

# Criminal Justice and Human Dignity in Constitutional Adjudication

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## Constitutional Law and Human Dignity

Constitutional adjudication carries out the function of state authority in protecting a constitutional value of human dignity as commanded by the Constitution. Human dignity, being the highest constitutional value, acts both as a standard and a guide to the interpretation of the Constitution and all legal norms. Human dignity not only serves as a standard and a guide to the interpretation of unenumerated fundamental rights and the guarantees of individual rights, but also has significance in meaning as the limitation of the fundamental rights, for it entails prohibition of justifying infringements of human dignity on the basis of public interests.

Human dignity is a constitutional expression that defines the fundamental attributes of human beings. The concept of human dignity can only be illuminated through the fundamental nature of human beings as follow: humans are possessed of independent and ethical characteristics based on reason; humans cannot live in solitude and without a relationship in society. The Constitution preordained a human being living an associated and bounded life with the society, yet maintaining his or her innate characters. Such a concept of human beings is basic knowledge for understanding human dignity as the limitations on fundamental rights. It is assumed that every human being is equally endowed with human dignity as a latent human trait regardless of his or her status as an offender or a prisoner.

Probing constitutional cases, one can get closer to the true nature of human

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dignity, that is respect of human beings for their sake and objection to treating human beings as a means or an object to achieving some other values, purposes, or interests. In particular, with relation to human dignity, landmark constitutional cases in the realm of criminal justice can be classified into three categories, which are (a) preservation of the human personality (b) self-determination, and (c) bodily integrity in close relation to the human personality. The thesis of this paper submitted for the Korean Institute of Criminology International Forum marking the 30th anniversary of the founding of the institute is limited to the realm of criminal justice.

### **Duality of Criminal Justice and Human Dignity**

In the realm of criminal justice, human dignity has significance as a guide for the enactment, application, and enforcement of criminal law. Ironical dualities nevertheless characterize criminal justice as it relates to human dignity; the state's exercise of its right to punish crime for maintaining social order and protecting human dignity can itself pose a grave threat to the human dignity of criminal suspects, criminal defendants, and prisoners.

Constitutional provisions on human dignity prohibit the state authority from enacting criminal legislations that infringe upon human dignity. The provisions make it illegal for the state authority to regulate, through criminal punishment, even unethical behaviors unless they do not fall within the scope of an individual's private life or pose a significant harm to the society or violate the rights of others. They also prohibit cruel punishments. No punishment of acts forbidden and punishable by the general and special parts of the criminal law shall infringe upon the human dignity of offenders. Meanwhile, the criminal punishments shall not be contrary to the dignity of victims.

Nowadays, in addition to criminal punishments prescribed by the criminal law, the state imposes many other types of criminal sanctions known as protective security measures. In order to address sexual assaults, especially those perpetrated against children the state, during the period from 2005 to 2010, enacted a series of punitive sanctions including registration, disclosure, and notification of identities of sex offenders, electronic monitoring, and medical therapy for impulsive sexual behaviors. The state also established the DNA databank to use genetic information for criminal investigations.

Although the protective security measures can serve a useful and necessary role

in addressing the limitations of criminal punishments, they shall not be imposed under unprincipled discretion. The measures ought to be imposed within the confines of human dignity. For this reason, the Constitution proscribes simply treating human beings as tools for combating or preventing crime or for the protection of social order as well as imposing inhumane criminal sanctions. The basic principles of the rule of legal system are due process of law, *nullum crimen sine lege*, *nulla poena sine lege*, the principle of proportionality, the principle of excessive restriction, and the common law doctrine of estoppel.

The addenda to criminal legislation that prescribe such protective security measures can lead to their extensive and retrospective applications. The imposition of electronic monitoring or collection of DNA data is such instances. In an instance where the addenda violate the prohibition on retrospective applications of legislation or otherwise enforcement with unlimited retroactivity, constitutional issues relating to the common law doctrine of estoppel and infringement of fundamental rights would arise. Therefore, the Court ought to decide whether the protective security measures are excessive by weighing the values and extents of the rights infringed by the extensive retrospective measures against public interests pursued in their legitimate aims.

Human dignity neither allows employment of torture or any cruel conduct in the investigation process nor the media footage of the suspects. Human dignity also rules that in any criminal prosecution trials, confessions are inadmissible unless they are voluntarily given.

Human dignity also prescribes that offenders be treated humanely in the execution of punishments and treatment of offenders. Therefore, offenders ought to be placed in the confinements that meet the basic needs for survival. The employment of protective equipment should be limited to afford offenders a dignified and a minimum level of decent living.

People in undertaking their day-to-day life or economic activities are sometimes in contact with the criminal justice system. Their experiences may lead to constitutional complaints alleging infringement upon human dignity. The judicial review of the Constitutional Court in these cases is not limited to the issue of infringement. The Court sometimes ruled the rights had been infringed and followed, *a fortiori*, that the inherent value and dignity of human beings had been violated. At other times, the Court only affirms infringement of fundamental rights as they are essentially inseparable from human dignity. Although human dignity as a subject may not be explicitly mentioned in some court decisions, they can nonetheless reveal the

true meaning of human dignity.

Constitutional cases reviewed in this paper deal with human dignity and other closely related fundamental rights in the realm of criminal justice. In other words, the cases are concerned with the basic rights of every human being that are considered necessary for the individual's self-determination and the manifestation of the human personality. The basic rights also include any unenumerated rights that can still be inferred from and originated with Article 10 of the Constitution or some of the individual rights, that are namely confidentiality and freedom of privacy and the right to liberty of the person, and freedom of conscience. Unenumerated rights affirmed by the Court are sexual self-determination, pregnant women's right to reproductive self-determination, and informational self-determination.

Excessive restrictions on the basic rights would constitute infringement of the rights and hence of the dignity of human beings. The yardstick suggested and applied in the adjudication proceedings of the Court would judge as to whether an alleged infringement of human dignity in a case is on merits.

## **Court Decision on Protection of the Human Personality**

### **a. Conscientious objection and freedom of conscience (2011Hun-Ba379 et al. June 28, 2018)**

The Court held unconstitutional five military service classifications, including active duty, reserve, supplemental, first class citizen and second citizen class under Clause 1 and Clause 2, Section 1, Article 55 of the Military Service Act. It declared imposing constitutional penalties on avoiding draft or a notice of call under Clause 1 and Clause 2, Section 1, Article 88 of the same Act. The landmark case put an end to the long-standing human rights quagmire.

Conscientious objection to military service can be construed as an individual's passive act to protect one's conscience rather than an active and aggressive campaign against law and order of society and communities. Objectors have consistently pleaded that they are willing to perform non-military and substitute service. It follows that even though their draft resistance may be contrary to the majority belief, it cannot be considered a disruptive anti-social behavior that merits the use of penal sanctions, which is by far the strongest exercise of power by the state authority.

The conscience of the individual as protected by the freedom of conscience

clause of the Constitution is irreplaceable and integral to affirming the dignity and value of oneself by adopting and professing belief. It follows that compelling the individual to doubt and recant one's belief can inflict a grave injury on the individual moral character. Imposing penal sanctions or restrictions on everyday life for refusing to recant belief makes the subjects doubt their existence and characters and thereby derogates their dignity as human beings. In the decision, the Court suggested that severe limitations on certain rights, including the right to self-determination and the right to manifest belief, indissociable from the intrinsic value of human life, can derogate human dignity.

**b. Capital punishment and the right to life  
(2008Hun-Ga23 February 25, 2010)**

Is capital punishment compatible with the constitutional order that regards the dignity and worth of human beings as its highest core value? The discussion on capital punishment triggers two counterfactual thoughts about two somewhat contrasting events. One is on whether to confer the right to life on Osama Bin Laden as part of a commitment to respect for the right contrary to the capital punishment, had he been prosecuted for plotting September 11 terrorist attacks. The other is on whether it might have been possible to prevent depriving the innocent individuals involved in the *Inhyeokdang* Incident of their rights to life.

The Constitutional Court held that capital punishment did not violate Article 10 of the Constitution that guarantees the dignity and worth of human beings and therefore was constitutional. The Court reasoned that capital punishment was constitutional as an institutionalized practice and that the constitutionality of each of the penal provisions can be assessed separately. The Court invoked the general limitation clause, Section 2, Article 37, stating that the guaranteed right to life can be limited for maintaining law and order and for promoting public welfare. The judgment of the Court nonetheless left open the possibility of limiting the number and type of capital crimes in the future when a consensus emerges on the need for the measure. In this case, the dignity and worth of human beings is served to set the parameters for the limitations of the right to life. Taking notice of the concurring opinion filed by the former Justice Doo-Hwan Song, the Court further should refine each of the capital punishment provisions.

Since the most fundamental problem lies in the abuse and misuse of capital punishment, it would be desirable to review the provisions allowing for capital

punishment, reserve the punishment only for the most serious offences, and abolished the punishment for crimes resulting in harm to the interests of society and nation.

**c. Withdrawal of life-sustaining treatments and the right to life  
(2008Hun-Ma385 November 26, 2009)**

The Constitutional Court held that a patient's decision to withdraw life-sustaining treatments is a type of a right belonging to the right to self-determination derived from constitutional guarantees of human dignity.

It was a case in which the Court dismissed a complaint alleging the legislative inaction on providing adequate guidelines, processes, and methods for withdrawal of life-sustaining treatments was unconstitutional. The Court reasoned that a legislature did not have a clear legal obligation to do and that withdrawal of such treatments was consistent with respect for the dignity of human beings. The decision provided by the Court would be a guide to absolving physicians of legal liabilities for forgoing life-sustaining treatments for patients with the patients' express or implied consents.

**Court Decision on Self-determination**

**a. The crime of abortion, fetal right and women's rights to self-determination (2017Hun-Ba127 April 11, 2019)**

The Constitutional Court declared unconstitutional Section 1, Article 269 of the Criminal Act which penalizes pregnant women for performing self-induced abortion and the part concerning the 'doctor' of Section 1, Article 270 of the Criminal Act which penalizes doctors for procuring abortion for women on her request or consent. The issue involves reflections on a human, a life, self-determination, ethics, a worldview, and a religion. Although the Court ruled the laws constitutional, they have been overturned indicating that the attention to, the significance of, and prospects on the issue of women's right to self-determination have been changed. As ethics and morality change with time and changing circumstances, the Court's decision reaffirmed the meaning of human dignity.

The opinion of the Court on the issue of capital punishment stated that the capital punishment does not violate the dignity and value of human beings, for it is given and reserved for those who commit the most heinous offenses. Then, what would be the

legal grounds for limiting the right to life of innocent fetus? The state's responsibility to protect the right to life and its degree of intervention can be differentiated in terms of fetal development. In addition, although the rights of pregnant women and those of the fetus seem to conflict with one another, it should be noted that the fetus depends on their mothers for maintenance of life and nourishment and women's abortion decision, made after due considerations, are unique and distinct from other rights.

**b. The crime of adultery, rights to sexual self-determination and confidentiality and freedom of privacy (2009Hun-Ba17 et al. February 26, 2015)**

The Constitutional Court declared unconstitutional the penal provisions on adultery, stating that they violated sexual self-determination as well as confidentiality and freedom of privacy. The Court ruled that "individuals' sexual life belonging to the intimate domain of privacy should be subject to the individual's self-determination, refraining from State's intervening and regulation, for its nature. The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It would infringe on the right to sexual self-determination and privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders". Although penalizing individuals, despite their marital statuses, for engaging in extramarital sex or affairs was constitutional, imposing the same penalties on martially separated or disrupted individuals was unconstitutional on the grounds that they violated the rights of single adulterers to sexual self-determination. Since the concepts of sexual fidelity or infidelity cannot be reasonably applied to single adulterers, it would be desirable to allow a system of civil forfeitures instead. Therefore, individuals' right to self-determination on such issues as adultery or sexual intercourse that falls within the scope of private life ought to be adjusted pursuant to the blameworthiness of their behaviors.

**c. The crime of sexual intercourse under pretense of marriage and rights to sexual self-determination (2008Hun-Ba58 November 26, 2009)**

The Constitutional Court declared unconstitutional Article 304 of the Criminal Act which penalizes those "who induce into sexual relations a female who is not habitually engaged in sexual intercourse under pretense of marriage or through

other fraudulent means.” The Court held that the provision did not serve a legitimate purpose contrary to the postulate of the prohibition on excess, stating that women’s right to sexual self-determination intended to be protected by the provision was contrary to their dignity and value. It noted that indecent motives that led to sexual intercourses were considered the issues of morality that did not pose harm to society, and therefore cannot be a justification for the intervention in private lives.

#### **d. The punishment of commercial sex and rights to sexual self-determination (2013Hun-Ga2 March 31, 2016)**

Does the penal provision on trading money for sexual service infringe on the individual’s sexual self-determination and confidentiality and freedom of privacy and so violate the Constitution? The Constitutional Court declared that the provision was constitutional. The right to sexual self-determination is construed as the right to choose the partner and to engage in sexual activity or as a legal goods or interest protected by the rape crime provision. In the reasoning of its judgment on adultery, the Court held that the right to sexual self-determination, in spite of being a fundamental right as a precondition to manifest one’s character, can be limited. In the context of the commercial sexual activity, however, the right to sexual self-determination was made less transparent, distorted, bizarre, and suppressed. Viewed in this way, dissenting opinions in opposition to the constitutionality of the penal provision on trading money for sexual service stated that sexual self-determination in this context ought to be construed as the right to choose a partner for sexual activity, not as the right to purchase women’s sexual autonomy or the right to self-determination.

In the judgment of the case, Justices of the Court held diverging views on the nature, characteristics, and harm to society of commercial sexual activities. On the surface, the activities seem to be voluntary translations among adults exercising their right to sexual self-determination. But, from the fact that at a deeper level, the commercial sexual activities are in fact a reflection of distorted socioeconomic conditions, there exists the need to update a constitutional interpretation of the activities on the basis of the constitutional core value of human dignity and changing social norms.



## **Court Decision of Bodily Integrity in Relation to the Human Personality**

In the cases dealing with prison overcrowding, the long-term and constant use of handcuffs and ropes in prisons, and prohibition on inmates' access to exercise, the Constitutional Court viewed the dignity and value of human beings as subjective rights. In the case concerning prison overcrowding, a complaint had been filed alleging that overcrowded prisons infringed on the dignity and value of human beings, the right to pursue happiness, and the personality right, and the right to lead a dignified life. The Court viewed that the allegations were all concerned with the issue of judging an infringement on human dignity and values and so only decided to review the question. In the cases concerning with the long-term and constant use of handcuffs and ropes and prohibition on inmates' access to exercise in prisons, the Court decided whether they violated the prohibition on excess and ruled that they violated the right to liberty and the dignity and value of human beings.

### *Execution of Punishments and Treatment of Offenders*

#### **a. Prison overcrowding and the value and dignity of human beings (2013Hun-Ma142 December 29, 2016)**

In this case, the Constitutional Court explained the limits of the state's power to define and punish crime as set by the dignity and value of human beings and ruled that prison overcrowding violated the constitutional core values. In reaching its decision, the Court attempted but could not suggest the minimum standard for personal living space in prisons. The Court unanimously decided that the small size of personal living space in prisons violated the dignity of prisoners.

#### **b. The long-term and constant use of restraining devices and the right to freedom of the person (2001Hun-Ma163 December 18, 2003)**

In this case, the Constitutional Court ruled that "in prisons, restraining devices for inmates are to be used to the minimum extent only when there is a specific need. More specific and clear justifications, including the risk of escape or violence, are required

for the long-term use of such devices that can deprive the subject of any meaningful or useful bodily movement. The use of the devices, even when used, should be limited to afford the inmates a dignified living as human beings.”

**c. Prohibition of inmates’ access to exercise and the value and dignity of human beings and the right to freedom of the person (2002Hun-Ma478 December 16, 2004)**

In the case, the Constitutional ruled that “Outdoor exercise is the minimum basic requirement for the maintenance of physical and mental health of the inmates who are imprisoned. Considering that the inmate subjected to the forfeiture of rights, even compared with other inmates in solitary confinement, lies in the state where communication with the outside world is disconnected, as interviews, correspondence by mail, communication by telephone, writing, work, reading the newspaper or books, listening to the radio and watching the television are prohibited, and is imprisoned in the punishment ward which is the size of approximately three(3) square meters with insufficient ventilation for up to two(2) months, there is a clearly high risk that is completely banning the inmate subjected to the forfeiture of rights from doing exercise will harm mental as well as physical health of such inmate. Therefore, the absolute ban of exercise of the inmate subjected to the forfeiture of rights, even considering the purpose of the sanction, is beyond the necessary minimum degree in terms of means and methods thereof, thus in our judgment reaching the extent violative of the human dignity and values under Article 10 of the Constitution and of the bodily freedom under Article 12 of the Constitution that includes the freedom not to have bodily safety.”

**d. The use of ropes and handcuffs and chaining to other inmates**

It was found that correctional officers, when transferring the inmates from a detention center to a prosecutor’s office, handcuffed them and tied ropes above their upper bodies using another rope to chain to other inmates. The issue of the case was whether handcuffing, tying ropes, and chaining to other inmates when transferring inmates to another location violated the right to liberty and personality.

The Constitutional Court ruled that they did not violate the inmates’ right to liberty and personality, stating that for the equipment had been used to the minimum extent necessary for preventing an escape.

*Judicial Police Officer's Granting of Taking Photographs of Interrogated Suspect and the Suspect's Right to Personality (2012Hun-Ma652 March 27, 2014)*

Section 4, Article 27 of the Constitution guarantees the presumption of innocence until proven guilty. Under the principle, the accused against whom a criminal prosecution charge was brought and those against whom a charge has not been brought have to be treated like innocent people and not be rendered at a significant disadvantage. It follows that releasing photographs of interrogated suspects infringed on their right to personality in contravention of the constitutional principle and the provision on respect of the suspect during interrogation as provided for in Section 2, Article 198 of the Criminal Procedure Act. The severity and impact of the act upon the subject and their family must be taken into account in judging its constitutionality. The Court ruled that a judicial police officer's granting of taking photographs of an interrogated suspect violated the postulate of the prohibition on excess and the subject's right to personality. The judgment provided by the Court ruled that guidelines were needed to allow photographing suspects and such photographing ought to be conducted in the least intrusive manner for protecting the subject's identity.

*Pharmacologic Treatment of Sex Offenders, the Fight to Liberty, Privacy, Self-determination and Personality (2013Hun-Ga9 December 13, 2015)*

The Act on Pharmacologic Treatment of Sex Offenders Sexual Impulses defines the term, pharmacological treatment of sex impulse as any treatment intended to suppress abnormal sexual impulses or desires, conducted by administering medication and psychotherapy to sexual deviants for weakening or normalizing their sexual functions (Section 3, Article 3 of the Act).

The court can order such treatment when delivering its verdict (Section 1, Article 8 of the same Act). As the treatment is administered two months prior to the release from prison of the subject (Section 3, Article 14), it might not be effective for long-term inmates due to a time difference between a verdict and a treatment.

The Constitutional Court ruled that the provision on filing a request of pharmacological treatment on sex offenders was constitutional whereas the provision

on court-ordering of such treatment unconstitutional on the ground that it did not take into account the length of time served by the subject of treatment and the possibilities where such treatment might be unnecessary. In 2017, the legislature complied with the judgment of the Court by amending the Act to include Article 8-2, which stipulates that “a person issued with a medical treatment order may file an application for exemption from execution of the medical treatment order with the district court on the grounds that the person is not liable to committing another sexual assault because he or she has improved to the extent of not requiring the execution of the treatment order.”

*Order of Electronic Monitoring, the Right to Self-determination and Confidentiality and Freedom of Privacy (2011Hun-Ba89 December 27, 2012 and 2010Hun-Ga82 et al. December 27, 2012)*

Pursuant to the Act on Probation and Electronic Monitoring, Etc. of Specific Criminal Offenders, a public prosecutor may file a request to the court to order attaching an electronic device to the suspect against whom a criminal charge of sex offense has been brought until the resolution of a case at the appellate courts, if the suspect is deemed to possess a high risk of reoffending (Section 1, Article 5 of the Act). If the court finds that such requests are warranted, it can sentence electronic monitoring for convicted sex offenders for a prescribed period of time (Section 1, Article 9 of the same Act).

The Court ruled that the provision of electronic monitoring does not violate the fundamental rights enshrined in the Constitution, holding that public interests in protecting the public from crime outweighed possible harm to the convicted offenders.

The Addenda (Act No. 9112), which took effect on June 13, 2008, grants the court the power to issue an order of electronic monitoring to the convicted sex offenders whose terms of imprisonment have not been lapsed for more than three years. The legislative intent behind the provision was that the act before the amendment would not be effective in addressing the risk of sexual recidivism. The Court declared constitutional the prohibition, holding that it did not violate the prohibition on retrospective application and excess.

The Act on Special Cases Concerning the Punishment, Etc. of Sexual Crimes stipulates that an individual subject to registration of personal information pursuant to the law should submit his or her personal information to the police departments having jurisdiction over the residential address of the subject of registration or correctional facilities having the responsibility of the custody of the person in question (Section I and III, Article 43 of the Act). The information required for submission includes a name, a resident registration number, postal and residential addresses, an occupation and an employer address, height and weight, and a vehicle registration number. The Minister of Justice is entrusted with registering, retaining, and managing the information of the subject about his or her prior sex crime convictions (Section 1 of Article 45 of the Act).

The Court declared constitutional the provision prescribing registration of personal information of offenders convicted of the crimes of taking photos of others by using cameras and etc. enumerated in Article 14 of the same Act and the provision prescribing retaining the information for a period of twenty years on the ground that it served compelling public interests in preventing reoffending and protecting social order. However, the Court stroke down the provision on managing the information as unconstitutional. The Court judged that registering personal information of the offenders did not violate informational self-determination and could be considered proper and valid whereas managing all such information, without any variations, for twenty years, constitute an infringement on the right to informational self-determination.

The provision prescribing registration of personal information of offenders was deemed unconstitutional, finding that it did not take into account the likelihood of reoffending when selecting the subject of registration and, therefore, imposed unnecessary restrictions on low-risk offenders. Also, it failed the least-intrusive-means test and the overall balance of interests, for its list of enumerated sex offenses had been made without due consideration of the characteristics, types, severity of criminality of all behaviors and its lack of an appeals procedure.

Many complaints have been raised on the constitutionality of prescribing registration of personal information about offenders convicted of the crimes of obscene acts by using means of communication and intrusion upon publicly used places with an intent to satisfy sexual urges. The Court decided the cases based on the

characteristics and severity of criminality of the offenses enumerated in the Act. The Court held that all the provisions on imposing registration of personal information about persons convicted of offenses under the Act constitutional except for the part on the crime of obscene acts by using means of communication declared unconstitutional.

The Court also declared that an amendment to the Act which prescribes registering, retaining and managing personal information about offenders sentenced to less than three years of imprisonment for the violation of the crime of taking photos by using cameras, etc. did not constitute an infringement on informational self-determination. In this case, several constitutional judges objected to the court decision, holding that an exemption scheme for registration of information presumed high probability of reoffending within a ten years.

*Disclosure and Notification of Personal Information, Personality Rights, and Informational Self-determination (2014Hun-Ba68 et al. May 26, 2016)*

Under the Act on the Protection of Children and Youth Against Sex Offenses, a scheme for internet disclosure of information on offenders convicted of sex crimes against children and the youth was introduced to facilitate public access to information about the offenders. The Act also introduced a notification scheme that allowed notification of the disclosed information by post to those having parental rights and legal representatives of children and youth living near the residence of the subject of the disclosure. The courts order disclosure and notification of information about the sex offenders which are executed by the Ministry of Gender Equality and Family.

The Court declared the court dispositions of disclosure and notification of information about the offenders constitutional on the grounds that they constituted the protective security measures differentiated from criminal punishments in their purpose and criteria and thus did not violate the principles of double jeopardy and the prohibition on the excess.

However, the schemes were akin to a punishment of public shaming that not only reinforces stigmatization and marginalization but also obstructs their successful reintegration into society. Furthermore, the schemes have the potential to inflict psychological trauma upon the innocent family members of the offenders and deprive them of their livelihoods. Deterrent effects of the system, however, are not clear at best.

*The Collection Provision, the Deletion Provision, and Addenda of the Act on Use and Protection of DNA Identification Information and the Right to Freedom of the Person and Informational Self-determination (2011Hun-Ma28 et al. August 28, 2014)*

The Act on Use and Protection of DNA Identification Information stipulates that DNA samples can be taken from offenders convicted of arson, homicide, kidnapping and abduction, rape and infamous conduct, theft and robbery, violence, intimidation, and intrusion upon habitation and refusal to leave (Section 1 of Article 5 of the Act, hereinafter, the DNA Collection Provision). The person entrusted by the Prosecutor-General or the Commissioner-General of the National Police Agency tests the extracted DNA samples and store and maintain them in a DNA databank (Article 10 of the Act, hereinafter, the Identification, Storage and Management Provision). The stored DNA identification data shall be expunged either ex officio or upon demand by the members of immediate family of the data subject (Article 13 of the Act, hereinafter, the DNA Deletion Provision). The said DNA collection and the Identification, Storage and Management provisions can be applied to offenders who, at the time of the act's taking effect, are convicted of the types of crime that necessitate their submission of DNA samples and are in custody serving a sentence of imprisonment (Section 1, Article 2 of Addenda)

The Court held that the DNA collection provision, the DNA deletion provision, and the provision of Addenda did not constitute an infringement on the right to freedom of the person nor informational self-determination. The judgement given by the Court was that compelling public interests in investigating and preventing crime justified slight restrictions on the right to freedom of the person and that stored DNA samples cannot be considered sensitive personal information. The Court also held that the provision of Addenda did not violate the postulates of prohibition on retrospective application and excess.

This provisions were unconstitutional. Fulfilling the Act's legislative intent of utilizing DNA samples for future investigation of crime cannot justify collecting or extracting DNA samples from low-risk offenders. However, the DNA collection provision did not distinguish offenders subject to DNA sampling and testing in terms of the likelihood of reoffending. The DNA deletion provision did not implement varying data retention periods corresponding to the severity of crime and the likelihood of reoffending. The provision of Addenda further violated the postulate of prohibition on retrospective application. Even if it did not, it undermined faith of

prisoners in law as well as the stability of the law by subjecting offenders convicted of offences enumerated in the Act to DNA sampling and testing. Therefore, the said provisions violated the prohibition on excess.

## **Conclusion**

The Constitutional Court raises a red flag to the actions, at all levels of the government, that infringe on human dignity, which is deemed the highest constitutional value. Human dignity essentially means advocating respect of every human being for his own sake and opposing objectification of human beings as a means for some other values or purposes. Reviewing constitutional precedents, this paper examined the question of how to realize human dignity in the realm of criminal justice.

First, it has been suggested that imposing criminal punishments on conscientious objection of military service, which is considered a less anti-social behavior, without permitting an alternative service scheme can derogate the dignity of human beings.

Second, it has been shown that the state's invocation of its power to define and punish crime to penalize certain behaviors such as sexual activities that technically fall within the scope of private life, even if they can be immoral, places excessive restrictions on the right of the individual to sexual self-determination and privacy.

Last, it has been illustrated the trends of the Constitutional Court decisions in placing greater importance on protecting the public, especially women and children, from sex crimes. On the issues of whether disclosure of personal information about convicted sex offenders can be likened to public shaming and hence violated the dignity and value of human beings and whether a pharmacological treatment of sexually impulsive behaviors amounted to chemical castration that threatened the subject's identity, the Court focused on whether treating human beings as a tool for preventing crime infringed on human dignity and declared it constitutional. The Court also declared constitutional a provision on disclosure and registration of personal information about convicted sex offenders, a provision on the extraction of DNA samples from certain convicted offenders, and a provision of Addenda on the retrospective application of the said measures. Indiscriminate retrospective applications of the measures need to be checked and the subject of their deterrent effects ought to be examined more broadly. Later on, human dignity should be featured more prominently in the field of criminal justice.