Case on National Security Act's Penalty Clauses for Conduct Including Pro-Enemy Actions and Manufacture of Expression Materials with Intention of Committing Pro-Enemy Actions

[2017Hun-Ba42, 2017Hun-Ba294, 2017Hun-Ba366, 2017Hun-Ka27, 2017Hun-Ba431, 2017Hun-Ba432, 2017Hun-Ba443, 2018Hun-Ba116, 2018Hun-Ba225, 2019Hun-Ka6, 2020Hun-Ba230 (consolidated), September 26, 2023]

In this case, the Court held that the following clauses are not unconstitutional: the portion of Article 7, Section (1) of the National Security Act regarding "any person who praises, incites, or propagates … or who acts in concert with it," which provides penalties for any person who praises, incites, or propagates the activities of an anti-state organization, a member thereof, etc. or who acts in concert with it, and the portion of Article 7, Section (5) of the National Security Act regarding "any person who manufactures, holds, carries, distributes, or acquires … with the intention of praising, inciting, or propagating … or acting in concert with it, as referred to in Section (1)," which provides penalties for any person who manufactures, holds, carries, distributes, or acquires any documents, drawings, or other expression materials with the intention of committing pro-enemy actions. The Court reasoned that the relevant clauses do not violate either the void-for-vagueness doctrine under the *nulla poena sine lege* principle, the rule against excessive restriction, or the principle of proportionality between crime and punishment.

Background of the Case

Complainants and Petitioners were prosecuted on charges of, *inter alia*, pro-enemy actions and manufacturing, holding, carrying, distributing, and acquiring expression materials with the intention of committing pro-enemy actions. While their trials were pending, they

petitioned the courts to request constitutional review of, *inter alia*, Article 7, Sections (1) and (5) of the National Security Act. Some of the courts granted the petitions and requested the constitutional review thereof. Complainants, whose petitions were rejected, filed constitutional complaints attacking the constitutionality of the relevant provisions.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of both the portion of Article 7, Section (1) of the National Security Act regarding "any person who praises, incites, or propagates … or who acts in concert with it" (hereinafter referred to as the "Pro-Enemy Actions Clause") and the portion of Article 7, Section (5) of the National Security Act regarding "any person who manufactures, holds, carries, distributes, or acquires … with the intention of praising, inciting, or propagating … or acting in concert with it, as referred to in Section (1)" (hereinafter referred to as the "Pro-Enemy Expression Materials Clause").

Clauses at Issue

National Security Act (amended by Act No. 4373 on May 31, 1991)
Article 7 (Praise, Incitement, etc.)

(1) Any person who praises, incites or propagates the activities of an anti-state organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or liberal democratic fundamental order, shall be punished by imprisonment for not more than seven years. (Emphasis added to highlight the Pro-Enemy Actions Clause.)

(5) Any person who manufactures, imports, reproduces, holds, carries, distributes, sells or acquires any documents, drawings or other expression

materials, with the intention of committing the act as referred to in Section (1), (3) or (4), shall be punished by the penalty as referred to in the respective Section. (Emphasis added to highlight the Pro-Enemy Expression Materials Clause.)

Summary of the Decision

1. Opinion of Justices Lee Eunae, Lee Jongseok, Lee Youngjin, and Kim Hyungdu for the constitutionality of the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause

A. Precedent of the Court

The Court, in the 2012Hun-Ba95 etc. decision on April 30, 2015, held that the Pro-Enemy Actions Clause neither violates the void-for-vagueness doctrine under the *nulla poena sine lege* principle nor infringes freedom of expression by going against the rule against excessive restriction. It also held that the Pro-Enemy Expression Materials Clause is not in violation of either the void-for-vagueness doctrine under the *nulla poena sine lege* principle, the freedoms of expression and conscience by infringing the rule against excessive restriction, or the principle of proportionality between crime and punishment. For these reasons, the Court concluded that both clauses are not unconstitutional.

B. Need to depart from the precedent

(1) The international situation surrounding the Korean Peninsula and relations with North Korea

The denial of North Korea's statehood and its classification as an anti-state organization originate from Article 3 of the Constitution. This strategic stance by the government of the Republic of Korea developed in response to the historical confrontation between the Republic of Korea

and North Korea. Therefore, to assess the need to depart from the precedent, which concluded that clauses in the National Security Act assuming North Korea's status as an anti-state organization do not conflict with the Constitution, it is essential to examine changes in the geographical characteristics of the Korean Peninsula and the inter-Korean relationship since the precedent decision. Given the ongoing geopolitical conflicts surrounding the Korean Peninsula and the persistent threat posed by North Korea to the Republic of Korea's regime, the Court does not find fundamental changes in the international situation or relations with North Korea warranting a departure from the traditional stance of the National Security Act, which views North Korea as an anti-state organization.

(2) Conformity with the void-for-vagueness doctrine under the *nulla poena sine lege* principle

By considering the amendment history and legislative intent of the National Security Act, the interpretations of the precedent, and the language of the statute, the addressees of the law can fully understand what elements constitute offenses. Further, since the precedent decision, a normative order based on the interpretations of the decision has been firmly established through the accumulation of court judgments. Thus, the position of the precedent that the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause do not violate the void-for-vagueness doctrine under the *nulla poena sine lege* principle remains valid.

(3) Conformity with the rule against excessive restriction

(a) Considering, *inter alia*, the legislative intent behind amendments to the National Security Act and the Constitutional Court decisions and Supreme Court rulings confirming that the application of the National Security Act is limited to cases where there is a clear risk of substantial harm to the existence and security of the State or liberal democratic fundamental order, the applicable scope of the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause has already been

narrowed to the minimum.

(b) There may be an argument that State intervention is justified only at a stage where there exists a concrete and genuinely imminent risk of substantial harm. However, making a sharp delineation between a "clear risk of substantial harm" and an "imminent and present danger" is not straightforward in reality. Moreover, at the stage where a concrete danger becomes imminent, it can materialize at any time, leading to substantial consequences that jeopardize the existence and security of the State or liberal democratic fundamental order. Therefore, it is difficult to protect vital legal interests in the security and existence of the State through governmental intervention that only occurs when the risk is concretized and is actually imminent and present.

(c) Complainants argue that penalizing concerts of action is excessive. However, concert of action that is subject to punishment under the Pro-Enemy Actions Clause is limited to action that involves an outward expression of one's active intent. Therefore, its potential harm is no less significant than the acts of praising, inciting, and propagating.

(d) The Pro-Enemy Expression Materials Clause applies exclusively to cases where there is a clear risk of substantial harm to the existence and security of the State or liberal democratic fundamental order. An individual becomes subject to punishment only if it is established that the person not only perceives the nature of the expression material in benefiting an enemy but also had the intention of committing pro-enemy actions. Consequently, the portion of the Pro-Enemy Expression Materials Clause relating to holding and acquiring is highly unlikely to be misused as a punitive measure for ideological preferences or as a tool for suppressing minorities. Moreover, as to the pro-enemy expression materials in electronic media formats, which are recently on the rise, there is minimal temporal gap between holding, acquiring, and disseminating. The extent or target of dissemination is unpredictable, and once disseminated, complete retrieval of such materials is nearly

impossible. Thus, the need to prohibit the acts of holding and acquiring pro-enemy expression materials has become even more pronounced.

(e) Taking into account all these factors, we do not find any normative or factual changes that would justify deviating from the precedent that established that the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause do not contravene the rule against excessive restriction.

(4) Conformity with the principle of proportionality between crime and punishment

In light of, *inter alia*, the assessments in the precedent and the ideological confrontation on the Korean Peninsula, we do not observe that the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause disrupt the balance in the penal system.

C. Sub-conclusion

Overall, as we find no normative or factual changes justifying a departure from the previous precedent, its finding that the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause are not unconstitutional remains valid.

2. Opinion of Justices Yoo Namseok and Jung Jungmi for the constitutionality of both the Pro-Enemy Actions Clause and the portion of the Pro-Enemy Expression Materials Clause regarding "who manufactures, carries, or distributes" and for the unconstitutionality of the portion of the Pro-Enemy Expression Materials Clause regarding "who holds or acquires"

A. The Pro-Enemy Actions Clause and the portion of the Pro-Enemy Expression Materials Clause regarding "who manufactures, carries, or distributes" are not deemed to violate the Constitution for the same reasons expressed in the Constitutional Court decision of 2012Hun-Ba95

etc., rendered on April 30, 2015, which is quoted in the constitutionality opinion of Justices Lee Eunae, Lee Jongseok, Lee Youngjin, and Kim Hyungdu.

B. (1) The act of holding or acquiring pro-enemy expression materials involves obtaining or storing knowledge and information in the process of forming one's conscience and making a decision under the conscience within the realm internal to one's heart. This falls within the protected sphere of freedom to form conscience. The freedom to form conscience is a fundamental right that is absolutely protected from external interference and coercion. Therefore, it is impermissible to penalize the act of holding or acquiring pro-enemy expression materials before a conscientious decision made through such acts is externally expressed and realized.

(2) Punishing individuals holding or acquiring pro-enemy expression materials based solely on the vague possibility that they might spread or disseminate such materials to the public constitutes excessive regulation. While it is true that there has been an increase in pro-enemy expression materials in electronic media formats, leading to a higher likelihood of widespread dissemination and circulation, this alone does not justify the acceptance of the aforementioned regulation.

(3) The criteria for the establishment of the subjective element of "intention of committing pro-enemy actions" in the Pro-Enemy Expression Materials Clause are too abstract, subjective, and inconclusive. Consequently, there is a possibility that the intention element may be established based on the actor's ideological preferences inferred from his or her track record or past history. This amounts to penalizing the actor based on his or her underlying thoughts, significantly infringing freedom of conscience or freedom of thought.

(4) Punishing the act of holding or acquiring pro-enemy expression materials, thereby blocking access to expression materials representing a certain perspective, constitutes a significant regulation on freedom of

thought or freedom of conscience, making it difficult to constitutionally justify in itself.

(5) Therefore, the portion of the Pro-Enemy Expression Materials Clause regarding "who holds or acquires" violates the rule against excessive restriction, infringing freedom of conscience or freedom of thought. As such, it violates the Constitution.

3. Opinion of Justices Kim Kiyoung, Moon Hyungbae, and Lee Mison for the unconstitutionality of the Pro-Enemy Actions Clause and the Pro-Enemy Expression Materials Clause

A. Assessment of the Pro-Enemy Actions Clause

(1) Freedom of expression is a fundamental right essential for individuals to maintain their dignity and worth as human beings and to pursue happiness. It is one of the most dignified fundamental rights that guarantee an individual's personality and constitutes a core component of the basic tenets of our Constitution, namely, the liberal democratic fundamental order. Therefore, when freedom of expression is suppressed, the political principles of popular sovereignty and democracy become no more than hollow echoes. Additionally, conscience or thought forms the basis for shaping an individual's personal identity and controlling his or her actions. Since it cannot be replaced by anyone or anything, freedom of conscience or freedom of thought is indispensable for ensuring our core constitutional values of human dignity and worth.

(2) The amendment to the National Security Act on May 31, 1991 added to the Pro-Enemy Actions Clause a subjective element that states "with the knowledge of the fact that it may endanger the existence and security of the State or liberal democratic fundamental order." However, even when the risk remains at an abstract level and there is no imminent concrete danger, there still exists the possibility of individuals being subject to punishment under this provision. Therefore, this represents an

excessive restriction on freedom of expression and freedom of conscience or thought.

(3) There may be an opinion suggesting that preventive intervention by public authorities is necessary before a danger is concretized to ensure the existence and security of the State. However, a concrete and imminent danger does not mean a materialized danger that is completely impossible for the State to control. Moreover, in our current society, which is relatively mature, the likelihood of concrete and imminent dangers materializing immediately through only pro-enemy actions is not very high.

(4) Contemporary information and communication networks operate on the premise of two-way communication. As such, pro-enemy expression materials distributed in electronic media formats can be promptly verified and excluded in the competitive marketplace of ideas. Therefore, it is difficult to assert that the development of information and communication networks necessarily increases the likelihood of dangers being concretized and materializing through the pro-enemy actions.

(5) The Pro-Enemy Actions Clause includes as punishable even those cases where there is no concrete danger of substantial harm to the existence or security of the State or liberal democratic fundamental order. By doing so, this clause deters and restricts the legitimate expression of the majority of citizens or the formation of conscience and thought that underpin such expression. This is difficult to reconcile with our constitutional tenet of liberal democratic fundamental order, and instead, it could pose a significant threat to democracy.

(6) Therefore, the Pro-Enemy Actions Clause violates the rule against excessive restriction, infringing freedom of expression and freedom of conscience or thought. As such, it violates the Constitution.

B. Pro-Enemy Expression Materials Clause

Inasmuch as the Pro-Enemy Actions Clause is found to be unconstitutional, then it follows that the Pro-Enemy Expression Materials Clause, which requires the subjective element of the "intention of committing the acts as referred to in the Pro-Enemy Actions Clause," violates the Constitution as well. The Pro-Enemy Expression Materials Clause constitutes an infringement of freedom of expression and freedom of conscience or thought. There is no need to examine it further.