

## **[Compulsory registration of sex criminal's personal data]**

Constitutional Court Decision 2014Hun-Ma340, 672, 2015Hun-Ma99 decided July 30, 2015

Regarding the constitutional incompatibility of Article 42(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Violence Crimes

### Facts

A person who has been indicted on account of taking pictures with a camera, etc. pursuant to Article 42(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Violence Crimes (hereinafter referred to as the "Sexual Violence Crimes Special Cases Act") filed a request for adjudication on unconstitutionality of the said Act with the Constitutional Court. The Claimant argued that the provision at issue represent the excess prohibition by indiscriminating the mode of action, unlawfulness, social acceptance, and the registration of criminal's personal information will pose an insurmountable obstacle to culprit's return to society.

### Provisions at issue

Under the Act on Special Cases Concerning the Punishment, etc. of Sexual Violence Crimes (As wholly amended by Act No. 11556 on December 18, 2012), the following provisions are at issue:

#### Article 42 (Persons Subject to Registration of Personal Information)

(1) Any person finally declared guilty of a crime as defined in any of Articles 2(1) 3 and 4 and (2) (limited to paragraph (1) 3 and 4) and 3 through 15 or a crime as defined in subparagraph 2 of Article 2 of the Act on Protection of Children and Juveniles from Sexual Abuse (hereinafter referred to as "sex crime subject to registration"), or any person to whom a definitive order is issued to disclose information under Article 49(1) 4 of the said Act, shall be a person subject to registration of personal information (hereinafter referred to as "person subject to registration"): Provided, That this shall exclude any person who is fined for committing a crime as defined in Article 11(5) of the Act on Protection of Children and Juveniles from Sexual Abuse.

To put it narrowly, any person finally declared guilty of a crime as defined in Articles 14(1) and 15 (Attempts to commit a crime under Article 14 shall be punished according to the relevant provisions.) shall be a person subject to registration of personal information.

#### Article 45 (Management of Registered Information)

(1) The Minister of Justice shall keep and manage any registered information for 20 years from the date on which it is initially registered (referring to the date of registration, the notice of which is given to the person subject to registration).

Reasoning

A person shall be indicted on account of taking pictures with a camera, etc. pursuant to Article 42(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Violence Crimes (hereinafter referred to as the "Sexual Violence Crimes Special Cases Act"). It would be conducive to prevention of recommitment of sexual crimes and efficient investigation of similar conducts. Also government authority's collection and preservation of sexual criminals' personal data is an appropriate and effective way to stop recidivism of similar sexual crimes.

It is true in case of taking pictures of sensitive parts of a body with a camera, etc. that the mode of action, unlawfulness, social acceptance will vary. It is also true that sexual freedom of a character and the freedom not to be made photographs taken should be respected. Otherwise, it will amount to a sexual crime in essence.

Therefore, the law makers' failure to discriminate the mode of action, unlawfulness, social acceptance does not amount to excess prohibition. Likewise, the government registration of criminal's personal data does not seem to hinder his/her returning to society. It would not infringe upon his/her right to self-determination of personal information.

In consequence, the public interest which is achieved by applying the provisions at issue is greater than the private interest which might be lost in the same way.

It is appropriate for the legitimate and proper purpose that the Minister of Justice shall preserve and manage the personal data in order to restrain the recidivism of sexual crimes and to enhance the investigative efficiency for the

period of 20 years while the risk of recidivism of the convict to be registered remains

By the way, the risk of recidivism depends on the type of sex crimes and the personality of the convicts. Nevertheless, this instant provision prescribes uniformly only 20 year-registration period without any possibility of exemption or reduction of such registration period. This is unreasonable and severe in nature.

As for the sexual crime convict of a relatively minor offence and low risk of recidivism, in particular, there might exist imbalance between the public interest protected by the instant provision at issue and the private interest damaged against the convict subject to the same provision. If so, the management clause is in violation of the right to self-determination of personal information.

Therefore, it is called for to put a graded period for registration and to allow the exemption of registration requirement and reduction of registration period in proportion to the lowered risk of recidivism. Because it is up to the law makers, the Constitutional Court has declared the provision at issue as incompatible with the Constitution only to give a grace period until December 31, 2016. Until then the management clause remains operative.

## Conclusion

Article 42(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Violence Crimes under which a person shall be punished on account of attempting to take pictures with a camera, etc. and his/her conviction has been finally concluded is in conformity with the Constitution.

However, Article 45(1) of the same Act is decided to be incompatible with the Constitution, but remains tentatively operative until December 31, 2016.

\* Dissenting Opinion of Two Justices

With respect to Article 42(1) of the Act at issue (so-called the “registration clause”), although its legislative purpose is to prevent recidivism of the crime to take pictures of sensitive parts of other’s body with a camera, etc., a convict to be registered under the Act but with low risk of recidivism of such sexual crime shall suffer unnecessary restrictions with no chance to reduce the scope of such sexual crime or to institute appellate proceedings for the convict. Then it must be in breach of the principle of minimal infringement that the personal data of a convict of an attempted crime or pecuniary punishment, in other words, with low illegality or accountability, shall be registered with the government.

Furthermore, no balance of legal interests can be found between the public interest to be achieved by the registration clause and the private interest damaged against the convict of minor sexual offence and low risk of recidivism of such sexual crime.

Consequently, the registration clause is in breach of the right to self-determination of personal information.

\* Dissenting Opinion of Two Other Justices

Since the crime to take pictures of sensitive parts of other’s body with a camera, etc. is not related with sexual violence but violating sexual customs or privacy in nature, the risk of recidivism and the needs for registration of criminal’s personal data with the government authority vary depending on the

individual mode of action based on criminal intention, motives, targets, velocity and methods of such criminal action. The registration clause has placed such criminal action on the list of uniform mandatory registration.

In addition, the registration clause requires the convict on charge of taking pictures of sensitive parts of other's body with a camera, etc. to be registered with no appropriate review of the judge.

Therefore, this registration clause is in breach of the Constitution because it lacks a proper review of the judge on the necessity of such registration.

Though this opinion is concurring with the majority opinion regarding the unconstitutionality of the management clause, the declaration of unconstitutionality is necessary to get rid of the element of violation of fundamental rights and to restore the constitutionality of the provision at issue.