. The regulation for physical examination upon conscription which classifies homosexuals and other different sexual preferences as personality disorders or behavior disorders also reflect the biased view of the Government. Therefore, this regulation should be discarded.

## **Protection of Personal Information**

### **Insufficient Regulation to Protect Individual Information in the Private Sector**

82. The Act on Promotion of Information and Communications Network Utilization and Data Protection is not a general law covering privacy and protection of personal information. The law applies only to communication services, travel agencies, educational institutions and aviation businesses, while the law does not cover medical services, insurance companies, banks or supermarkets. With the progress of social change, individual information handling by digital technology augments an alarming trend. Even though measures to protect personal information are urgently needed, the Government has been slow in introducing new regulations on account of conflict as to who will be the authority in charge among government departments. In particular, the Republic of Korea has not set up competent institutions to protect personal information that most of OECD (Organization for Economic Cooperation and Development) countries have. NGOs proposed a bill on Protection of Personal Information in 2004. The NGOs expressed their opinions that a personal information protection review commission should be regulated to cover all public and private institutions, with roles as follows:

- investigation and relief regarding infringement
- supervision of the status of protecting personal information
- research and recommendations about the law or policy related to personal information, and
- education and PR (public relations).

83. The Personal Information Dispute Mediation Committee under the Act on Promotion of Information and Communications Network Utilization and Data Protection has played an *ex post facto* role as the committee can impose a small penalty, about 300,000 Korean Won (approximately 300 US dollars), for a breach of the personal data protection principle. Since the

punitive provisions regulated by the Act on Promotion of Information and Communications Network Utilization and Data Protection are so insignificant, companies have never been adversely affected or harmed, even though many information infringement cases have occurred. The fact that the profit earned illegally is greater than the penalty negatively affects protection of personal information. The Ministry of Information and Communication has been neglecting such realities. Furthermore, it has been trying to revise the law for the purpose of introducing a compulsory internet real-name system. It is the free choice of an individual or community whether to write with a real-name or write anonymously. The Ministry of Information and Communication has also forced companies to collect unnecessary personal information as a tool to suppress freedom of expression.

### **Issue Concerning the Law about Protection and Use of Location Information**

84. The Act on Protection and Use of Location Information proposed and enacted by the Government was promulgated on 27 January 2005. The Act shows an inclination toward collection of:

- location information gathered by those (for example, public institutions, employers, non-profit organizations), who are not location information businessmen or location basis service providers
- location information about the real owner in case the real owner is different from legal owner
- location information through GPS (Global Positioning System) or a base station.

It has been criticized for lack of adequate tools to protect location information when collected by other means, such as future-payment type traffic cards or RFID (Radio Frequency Identification). It might also be concerned that it is possible for location basis service providers to hand over location information to location information businessmen by fabricating the subjects of information's consents.

### **Issues Related to Persons with AIDS: Report of Personal Information Using Real-Name**

#### **Issues Concerning Reports Using Real Names by Delegated Legislation**

85. The existing preventive law on AIDS (Acquired Immune Deficiency Syndrome) delegates the detailed contents of keeping a reporting system with real names of AIDS positive persons, and the lists of AIDS positive people to the directive of the Ministry of Health and Welfare. Reporting or listing of the medical history information limits right to privacy. It is against the Constitution and the Covenant that the detailed contents of reporting or listing medical history information are delegated to the lower directive without regulating specific contents in the

legislative act, because it goes beyond the boundary of delegated legislation.

### **Issues Concerning Reports Using Real-Names**

86. Reporting or informing about the medical history of an AIDS positive person violates privacy and freedom, so it cannot have a legitimate purpose unless it is justified, suitable and infringes to the minimum extent. The Government supervises information about people with contagious diseases for the purpose of protecting other people from contraction at birth, or due to an epidemic and circulation of contagious diseases. Most countries administer statistical data concerning births and eradication of contagious diseases. Medical history information on gender or route of transmission is enough for administrative purposes to control disease. Real-name reporting is not essential for preventing HIV/AIDS. There are no necessary and adequate reasons for personal information--real names and residence registration numbers--to be stored or administered by the administration headquarter of controlling disease where final decisions of positive reaction, instructions of investigating medical history, and allocations of medical expense are administrated. But the current system asks that all information regarding HIV/AIDS positive persons be reported to the Ministry of Health and Welfare. This system raises the risk that information may be exposed, due to many steps in the informing reporting process. Also, accumulation of unnecessary information is a serious infringement of the rights of the infected person. The law should be revised in a manner that reporting of personal information of infected persons is reduced to a minimum and the reporting procedure is simplified.

### **Disclosure of Persons with Medical Histories to Blood Banks without Legal Grounds**

87. The real-name reporting system under the HIV/AIDS Prevention Acts moves from doctor to public health center to mayor, magistrate of the county or district leader to governor of the province to administration headquarters. It allows information which is collected by the administration headquarters without legal grounds to be distributed to private institutions such as blood banks. The NHRC has expressed its opinion throughout two resolutions<sup>79</sup> that, "The Act on Protection of Personal Information Regarding Public Institutions, article 10, paragraph 2." <sup>80</sup> cannot be used as a ground of providing personal information to any other public

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<sup>79</sup> Recommendation of NHRC, 30 July 2002, on providing medical history information of a person with a mental disease for occasional aptitude tests of driver's license; Opinion of NHRC, 25 September 2002, on Insurance Business Amendment Bill.

<sup>80</sup> Article 10, paragraph 1, stipulates that the head of the institution shall not, for a purpose other than established, use

institution. The provision should be construed in such a way that the institution that possesses personal information can only divulge this information under narrowly defined criteria.” This is of importance because at present the phrase “the proper reason” paints a broad definition. It allows too much room for the infringement of a person’s right to privacy. Accordingly, it is reasonable to conclude that under the principle of the right to privacy and freedom as defined in the Constitution, the principle of directing collection of information and the principle of the subject of information’s consent that the above provision cannot be used as a ground for providing information to other institutions, as the existing decisions by the National Human Right Commission assert.

### **Disclosing Residence Registration Number to Private Companies**

88. The Government revised The Residence Registration Act in 2005, introducing the new provision of article 19 (authentication of residence registration).<sup>81</sup> This provision is based on article 82, paragraph 6. 1. of the public office election law (verification of real-name on internet press board or conversation room) that technical measures should be taken to verify users’ real names using real-name authentication provided by the Ministry of Government Affairs and Home Affairs. This provision allows private companies to use the national computer network, which poses a serious risk of infringement of the right to privacy. The Korean residence registration number system uses a bar-code, which cannot be changed after being granted. Not only is the code itself against the right to privacy, but also it is prone to inadvertent leaks. One quarter of internet users have had their code misappropriated. The Government should take adequate measures to guarantee that personal information will not be disclosed to a person who is not permitted to receive, handle, or use it, and that it should not be used for a wrongful purpose.<sup>82</sup> However, the Government fails to restrict the collection or use of the residence

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a personal information file or provide it to other institutions, except for using it within the institution or providing it to other institutions according to other laws.

Paragraph 2 of the same article prescribes that despite the provision of paragraph 1, the head of the institution may use a personal information file or provide it to other institutions in case of each item below. However, it does not apply to the cases where the fear of unreasonable violation of the subject of information or other’s rights and interests is recognized. <Revised on 29 January 1999>

Item 1. in case there is a consent of the subject of information or it is to provide information to the subject of information

Item 2. in case there is a considerable reason to use information in order to carry out its mandate provided in other laws.

<sup>81</sup> Article 19 states that Minister of Government Administration and Home Affairs shall identify the authenticity of items on residence registration when each condition below is fulfilled.

Paragraph 1. When there is a need of verification of the name and residence registration number of a person who expresses his/her opinion on the notice board or chat room of a website by an internet media, a political party, a candidate or an would-be candidate according to the Act on Public Office Election and Anti-Corruption of Election.

Paragraph 2. When there is a need of verification of a residence registration card by a residence registration computerizing organ.

<sup>82</sup> General Comment No. 16 (1988), para. 10

registration number. Instead, it has allowed for the abuse of the registration number system by opening the national computer network to private firms. Therefore, the Government is violating the freedom of expression of anonymous users of the internet.

### **Collection and Utilization Plan of the Biological Life DB (Database)**

89. On 25 July 2006, the Cabinet passed a resolution on the collection and administration of genetic identification information. In order to introduce an administration system for genetic identification information, the resolution includes the following:

- judgment of the genetic information to identify individuals
- collection of genetic samples of prisoners and criminals in 11 categories of special crime, such as murder or arson
- collection of genetic samples of convicted persons in correctional institutions

The Ministry of Justice has expressed its opinion that the law should be introduced for the prevention of felonious crime and arrest at an early stage. However, it has not been proved that the collection of genetic information prevents crime. The Government should withdraw the resolution, as it will violate human rights and will result in the possibility of expanded means to collect or use the biological information of individuals.

### **Plan for Electronic Residence Card**

90. The Ministry of Government Affairs and Home Affairs in February 2006 announced “The Advanced Model of ID Cards Suitable for the Information Technology Era” and opened a public hearing. The main information in the Government announcement was to convert current residence registration system to smart cards equipped with IC chips. This is a push to a plan for issuing public ID cards that failed ten years ago due to public opposition. The electronic cards will contain not only identity conformation data but also details about health insurances, transportation passes and credit cards. Moreover, they are to include certificates that will be used for online settlement. The more you use it, the more individual information DB will be accumulated. Believing that storing residence registration numbers in IC chips is safer is wrong, because the residence registration number system itself is more abused than used. Without solving the fundamental problem of excessive abuse of residence numbers, enforcing a new project will result in huge social loss. In addition, combining personal information with other related information creates an effective structural basis to put individual privacy under government surveillance; hence, it will seriously invade the right to retain control of personal information.

## **Plan for Electronic Military Card**

91. The Ministry of National Defence is introducing a “Narasarang Card” (Love the Country Card) which is a combined military identification and ATM card. Because Korea has adopted the draft system, most adult males are required to serve in the army for around 2 years. Even after that, they keep their military status in the standing army for 7 years. Therefore, the card will be distributed to many millions in couple of years. This large scale distribution could result in loss and misappropriation. In addition, counteracting these problems results in huge expense. This operation is planned to be carried out by the Military Mutual Aid Association, a private business. All the information pertaining to the army on duty and the standing army is to be brought into the association’s system and it will be provided to a specific bank for financial service. The current technology cannot promise complete security, thus not only military information but also individual information can be exposed. The project, which is invading the right to privacy and the right to retain control over personal information, should be stopped.

## **Spread of CCTV (Closed Circuit Television) Without Legal Grounds**

92. In 2003, according to research done by an NGO called the Citizen’s Action Network, there were a total of 1178 security cameras run by 7 city police stations in Seoul. Out of them, 466 were CCTV related to research of the transportation flow, and 712 were unmanned security cameras to watch out for transportation violations. Moreover, 3 ward offices (Jongro, Kwanak, Gangnam) operated 107 security cameras. Out of them, 67 were unmanned security cameras to watch for transportation violations, 35 were to watch for unnoticed waste disposal, and 5 were to prevent crime. The total setting-up expenses were estimated to be about 55 billion won (60 million US dollars). The pace of installing cameras is believed to be accelerating.

93. In May 2005, the NHRC advised that CCTV could possibly violate and restrict the right to control personal information, privacy and freedom of the individual, and it therefore recommended that laws should be passed to cover its running procedures, methods, and requirements. If CCTV needs to be used in public areas, there should be stated laws that protect privacy. However, this is not taking place. The laws to regulate CCTV should cover the following areas:

- standards for use of security cameras
- regulations about the duty to inform and procedure of consent
- guidelines on specific purpose for installation and operation of a system suitable to that

purpose

- strict restrictions on providing information to third parties
- clear lines of authority about installation and operation of security cameras
- supervision system of CCTV

## **Freedom of Correspondence**

### **Issues Concerning the Protection of Telecommunications under the Protection of Communications Secrets Act**

94. The article 9, paragraph 2. 2. of the Protection of Communications Secrets Act covers notices about execution of telecommunication restriction measures, and regulates deference of the notice in case that restrictive measures on correspondence are crucial and inevitable for national security or public safety. Article 9, paragraph 2. 5. states that not a judge but a chief public prosecutor of the concerned district should give authorization in case of unavoidable restriction upon correspondence is necessary for those reasons.

95. In addition, on 25 August 2006, the Ministry of Justice amended the Protection of Communications Secrets Act and revised article 21, paragraph 4, on the duty of telecommunications businesses to cooperate. According to this act, all telecommunications businesses should provide the necessary equipment, technology and skill for measures to restrict and monitor telecommunications. Also, they should keep all real communications data for 12 months (except city telephone and internet log-in records, which are for 6 months). The communications data covering who communicated, how many times, and from where, should be protected. Article 21, paragraph 4 of the amended Act unintentionally treats members of the public as criminals under the clause concerning investigation, as it is implying that businesses will monitor the public's daily communications. Without any safety measures, a law that requires businesses to keep all national public daily communications content, communication times and places and details of whom they communicated with, for 12 months, will increase the chance of misappropriation or leaks of communication by investigating agencies, telecommunication businesses or their employees. Thus, it is in conflict with the purpose of the Act.

Furthermore, the court has not rejected any single request for a warrant of interception requested by an investing agency, which is completely incompatible with General Comment of the Committee, as it emphasizes the role of the courts in deciding on interception in individual

cases.<sup>83</sup>

### **Restriction on Freedom of Communication by the Telecommunication Business Act**

96. In responding to a constitutional petition by NGOs about article 53 of the Telecommunication Business Act, the Constitutional Court confirmed in its judgment that article 53 of the Telecommunication Business Act is unconstitutional because it violates the freedom of expression. Article 53, paragraph 1 regulates surveillance of seditious communication. Based on paragraph 1 of article 53, paragraph 2 regulates establishment of the Korea Internet Safety Commission. These two provisions are against the principle of clarity, prohibition of excessive restriction, and prohibition of comprehensive delegation.<sup>84</sup>

97. The Government has retained paragraph 1 of article 53, which was determined as unconstitutional before, by changing it from seditious communication to illegal communication. The Korea Internet Safety Commission consists of members appointed by the Minister of Information and Communication. The Commission is actually a branch of the Ministry of Information and Communication, since the Ministry controls its entire budget.

The Korea Internet Safety Commission is demanding that public companies restrict the search of 718 words that are deemed as obscenities or violent and is violating the freedom of information and communication under the excuse of voluntary ethics.

### **Conscientious Objection to Military Service**

98. The UN Commission on Human Rights (referred to as “the UNCHR” henceforth) acknowledged “conscientious objection to military service” in its Resolution (1989)<sup>85</sup>, based on articles 3 and 18 of the Universal Declaration of Human Rights and article 18 of the the Covenant, thereby endorsing this issue as laid down in the UN Charter’s definition of member states’ duty. Moreover, UNCHR Resolution 77 (1998) declares that states with conscription systems should implement various substitute service systems that coincide with reasons for “conscientious objection to military service”, refrain from detaining or repeatedly punishing conscientious objectors, and not discriminate their economic, social, cultural, civil, and political

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<sup>83</sup> General Comment No. 16 (1988), para. 10

<sup>84</sup> Constitutional Court Decision, 27 June 2002, 99HEONMA480

<sup>85</sup> U.N. Doc. E/CN.4/1989/59, Preamble, para. 1

rights.<sup>86</sup> Furthermore, the UNCHR has consistently confirmed the contents of previous resolutions declared in years 2000, 2002, and 2004, and pressed for the reexamination of relevant laws and practices in each member state by reflecting on the specific contents of UNCHR Resolution 77 (1998) concerning “conscientious objection to military service”. Also, the UNCHR has adopted a resolution which requires the gathering of relevant information from the Government, the NHRC and NGOs, and also has requested a comprehensive report to be submitted to the Office of the High Commissioner for Human Rights (OHCHR).

99. The Committee also announced officially that the General Comment adopted in 1993 deduced “conscientious objection to military service” from article 18 of the Covenant which stipulates moral, ethical, and religious freedoms, and that conscientious objectors should not be discriminated against on ground of their objection to military service.<sup>87</sup>

100. As seen above, “conscientious objection to military service” is a right recognized by the Covenant, and the Republic of Korea has not only joined the Covenant but is a state in favor of the UNCHR’s resolutions of years 2000, 2002, and 2004 which acknowledges “conscientious objection to military service”. Thus, the Republic of Korea has a duty to make its domestic laws and practices comply with the contents of the UNCHR resolutions. However, conscientious objectors in the Republic of Korea face heavy punishments without exception, to the extent that getting a decent job after imprisonment is almost impossible. This fact illustrates the Government’s lack of responsibility and duty to the Covenant, and lack of intent to follow the UNCHR’s resolutions.

101. The Government must provide various forms of alternative services for conscientious objectors as an option to military service, provide systems which protect such objectors from

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<sup>86</sup> U.N. Doc. E/CN.4/1998/77; The essential contents of the resolution are as follows:

(a) Recognizing that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives, Aware that persons performing military service may develop conscientious objections (Preamble).

(b) States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, taking account of the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs (para. 1).

(c) States with a system of compulsory military service, where such provision has not already been made, of its recommendation that they provide for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, of a noncombatant or civilian character, in the public interest and not of a punitive nature (para. 4).

(d) States should take the necessary measures to refrain from subjecting conscientious objectors to imprisonment and to repeated punishment for failure to perform military service (para. 5).

(e) States, in their law and practice, must not discriminate against conscientious objectors in relation to their terms or conditions of service, or any economic, social, cultural, civil or political rights (para. 6).

<sup>87</sup> General Comment 22 (1998), para.11

being discriminated against by way of criminal punishment, and help “conscientious objection to military service” become a basic right that all Korean citizens can enjoy.

102. In its report, the Government states the reasons for rejecting “conscientious objection to military service”. First, in the current circumstances, with the two Koreas divided, and the Democratic People’s Republic of Korea developing nuclear weapons, the danger of the Republic of Korea becoming communized by force still exists, especially with decreasing military personnel due to low birth rates. It argues that alternative service for conscientious objectors cannot be allowed because the Republic of Korea’s national defense would rapidly weaken or a national security crisis may even ensue. Second, it will become very difficult to maintain the current conscription system because standards which define conscientious objectors such as religion and personal beliefs are abstract and arbitrary and the possibility of people exploiting this system may increase objectors to military service. Third, it will raise the issue of equality and non-discrimination because conscientious objectors will be exempt from all of the universal conscription system’s basic military training, reservist training, and mobilization at war.<sup>88</sup>

103. However, a majority of conscientious objectors are Jehovah’s Witnesses, a minority religious group with approximately 600-700 people objecting to military service annually. Considering the fact that annually 300,000-350,000 are potential soldiers on service, and annually 30,000 work as public service workers, 55,000 work as industrial skilled workers, 15,000 are expert research workers, 4,000 are public health workers, 36,000 are full-time reservists, and 50,000 work as on-duty police, totaling approximately 200,000 people who are working in alternative services annually, it is hard to believe that recognizing alternative service for conscientious objectors will weaken the Republic of Korea’s national defense.<sup>89</sup>

104. Furthermore, as seen in the experiences of numerous states already providing alternative service, not only is clarifying standards for defining conscientious objectors and searching out intentional evaders of military service possible, but equitableness in terms of public responsibility and conscription administration can be maintained if alternative service becomes equal to military service or even heavier service.<sup>90</sup> In addition, considering the need to

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<sup>88</sup> CCPR/C/KOR/2005/3, paras. 272-276

<sup>89</sup> This was acknowledged by the Supreme Court in a case of 17 July 2004, 2004DO2965, in which it was found that there was a violation of the military service law.

<sup>90</sup> Even in the west of Germany, when it was divided from the east like the north and south of Korea, implemented alternative services in 1961. Taiwan, which is under tense relations with China, implemented alternative services starting from 2000, and to this day its national defense has not weakened and intentional evaders of military service have been detected. Thus, implementing alternative services in ROK should be of little consequence.

acknowledge “conscientious objection to military service” not only for believers of a particular religion but also objectors with reasons of general conscience, alternative service must be implemented.

105. Based on its constitution and the military service law, the Republic of Korea operates a drafting system that applies to men universally.<sup>91</sup> Military servicemen are categorized into soldiers serving active service, those in reservist duty, and those in general reservist duty.<sup>92</sup> Exemption from military service is limited to physical inadequacies, insufficient educational background, or domestic reasons, with no exemption provisions for conscientious objectors.<sup>93</sup> Even for those serving reservist duty, four weeks of basic military training is mandatory under article 55 of the military service law. Thus, even when conscientious objectors are given reservist duty or are eligible to apply for reservist duty, objectors do not accept nor apply for it.<sup>94</sup> Plus, objectors eligible for general reservist duty are also punished repeatedly for not answering to reservist call-ups, for reasons of conscience.<sup>95</sup> Therefore, conscientious objectors are in reality punished without exception.

106. Punishment on conscientious objectors was first recorded in 1939 during the Japanese colonization of Korea. The number of such prisoners has increased annually in the past 66 years. From 2000 to 30 April 2006, 3537 were under criminal punishment for objecting to military service.<sup>96</sup> More than 500 people are sentenced to criminal punishment annually, and those punished since 1939 to this day total approximately 10,000 people, which is the biggest number for punishment of objectors to military service worldwide to this day.

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<sup>91</sup> Relevant provisions are article 39, paragraph 1 of the constitution which stipulates, “All citizens bear duty to national defense as stipulated by the law” and article 3, paragraph 1 of the military service law, which stipulates “All men who are citizens of ROK must faithfully fulfill their service to the military as stipulated by the law.”

<sup>92</sup> Soldiers on active service serve in the army for 24-30 months including 6 weeks of basic military training. Those serving reservist duty are categorized into those with physical inadequacies and those with insufficient educational backgrounds. Also, those with special skills or qualifications can apply for reservist duty as well. Reservist duty is for 32-36 months including 4 weeks of basic military training. It is mandatory for active service soldiers to serve as reservists after their military service, for 8 years in the case of private soldiers.

<sup>93</sup> According to the national defense white paper, which was published by the ROK government in 2000, among the entire ROK population of 48 million those who are serving active service in the military at any one time amount to 690,000, and reservist duty by approximately 140,000. According to the Office of Military Manpower Administration’s statistics, amongst the drafted examinees of the first-half of year 2001, 2.6%--amounting to 4,916 people--were exempted from enlistment due to physical inadequacies and insufficient educational background.

<sup>94</sup> Article 88 of the military service law stipulates that if one objects to serving in active service in the army, one can be sentenced to up to 3 years of imprisonment. Article 33 of the military penal code stipulates that objectors to military service can be sentenced to up to 3 years of imprisonment for mutiny.

<sup>95</sup> If reservist call-ups are not answered, with reference to article 90 of the military service law, the penalty is imprisonment of up to 6 months or a fine of less than 200 million Korean Won. If mobilization training is not answered, with reference to article 15, paragraph 4 of the Establishment of Homeland Reserve Forces Act, the penalty is imprisonment of up to 3 years or a fine of less than 500 million Korean Won.

<sup>96</sup> A report submitted to Im Jong-In at the Ministry of National Defence

107. Conscientious objectors punished before mid-2001 were automatically sentenced to the maximum punishment of 3 years for mutiny, based on article 44 of the military penal code, by a military trial. After mid-2001, the military service law was applied instead of the military penal code because most objectors rejected getting into the military itself. Thus, they are tried under civil courts and sentenced to 18-26 months in prison. Under the current military service law, one is exempted from military service if one is sentenced to more than 1 year and 6 months. Thus, the civil court generally sentences imprisonment close to 1 year and 6 months. The Constitution of the Republic of Korea stipulates that until one is found guilty under final judgment one is assumed innocent, and under the code of criminal procedure the general principle is that unless there is a risk of the suspect fleeing or a risk of evidence being destructed, the suspect goes under trial without confinement. However, conscientious objectors are mostly confined from the beginning of the investigation. Even when the father and the elder brother are imprisoned for the same reasons, or when brothers are imprisoned simultaneously, such circumstances are almost never considered in deciding the length of the sentence.

108. Conscientious objectors are excluded from release on parole on special occasions and periodical paroles, and also omitted from the amnesty and rehabilitation opportunities that are given several times every year.<sup>97</sup> As a result, conscientious objectors still carry the dishonor of criminal records, causing them social disadvantages to this day. Such conscientious objectors are not eligible for the civil service due to their criminal records, and face restrictions on working for government-approved industries under article 76 of the military service law. Moreover, they face social discrimination when they apply for employment in private companies because of their criminal punishment records.

109. Most conscientious objectors in the Republic of Korea are Jehova's Witnesses, and a minority is believers in the Seventh-Day Adventist Church. Since a non-Jehova's Witness (Oh Tae-yang) objected to military service at the end of 2001, 10 people have been punished or are under trial for rejecting military service because of antiwar and peace beliefs. In November 2003, a soldier at service (Kang Chul-min) was the first to reject military service, for reasons of opposing dispatch of troops to Iraq.

110. On 15 September 2004, 12 out of 13 justices of the Supreme Court declared a majority

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<sup>97</sup> Unlike the general prisoner, objectors to military service who are Jehovah's Witnesses are placed in a special category for parole screening standards and graded 1st class trustees within prisons. However, despite the fact that generally a prisoner is released on parole if they serve 50% or more of their term of sentence, these objectors are only allowed to apply for parole if they serve 27 months (75% of a 3 year sentence) or more. In view of the fact that 'soldiers on active service' serve 26 months in the military, the term in which conscientious objectors can apply for parole was intentionally extended to make them serve a longer term than 'soldiers on active service', which is unfair.

opinion that “conscientious freedom cannot be considered a superior value over one’s duty to national defense” and ruled that conscientious objectors are guilty.<sup>98</sup> Only one justice of the Supreme Court announced his opposing opinion that conscientious objectors should be found innocent, saying, “In the case of the accused, it is proper that the state take a step back and concede its right to impose criminal punishment, to guarantee and show respect to every individual’s conscientious freedom.” Among the 13 justices of the Supreme Court, 4 justices who ruled conscientious objectors were guilty also urged the implementation of alternative services, as did the opposing opinion. In deciding whether punishing conscientious objectors under the military service law is constitutional or not, on 26 August 2004, the Constitutional Court decided punishment was constitutional, with 7 judges in agreement and 2 judges in disagreement.<sup>99</sup> However, 5 out of 7 judges in agreement also gave a supplementary opinion to lawmakers, that it was time to derive a national solution through a serious social discussion on ways to show consideration for conscientious objectors, and reflect carefully to produce plans such as providing alternative services.

111. At the National Assembly’s regular session in 2004, two motions to implement alternative services were proposed by National Assembly members. However, no relevant law has been enacted because the National Defense Committee has not enforced a resolution to lay the bill before the Assembly plenary session for enactment. The NHRC has recommended the Chairman of the National Assembly and the defense minister to implement alternative services that allow “conscientious objection to military service” to exist in harmony with military service. However, the defense minister is maintaining a noncommittal attitude, saying that he will announce his position after examining policies on alternative services with the Government and relevant NGOs.

112. Thus, the Government of the Republic of Korea must acknowledge “conscientious objection to military service”, provide various forms of alternative services, and immediately stop all criminal punishment passed against conscientious objectors. It also must refrain from subjecting conscientious objectors to imprisonment and repeated punishment for failure to perform military service, and not discriminate against conscientious objectors in relation to their terms or conditions of service, or any economic, social, cultural, civil or political rights.

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<sup>98</sup> The Supreme Court on 15 July 2004, 2004DO2965, ruled that there was a violation of the military service law.

<sup>99</sup> The Constitutional Court on 26 August 2004, 2002HEONGA 1, recommended that paragraph 1 (1) of the military service law be deemed unconstitutional.

## Freedom of Expression

### National Security Law

113. According to the Government report, the Government asserts that it makes every effort not to abuse the National Security Law. The Government also claims that it has strictly forbidden law-enforcement officials to interpret the notions of “crimes of praising, inciting, propagating the activities of or acting”, as stated in article 7 of the law in its application, too loosely.<sup>100</sup> However, the law has infringed freedom of expression and hindered the development of civil society, as described below.

### Raising Controversies over the Issue of the Total Abolishment of the National Security Law

114. Korean society had hoped to abolish the National Security Law when the 17<sup>th</sup> Congress began with a majority to the reforming ruling party in April of 2004. The Committee was of the view that the imprisonment of Shin Hak-Chul for drawing rice-planting violated the freedom of expression under article 19, paragraph 2 of the Covenant and recommended the Government to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, legal costs, and return of the painting in its original condition, bearing any necessary expenses incurred thereby, on March 19 of the same year.<sup>101</sup> 305 Korean NGOs began solidarity actions for the total abolishment of the National Security Law again in August of 2004, and a survey of the public showed a majority of public opinion for the abolishment.

115. However, the Constitutional Court found that the National Security Law is constitutional in its judgment on Constitutional Complaints concerning the infringement of freedom of expression under the National Security Law article 7, paragraphs 1 and 5. The Constitutional Court reasoned that the revision of the National Security Law in 1991 eliminated possibilities of its broad application and, for that reason the law does not violate the principle of *nulla poena [nullum crimen] sine lege* (the principle of legality).<sup>102</sup> The decision was made unanimously and the Supreme Court also showed its opposition to the abolishment of the National Security Law. When the regular session of the National Assembly was scheduled to discuss the matters

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<sup>100</sup> CCPR/C/KOR/2005/3, paras 294-297

<sup>101</sup> CCPR/C/80/D/926/2000

<sup>102</sup> Constitutional Court, 26 August 2004, 2003HEONBA85-102

of the National Security Law in 1 September 2004, the police authorities arrested members of Hanchongnyeon, also known as the Korean Federation of Students Councils, under the National Security Law. Meanwhile, the regular session of the National Assembly did not discuss the matters of the National Security Law, due to strong objections by the shadow cabinet.

## **Recent Notable Cases under the National Security Law**

### **Praising or Sympathizing (article 7 of National Security Law)**

116. Article 7 has been criticized for its vague and broad elements in constituting a crime. It provides a wide range of discretionary powers for prosecutors or judges to apply the National Security Law, which triggers abuse in exercising the law. The majority of people arrested under the National Security Law are in prison for violation of article 7. According to the general inspection of the Administration conducted by the National Assembly in 2003, 94.9% of violations under the National Security Law fell under article 7. In 2004, 97.4% of violations under the National Security Law fell under article 7. The high portion of violations under article 7 show that article 7 has been a threat to freedom of expression. The Committee found that the guilty verdicts of Korean courts in the cases of Park Tae-Hoon<sup>103</sup> (October 20, 1998) and Kim Keun-Tae<sup>104</sup> (November 30, 1998) violated article 19 of the Covenant. That a majority of the arrests were violations of article 7 of the National Security Law means that the law increases the possibility of threats to the freedom of expression.

	Year of 2001	Year of 2002	Year of 2003	Year of 2004
Number of the arrestee under The National Security Law	126	131	84	30
Number of the arrestee under the violation of Art. 7	113 (89.7%)	126 (96.1%)	74 (88.0%)	28 (93.3%)

<Source: 2004 report submitted by the Ministry of Justice while the general inspection of the Administration conducted by the National Assembly>

117. On 26 May 2006 a district court found Professor Kang Jeong-Ku guilty under the National Security Law for his opinion about the Korean War. Professor Kang set forth his opinion that intervention by the United States only caused an increase in victims and extended the period of the Korean War, because the Korean War was about reunification of the south and north. After

<sup>103</sup> CCPR/C/64/D/628/1995.

<sup>104</sup> CCPR/C/64/D/574/1994.

the investigation of Professor Kang began, scholar's groups argued that Professor Kang's opinion about the Korean War was based on the Historical Projection Comparative Method, which is widely accepted in the area of social science. However, the district court pointed out a similarity between Professor Kang's opinion and the Democratic People's Republic of Korea's criticism about U.S. policy and a federal system of reunification. It also reasoned that Professor Kang's opinion amounted to an anti-State act sympathetic to revolutionary theory of the Democratic People's Republic of Korea and was a pro-north opinion. This case is a good example of how the National Security Law punishes any person if their opinions agree with those of the Democratic People's Republic of Korea.

### **Organizing and Joining an Enemy-Benefiting Group (paragraph 3 of article)**

118. The Committee announced its opinion that the guilty verdicts of Korean courts that membership of Hanchongnyeon is illegal violates the freedom of association under paragraph 1 of article 22 of the Covenant.<sup>105</sup> The Committee also recommended the Government to seek relief steps to revise article 7 of the National Security Law and to prevent similar occurrences. However, four members of Hanchongnyeon--Song Hyo-Eon, Kim Noh-Jin, Kim Byoung-Seol and You Byoung-Moon--have been sought by the police for violation of paragraph 3 of article 7 of the National Security Law. A total of 20 members of Hanchongnyeon, including the four members named above, are wanted by the police for violations of the National Security Law.

### **Expressions for Enemy-Benefiting Groups (paragraph 5 of article 7)**

119. A district court Lee Byoung-Young of possessing material containing expressions for an enemy-benefiting group. Lee was arrested and indicted for carrying the report of the 12<sup>th</sup> Hanchongnyeon Assembly for the delegation in May 2006.<sup>106</sup>

### **National Security Secrets (paragraph 2 of article 4)**

120. Article 4 of the National Security Law employs a vague and indefinite interpretation of the law when it defines the meaning of 'national security secret'. For this reason, it leaves the law open to the discretion of law enforcers in its application to cases. The definition of 'an anti-State act' and 'a national security secret' is ambiguous and fails to distinguish elements of the crime in article 4, paragraph 1 and 2, item GA. In fact, the courts of the Republic of Korea

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<sup>105</sup> CCPR/C/84/D/1119/2002

<sup>106</sup> Seoul District Court Decision, 24 May 2006, 2004GAHAP103233

restrict freedom of expression affirmed under article 19 of the Covenant by extensively applying references of ‘a military secret’ and ‘a national security secret’ to cases.

The Supreme Court has decided that ‘national security secrets’ can include all secrets in areas of politics, economics, society and culture.<sup>107</sup> The Supreme Court interpreted that a national security secret can include facts acknowledged as common sense among the public as long as those facts can aid the enemy. Among relevant article 4 cases are the following:

i. During a trip to China, Jeon Yong-Wook entered the Democratic People's Republic of Korea and made a statement about a military facility (including location of a control tower and a hangar), which he knew from his period in service (from January 1991 to July 1992). Jeon was indicted and sentenced to jail for 3 years and 6 months. He was found guilty and is imprisoned although the information he gave was more than 10 years old and known to the public in the communities where the military facilities are located.<sup>108</sup>

ii. In 1997, Kang Tae-Woon, a former counsel for the Democratic Labour Party, shared his political views about Korean society with his relative Park Choon-Geun in Japan. Kang sent Korean newspapers and reports about the movement of progressive parties and the social movement toward reunification to Park. Kang also met Park in Japan and China and discussed political issues of the Republic of Korea. The prosecution insisted that Park was a spy for the Democratic People's Republic of Korea, who collected information and delivered it. However, the prosecution could not present evidence to prove its accusation. The court found Kang not guilty regarding 2 letters sent to him from Park. But, it found him guilty for reports that he passed on which had been made in public over the internet or in public forums, and sentenced him to 6 years.<sup>109</sup>

iii. Professor Song Doo-Youl, a German national, was taken by the National Intelligence Service for interrogation at the airport when he first entered his native country, the Republic of Korea, after 37 years. The interrogation was problematic because it denied Professor Song's right to counsel and was revealed in a report of the National Intelligence Service to the media while the investigation was in progress. Professor Song was treated before the public as a prominent spy for the

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<sup>107</sup> Supreme Court Decision, 8 June 1990, 90DO646

<sup>108</sup> Supreme Court Decision, 9 September 2005, 2005DO3853

<sup>109</sup> Supreme Court Decision, 20 August 2004, 2004DO2788

Democratic People's Republic of Korea even before any verdict. The district court found him guilty on 30 March 2004, on the basis of his being a delegate of the Chosun Labor Party of the Democratic People's Republic of Korea, his literary work and seminars as a delegate. The Appellate Court found guilty only on the ground of having fled the Republic of Korea, under article 6 of the National Security Law, and sentenced Professor Song to 3 years of imprisonment and 5 years of probation.<sup>110</sup> Also, when Professor Song revealed during interrogation that he had joined the Chosun Labor Party, even intellectuals blamed him, which demonstrates the continued phobia of communism induced by the National Security Law.

### **The National Security Act Is Still Powerful**

121. Fewer people are imprisoned for violation of the National Security Act these days. However, the case of Professor Song in 2004 and the case of Professor Kang are still pending and widely publicized by the media. The media led public opinion to convict both men under the National Security Act before the verdicts. This represents Koreans' hypersensitive attitude toward the powerful National Security Law. Despite decreased numbers of arrestees, the National Security Law still controls the mindset of Koreans in all areas of society.

### **Movie Grading System**

122. The Government report announced that it abolished the system of preliminary review of films in February 1999 through the revision of the Public Performance Act. The revision of the Public Performance Act in January 2002 abolished 'rating restriction standards for all movies' and, instead created 'rating restriction standards for adults'. The Government claims that freedom of expression in movies and the like has been greatly increased by the new regulation.

123. However, the new standard for 'rating restriction standards for adults' applies to all movies which need a certain restrictions in presentation and advertisement under the Law on Promotion of Films, article 21, paragraph 3(v). The Korea Media Rating Board has wide discretion to choose and decide on a specific standard for the necessary substance for movies under the Law on Promotion of Films, article 3, paragraph 7. Article 3, paragraph 5 of the Directive for Foreign Imported Films and Standards for Grade Classification for Movies and Videos defines 'rating restriction standards for adults' as pertaining to excessively violent or indecent content that is

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<sup>110</sup> Supreme Court 2004DO4899

harmful to public morality, and that may upset the social order.

124. The new definition leaves more room for the personal judgment of the members of the Korea Media Rating Board than the previous one, which provided classification standards for nudity, violence, exploitation, cruelty, outrageousness and so on. For this reason, movie importers as well as movie producers are not able to anticipate what grade their movie products will receive from the Korea Media Rating Board.

125. After the Korea Media Rating Board restricts a film it must be shown only at a movie theater with limited screening classification and cannot be advertised or publicized in any way. There is only one theater for showing such movies for adults in the Republic of Korea and even this theater has serious financial problems due to the new standards. Therefore, movie importers and producers cannot help but to avoid importing and producing movies and the like which have the possibility to be classified as restricted. They also have to avoid producing such movies.

126. Since all of these factors obviously indicate the infringement of freedom of expression, the Government has abandoned its obligation to make clear standards to increase the freedom of expression.

## **Freedom of Association**

### **The Act on Assembly and Demonstration**

127. The Government report asserted, in relation to the concerns by the Committee that the prohibition of all assemblies on major roads of major cities might be excessively prohibitive<sup>111</sup>, that it does not unconditionally prohibit an assembly or a demonstration on major roads of major cities. In its report, with the revised Act on Assembly and Demonstration and statistics, it says that, “An assembly or a demonstration cannot be prohibited when the sponsors of the assembly or demonstration duly designate persons in charge of maintaining order and discipline and march on the roads. However, an assembly or a demonstration can be prohibited when a severe obstruction to the flow of traffic may occur, thereby causing a serious inconvenience to the public.”<sup>112</sup>

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<sup>111</sup> CCPR/C/79/Add. 114, para. 18

<sup>112</sup> CCPR/C/KOR/2005/3, paras. 306-314

128. The revised Act on Assembly and Demonstration can prohibit an assembly or a demonstration where a severe obstruction to the flow of traffic on and around the roads may occur. However, it is a change for the worse because the former Act did not prohibit the sponsors of an assembly or demonstration where they duly designate persons in charge of maintaining order and discipline and marching on the roads. It can be seen as a further limitation of freedom of association.

### **Issues Concerning the Act on Assembly and Demonstration**

129. The amended Act can prohibit an assembly or demonstration where

i. severe damage may occur to one's property or private facility, or there is a concern that remarkable damage may occur to public calm and privacy due to an assembly and demonstration in others' residential area or a similar place,

ii. severe infringement of the right to education may occur in the vicinity of schools, as defined by article 2 of the Education Act on Primary and Middle Schools, or

iii. severe damage may occur to the facilities and operation in the vicinity of military facilities, as defined by article 2, paragraph 1, of the Act on Protection of Military Facilities.<sup>113</sup>

130. In the provisions above, "a similar place" means residences or places where a building can be used as a de facto residence, or neighboring unoccupied ground and roads.<sup>114</sup> According to the Seoul Metropolitan Office of Education, there are 2229 school facilities under article 2 of Education Act on Primary and Middle Schools around Seoul City, including kindergartens. Article 2, paragraph 1 of the Act on Protection on Military Facilities covers chief command facilities, communication facilities, anti-aircraft protection facilities, storing facilities for war equipment and research production of war commodities, military airfields, emergency airstrips, naval ports, quays in military use, military fields for shooting and military training camps,<sup>115</sup> and thereby it is very comprehensive. The possibility of an arbitrary prohibition notice is broad. And so the Act on Assembly and Demonstration has been revised in a way to limit the right to association.

### **Excessive Responsibility of Crime for the Participation to Assembly and Demonstration**

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<sup>113</sup> Article 6, paragraph 3, of the Act on Assembly and Demonstration

<sup>114</sup> Article 2, paragraph 1, of the Enforcement Ordinance of the Act on Assembly and Demonstration

<sup>115</sup> Article 2 of the Enforcement Ordinance of the Act on Protection of Military Facilities

131. Article 30 of the Criminal Law states that each criminal shall be regarded as a principal offender if a crime is jointly committed by two or more people. Though not explicitly stated in the Criminal Law, it is evident that the subjective condition of will to conspire and the objective condition of the fact of a conspiracy are required. In principle therefore, although there may be will to conspire, a criminal shall not be deemed as a principal offender without the fact of a conspiracy. Without actual participation in an act a person cannot be punished as a principal offender under article 30 of the Criminal Law, but can only be punished for preparation or planning to commit an individual crime.

132. For some crimes, however, the courts have applied the theory of joint principal offenders although the suspects have not actually participated in the crime. In other words, even if a crime has been collectively prepared by a group and only some members of the group have actually participated in the crime other members who did not participate in it have also been punished.

133. The courts apply the theory of joint principal offenders to people who have participated in associations or demonstrations. Regardless of whether or not they have actually performed, prepared, or acknowledged violent actions in demonstrations, people arrested in associations or demonstrations have been held liable for violent actions. For instance, some farmers who were arrested during a gathering of farmers held in 2006 were held guilty of assaulting policemen and setting fire to police vehicles.

134. The violent behavior taking place at gatherings and demonstrations may be circumstantial, not organized. And most people participate in associations or demonstrations without knowing that violent actions may have been prepared in advance.

135. To hold people who have participated in associations or demonstrations for various purposes criminally liable for all unexpected violent actions is against the principle of *nulla poena sine lege* of article 12 of the Constitution. It is also be against the principle of clarity that the law should clearly state punishable actions, making it possible for a person committing criminal acts to predict what the punishment will be, and make it possible for a person committing criminal acts to make decisions accordingly.

136. If a participant in a demonstration, without any specific evidence of participating in the preparation of a criminal act, is held criminally liable for all the criminal action that took place for the reason of being at the scene of the crime, this restricts the rights to participate in

associations and demonstrations, which are basic constitutional rights. It is also against article 37 of the Constitution, the principle of the prohibition of excessive restriction in the face of justifiable purposes of guaranteeing order and security of the society.

137. Some might argue that there are concerns over how to prevent and to call to account violent behavior in associations or demonstrations if the theory of joint principal offender is relinquished. The police in advanced countries surround participants engaging in violent actions during demonstrations and only arrest those people. It is not impossible to punish organized crimes, since photographs taken at the scene without consent are acknowledged by the Supreme Court as legitimate evidence. Therefore, the problem of excessive restrictions on the basic rights of participating in associations and demonstrations due to unreasonable punishment of peaceful participants caused by the application of the vague concept and extent of the theory of the joint principal offender should be solved.

## **Family Protection, Marriage and Divorce**

### **Welfare Policy for Underprivileged Family**

138. Welfare policy for protection of underprivileged family focuses heavily on indirect and temporary measures. In other words, the current welfare policy regarding underprivileged family can be said to be insufficient or unstable on the basis of the following considerations: (i) in case of welfare funds, the economically distressed single mom family is eventually the final obligor of the loan related to such welfare funds, (ii) most of the single parent family can barely benefit from the government housing policy running on a permanent rent basis because the right of entering the permanently rented apartment is extremely limited to a few chosen, and (iii) there are very few state-run institutions for the protection of single moms and their kids, and in addition, related private facilities run by religious organizations are not sufficiently supported by the government.

139. Therefore, there is a need (i) to secure the fiscal stableness by separately planning and operating welfare funds targeted at the underprivileged family, (ii) to positively review the introduction of policy regarding family allowances substantially and directly necessary to help underprivileged family, and (iii) to upgrade the current employment support system at the government level for the welfare of single mom families with low incomes on a long term and self reliant basis

## **Guidelines on the Resident Status of Foreign National Spouse**

140. In accordance with Article 333 of the Amended Guidelines on the Resident Status of Foreign National Spouse Married with Korean National (October 1, 1999), foreign males married with Korean woman shall obtain approval regarding the resident status in the same manner as their counter parts married with Korean man, if the Korean woman or the foreign male spouse can earn a living on his or her own.

However, the question whether the foreign national spouse can stand on his/her own for a living is legally groundless as the criteria and is beyond reasonable judgment, and it is also difficult to establish specific standards which can serve as a basis to determine the question. Therefore, it is necessary to review the aforementioned guidelines thoroughly.

141. On the other hand, under the current Nationality Act, which is based on a blood relationship, the children of foreign national parents residing as workers in Korea are prohibited from obtaining the Korean nationality even if the children were born in Korea. As a result, the reality is that the status of their children is unstable and not being provided sufficiently with education opportunity. In conclusion, it is urgently needed to come up with more fundamental protective measures for the children of immigrant workers in terms of nationality and education opportunity.

## **Protection of Immigrant Woman through International Marriage**

142. Over the past few years, the number of international marriage has sharply increased since a certain religious organization and a matchmaking agency began to jump in the matchmaking service area. In particular, as legal immigration route is limited due to the implementation of the registered employment scheme, international marriage is becoming more popular than ever because it guarantees a long term and stable resident status. According to data released by the National Statistics Service, the number of international marriage stands at 35,447 in 2004, up more than 7 times that of 1991 recorded at 5,012, and up 72.8% from 25,658 in 2003, thus reaching 11.4% of the total number of marriage in Korea. Among others, the number of marriage between Korean men and their foreign female spouse stands at 25,594, more than three times of that of marriage between Korean women and their foreign male spouse at 9,853. In case of marriage between Korean men and their foreign spouse, spouses from China top the list at 70.4%, followed by Vietnam (9.6%), Japan (4.8%), and Philippine (3.8%), with Vietnamese spouses making a significant increase in number.

In Korean society, the increase of international marriage can be attributed to the factors that follow: (1) the high demand of unmarried men due to the distorted ratio of gender, (2) the increase of unmarried women, (3) the social environment that remains silent as to disguised marriage with foreign nationals [involving human traffic], and (4) Korea has become the focal point for immigration since the introduction of labor policy attracting low wage immigrant workers.

143. The international marriage mentioned above takes the form of marriage in appearance. However, in substance, it is becoming 'marriage involving human trade', in which women are traded as exchangeable 'goods' in the global match making market.

With the increasing number of international marriage arranged by match making agency, problems are raised such as (1) the screening procedures like those of the beauty contest, (2) provision of false information regarding spouse, and (3) excessive agency fees. In addition, under the current system, mostly Korean men are required to pay economic resources of 10 million won on average to their prospective spouse or the spouse's family. Therefore, the current practice also led Korea men and their family to treat female immigrant spouse as 'purchased bride'.

144. Currently, in Korea, the match making agency can be operated by any one filing with the relevant tax office for business registration. As of April 2005, the number of the wedding consulting agency, including international wedding consulting, was presumed to be at approximately 1,000, but the exact number still remains unknown. At a time when international marriage is inevitable due to the real demand thereof, voices are becoming louder to regulate the current business practice of international wedding agency in terms of humane aspects.

145. On the other side, voices of concern have also been raised as to violence against immigrant female spouse, together with the problems presented in the process of international marriage.

According to the results of the survey conducted by Gwangju Women Development Institute in 2002 at 100 internationally married women residing in Gwangju and Jeolla Namdo area, 30% of those surveyed suffer from domestic violence, and there are physical violence (57%), verbal abuses (18%), economic distress (12%) by type of abuse. In addition, 64% of them responded to the survey by saying 'just be patient'. According to the 2005 survey of the Ministry of Health and Welfare, 31% of the female immigrant spouses surveyed suffered from verbal abuses for the past one year, with physical violence recorded at 13-14% and forced sexual intercourse or abnormal sexual activities in their respective ratios of 14% and 9.5%. The results lead us to believe that at least one out of ten female immigrant spouses had once suffered from domestic violence or had to involuntarily slept with their husband. In addition, problems are also raised

regarding the cases in which husbands on suspicion of their spouse do not support their family in financial matters, prevent wire transfer to the home country of their spouse or take identification card from their wife.

146. One of the most crucial factors to problems like these is that the legal resident status of female immigrant spouses depends entirely on their Korean husband.

According to The Korean Nationality Act 2001 (before amendment in the year of 2004), in principle, a foreigner married to a Korean has to sustain domicile in the Republic of Korea for not less than two years consecutively under the state of marriage with the Korean spouse or has to meet other certain conditions to get the permission of naturalization from the Minister of Justice. However, The Korean Nationality Act 2004, in the light of humanitarian standpoint, newly provided Paragraph 2 and 3 in the Article 6 that if a person married to a Korean national and domiciled in Korea encounters Korean spouse's death or disappearance or other events disabling the continuance of normal married life without cause attributable to him/her, and he/she is bringing up or under duty to bring up a minor born by the marriage with the said spouse, the person can acquire a Korean nationality.

Despite the amendment of the Korean Nationality Act, systematic complement is still necessary, for the Act to show efficacy. It is hardly expected that a female immigrated through marriage without social or material basis and not familiar with Korean Language and culture should successfully prove the faults of his/her Korean Spouse to apply for the naturalization.

147. In addition, the Immigration Act, under which a holder of spouse visa (F-2 Visa) must obtain prior approval to get a job, was amended in 2005 to allow the holder to work without limitation, and the acquisition period of permanent visa was shortened from five years to two years. All of the foregoing are encouraging measures. Furthermore, the government has recently come up with long awaited measures that follow: (1) to allow 'certificate of employment of the party itself or its spouse' as evidence demonstrating the economic capability in case of application for nationalization, (2) to allow female immigrant spouses to continue to work by granting F-2 Visa, even if in divorce proceedings, and (3) to grant female immigrant spouses F-2 Visa to guarantee them the right of custody of their children even if the spouses were divorced with their Korean husband and did not obtain custody of their children due to their inability to demonstrate the reasons attributable to their Korean husband.

However, unless the holder of permanent visa is guaranteed the rights relating to the citizenship, the current situation, in which female immigrant spouses tend to prefer the acquisition of Korean nationality by giving up the nationality of home country, will not be changed much. In addition, the current support system relating to domestic violence must be reorganized to grant

female immigrant spouses access to it so that they can get professional assistance from consulting agency or women's shelter whenever they happen to be in trouble with domestic violence.

However without securing the right as a citizen the situation that female immigrants prefer giving up their own nationalities to acquire Korean nationalities would not change. Social supporting systems through which experts of consultation offices can professionally help female immigrants when they are faced with problems such as family violence need to be prepared and arranged.

## **Protection of Child**

### **Physical punishment in School**

148. Paragraph 7 of Article 31 of the Elementary and Secondary Education Act basically prohibits physical punishment but exceptionally admits for education in an unavoidable case. Ministry of Education established a guideline to set forth kinds, procedures, measures, places and materials for physical punishment, an occasion when physical punishment is unavoidable in the light of education, guidance after punishment, opinions of parents, and measures to be taken when physical punishment is refused

149. Those provisions of the Elementary and Secondary Education Act mentioned above seems to have progressed in comparison with the past where the law kept silence on physical punishment. However 'an unavoidable case for education' leaves room for interpretation and furthermore, physical punishment was systemized and legislated as if it is needed for education, finally drawing in and shifting the matter from the prohibition to lawful procedure (kinds and standards of physical punishment) regarding physical punishment.

150. In the State Report Korean government expresses objection to prohibition of physical punishment resting on the cultural and historical background of Korea and transition of recognition on physical punishment, which is the result of anachronistic idea. It is not that physical punishment has been approved under cultural or historical ground but that it has stemmed from wrong educational practice of the past where no respect for students' human rights recognized. There is no ground that Korean people agreed physical punishment in the present educational circumstances.

151. Therefore the government should eliminate deep rooted traditions that justify practices of violence which invades students' basic human rights in the name of education, by changing Paragraph 7 of Article 31 of the Presidential Decree of the Elementary and Secondary Education Act to prohibit any form of physical punishment in school, which shall be in harmony with the spirit of the constitution and with the purpose of our education.

## **Rights of Migrant Workers**

### **Migrants in General**

152. The Korean Immigration Control Act prescribes that an alien staying in the Republic of Korea shall not be engaged in political activities (article 17, paragraph 2) and those who violate this article can be deported.<sup>116</sup> Furthermore, the Government came up with “the comprehensive countermeasures against illegal aliens’ anti-Korean activities” in April 2004, which defines “anti-Korean illegal aliens” to include “those who actively participate in an assembly or a demonstration against the Government’s policies” and “those who actively express political opinion criticizing the Government’s measures.”<sup>117</sup> In October 2004, most of the Korean media reported that “an anti-Korean Bangladesh Islamic group” was exposed for the first time and its members were deported for the reason that this Bangladesh religious group had sent money to a Bangladesh political party of its support.<sup>118</sup> The Korea Immigration Control Act and the Government’s attitude which deny migrants’ right to political activities, are not compatible with article 21 (freedom of assembly), article 22 (freedom of association), article 2 (equal rights) and article 26 (equality before the law) of the Covenant, as well as article 21 (freedom of speech, press, assembly, and association) and article 11 (equal rights) of the Constitution. The Committee has encouraged the repeal of legislation aimed at limiting the rights of foreigners to political expression.<sup>119</sup>

153. Article 7 of the State Compensation Act provides that the provisions of this law shall be applied to any alien victims upon the conditions that the right to seek state compensation would be reciprocally guaranteed. Article 10 of the Crime Victims Aid Act indicates that this law shall not be applied to any alien victims or survivors unless there is reciprocal guarantee to aid victims between Korea and the country concerned. These laws provide for the principle of

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<sup>116</sup> Article 22 of the Enforcement Ordinance of the Korean Immigration Control Law

<sup>117</sup> Yonhap News, 13 October 2004, “Disclosure of anti-Korean Islamic group from Bangladesh.”

<sup>118</sup> Hankyoreh 21, 21 October 2004, “No Islamic group anti-Korean.”

<sup>119</sup> Concluding Observation on Switzerland (2002), CCPR/CO/73/CH, para. 76(4)

reciprocity in guaranteeing Covenant rights to migrants. The Committee has concluded that requiring reciprocity as a condition for extending human rights to migrants from other countries violates the Covenant.<sup>120</sup> The provisions of these laws are in conflict with those of article 29 and article 30 of the Constitution, which do not indicate reciprocity, as well as those of article 9 (right to liberty and security of person), article (equal rights), article 26 (equality before the law), and article 3 (right to an effective remedy) of the Covenant.

### **Industrial Trainee Program**

154. The Government asserts that the Employment Permit System has been adopted since 2003 in order to reduce the corruption scandals of mediating firms and organizations and infringement of employees' rights, which have been mainly caused by the alien employment system based on the Industrial Trainee Program.<sup>121</sup> However, the Government takes an inconsistent position by retaining the Industrial Trainee Program "to promote cooperating on industrial technology with other developing countries." Even though the Government has promised to intensify the training standards and ensure continuous labor supervision, it has failed to explain the reasons why intensive training or labor supervision has not been accomplished and has failed to suggest alternatives to solve the problems. Meanwhile, the Ministry of Justice has expressed its concern about the Industrial Trainee Program, admitting that the Employment Permit System, which was introduced to solve the malfunctioning of the Industrial Trainee Program, has not successfully attracted employers' attention because it was used together with the Industrial Trainee Program. The Ministry says that the Industrial Trainee Program will be abolished on 1 January 2007 for the purpose of protecting alien employees' rights and satisfying employers' needs.<sup>122</sup> But the Ministry has not yet presented any proper plan or alternatives.<sup>123</sup>

155. The NHRC has made two resolutions advising the Government to abolish the Industrial Trainee Program.<sup>124</sup> "It was introduced primarily to cooperate on technology with the Third World. But in reality it is a deceptive and expedient policy used to secure low-wage alien labor. Since the alien trainees provide their labor not under the status of workers but under the status of trainees, they are not protected by the Labor Standards Act and they suffer from serious

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<sup>120</sup> Concluding Observation on Azerbaijan (2002), A/57/40 vol. I 47, para. 77(20)

<sup>121</sup> CCPR/C/KOR/2005/3, paras. 33-35

<sup>122</sup> Ministry of Justice, "Unity Plan of Alien Worker Program and Measures concerning Alien's Illegal Residence and Protection of their Rights." 19 May 2005, pp.1, 5,

<sup>123</sup> Ministry of Justice, Change Strategy Plan of Immigration Control, February 2005

<sup>124</sup> NHRC's opinion on the Measures for the Alien Worker Program, 12 August 2002; Recommendation on the Policy to improve human rights of alien workers residing in the ROK

human rights infringements. Therefore, the Industrial Trainee Program should be abolished in order to protect alien workers' rights. The Ministry of Labor declares as its position that industrial trainees do not belong to the labor class protected by the Labor Standards Act.<sup>125</sup> However, the Supreme Court decided that industrial trainees should be included in the labor class under article 14 of the Labor Standards Act.<sup>126</sup> The Ministry of Labor applies to trainees some provisions under the Labor Standards Act, the Minimum Wage Act, Industrial Security Act, Industrial Accident Compensation Insurance, and Medical Insurance.<sup>127</sup> But the regulations do not guarantee working hours, various kinds of bonuses, unfair dismissal, or retirement benefits and denies the three primary labor rights. Therefore, it is clear that the Industrial Trainee Program is against article 2 (equal rights), article 22 (freedom of association) and article 26 (equality before the law) of the Covenant.

### **Undocumented Migrant Workers**

156. Immigration officers restrain targeted migrants' personal liberty without verifying their legal status, asking them to submit foreigner ID cards. It is an illegitimate exercise of power for public officers to detain migrant workers in official vehicles and then check their status. But the Government has kept controlling undocumented migrant workers without considering their rights. It is against the Constitution and against the law except in the case of an urgent detention order or if the detention satisfies substantial or procedural requisites required by the law. There are no legal grounds for inspection or arrest for the purpose of detaining or deporting migrant workers except in a few cases. Under related regulations and the purpose or concept of the detention system for migrants, the detention of aliens should be interpreted to guarantee their basic human rights as much as possible and to maintain strict requirements in investigating or executing their expulsion. Therefore, the detention of aliens does not cover inspection or arrest by force.

157. The NHRC has decided that "detention order or urgent detention order does not give immigration officials an authority to inspect or arrest by force. However, in practice the Government or public officials have such broad and general powers that they are able to violate migrants' rights and apply discriminatory standards of law to migrants. Therefore, it is necessary that the Immigration Control Act should be revised in such a manner that it strictly stipulates requisite conditions of arrest and enforcement, or a procedure for undocumented

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<sup>125</sup> Labor Directive 68207-1974, 13 December 1994

<sup>126</sup> Supreme Court Decision 95NU2050

<sup>127</sup> Guide to Protection and Management of Alien Industrial Trainees (enactment 14 February 1995, regulation 258, revision 23 February 1998, regulation 369)

migrant workers. Moreover, a special supervising system, similar to that of the criminal procedure in the criminal law system, must be introduced to restrict the government power of inspection, arrest, detention or urgent detention. Inspection and arrest executed without legal basis is against article 2 (equal rights), article 9 (right to liberty and security of person), and article 26 (equality before the law) of the Covenant.

158. Article 6, paragraph 1 of the Immigration Control Act stipulates that if it is “impossible to immediately repatriate a person who received a deportation order” then the head of the concerned office, branch office or detention center for foreigners may detain him/her in a detention center for foreigners or other place designated by the Minister of Justice “until the repatriation is possible.” The NHRC requested university research centers, lawyers association, international organizations and human right research centers to examine the cases of foreigners needing protection in detention center for foreigners. According to their report, more than 80% of those foreigners have not been notified about the rights to counsel, to demur detention, or to petition about their human rights.<sup>128</sup> More than 50% are allowed only a 10 minute interview time with outside visitors. 10% have experienced that their letters have been censored by inspectors. 50% say that they have not been allowed exercise at the centers. 5% have been put in solitary confinement. 20% have been verbally harassed by public officials. 5% have experienced physical torture or battery.

159. The Government’s regulations and treatment of migrants under its detention is in conflict with the Covenant. Sometimes undocumented migrant workers are treated more harshly than the standards set by criminal procedure provisions. This harsh treatment breaches most provisions dealing with human rights and personal rights under the Covenant, such as article 2 (equal rights), article 26 (equality before the law), article 7 (prohibition of torture and other inhumane treatment), article 9 (right to liberty and security of person), article 10 (treatment of detainees), article 13 (expulsion of foreigners), article 16 (right to recognition everywhere as a person before the law), and article 17 (protection of privacy and freedom of correspondence).

160. Immigration officials have often entered into the working places of alien laborers without identifying themselves. Sometimes they have taken action against illegal residents contrary to a supervisor’s will. During the process of inspection, many illegal alien workers have been injured or few died trying to escape from immigration control.<sup>129</sup> However, article 81 of the

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<sup>128</sup> NHRC, 18 November 2005, “Research on the Actual Conditions of Undocumented Migrant Workers Control and Protection Facilities”

<sup>129</sup> Nocutnews, 23 April 2006, “Continuous Occurrence of Undocumented Migrant Workers Death Due to Excessive Controls by the Government”

Immigration Control Act only says that in order to investigate whether or not any foreigner sojourns lawfully in accordance with this Act or any order issued under this Act, immigration control officials or public officials belonging to related agencies as determined by Presidential Decree may visit a foreigner, a foreigner's employer, a representative of the organization to which the foreigner belongs or a foreigner's work place, or those who provide a foreigner with accommodation, and ask them any question or demand that they present other necessary materials. The immigration officials have no right to enter into a business place or residence in order to inspect illegal immigrant workers against a supervisor's will.

161. The NHRC has expressed its opinion that there are no legal grounds in the Immigration Control Law for immigration officials to enter into a business or residence without permission from a supervisor or owner. It has pointed out that the Constitution has adopted the principle of issuing a warrant to protect freedom and the rights of individuals and that the criminal procedure stipulates that the public prosecutor should ask a judge to issue a warrant in seizing or searching individuals. It has also said that immigration officers infringe basic human rights. Therefore, it is not reasonable to give immigration officers rights to trespass only for administrative purposes. Illegitimate immigration officers' trespassing is contrary to the rights guaranteed in article 2 (equal rights), article 9 (right to liberty and security of person), article 17 (protection of privacy and freedom of correspondence), and article 26 (equality before the law) of the Covenant.

162. The Seoul District Labor Bureau on 3 June 2005 rejected an application submitted by the Seoul, Kyunggi, and Incheon Alien Labor Union on 3 May 2005 on the ground that this organization consists of undocumented migrant workers who are not eligible to form a labor union and that such an organization is not a union within the labor law. The court, furthermore, dismissed their request to withdraw the decision saying that the Immigration Control Act strictly limits undocumented migrant workers from working in Korea, that the law does not provide illegal migrant workers legitimate grounds of employment, which guarantee labor conditions, and that illegal migrant workers are not eligible to join labor unions.<sup>130</sup>

163. Migrants should enjoy the right to freedom of assembly and association.<sup>131</sup> The NHRC has expressed its concern about the Government's decisions to restrict alien workers from participating labor unions or prevent them from being union leaders.<sup>132</sup> Moreover, the

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<sup>130</sup> Seoul Administration Court Decision, 27 February 2006, 2005GUHAP18266

<sup>131</sup> General Comment No. 15 (1986), para. 7

<sup>132</sup> Concluding Observation on Kuwait (2000), CCPR/CO/69/KWT, paras 40-41; Concluding Observation on Senegal (1998), CCPR/C/79/Add.82, para. 16

Constitution and the laws do not contain any provisions to deny the three primary labor rights to undocumented migrant workers. Therefore, it is reasonable to conclude that article 2 (equal rights), article 22 (freedom of association), and article 26 (equality before the law) of the Covenant guarantee that all migrant workers be protected by these primary rights. Because there is no ground to deprive a migrant worker of his three primary labor rights, the position of the government and the courts in denying them is not compatible with the Covenant.