

# State Compensation of State Crime under the Yushin Regime\*

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## I. Introduction

As the Act on the Settlement of Past History was enacted in 2005 to investigate human rights violations under authoritarian regimes, the Truth and Reconciliation Committee (hereinafter referred to as TRC) was established as an independent state agency and commenced fact finding on the subject of State Crime.

Since then, the Lawyers for a Democratic Society has organized a team of lawyers to conduct research, collect data, carry out legislative campaigns to help more than 1,000 victims, and prepare criminal trials, constitutional suits, and civil lawsuits.<sup>1)</sup> After a long struggle, many of the victims were acquitted by a criminal trial, and the court ruled that emergency measures were unconstitutional.<sup>2)</sup> But from 2011 to the present, claims for damages

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1) MINJU SAHOEREUL WIHAN BYEONHOSA MOIM [LAWYERS' GATHERING FOR DEMOCRATIC SOCIETY], HANGUGUI GONGGINGWONSOSONG [KOREA'S PUBLIC HUMAN RIGHTS LAWSUIT] 467 (2nd ed. 2018) (In Korean).

2) The Supreme Court Decision 2010Do5986, decided December 16, 2010, also known as the "Oh Jong-Sang Case," was the first case in which the emergency measure under Yushin regime was declared unconstitutional and the conviction was overturned. In this case, the issue of unconstitutionality of emergency measure No. 1 has been addressed. Subsequently, emergency measure No.9 (Supreme Court Decision 2011ChoGi689, Decided April 18, 2013), No.4 (Supreme Court Decision 2011Do2631, Decided May 16, 2013) were declared unconstitutional by the Supreme Court. Not only Supreme Court, but also the Constitutional Court also ruled that emergency measures No. 1, 2, and 9 were unconstitutional in the Constitutional Court Decision 2010 Hun-ba 70, 132, and 170 Decided March 21, 2013.

are still ongoing. In fact, acquittal and criminal compensation are not enough to restore victims' shattered lives. Only through state compensation can victims be fully sufficiently indemnified.

State crime can be compensated on the grounds of two acts: the Act on Criminal Compensation and Restoration of Impaired Reputation and the State Compensation Act. Both acts seem similar, but the meaning of 'compensation' in the two acts is quite different. The compensation of the former act means 'reparation' which is not based on intention or negligence<sup>3), 4)</sup>, whereas that of the latter means 'full compensation' based on intention or negligence.<sup>5)</sup> Thus, the amount of reparation is fixed without considering the individual's specific damages, whereas compensation is determined on the individual's specific damages. Thus, in general, the amount of reparation is much less than the amount of compensation. The legal nature of state compensation is compensation for tort. Therefore, not only should the liability, illegality and causality be demonstrated, but also the objective starting point of the extinction prescription should be applied. These elements have been an obstacle to the relief of the rights of judicial victims.

The Supreme Court rejects the victims' claims on state compensation based on (1) the logic that civil servants at the time were not guilty of intentional negligence because they properly applied the law of that time, (2) that compensation is already provided and compromise (Article 220 of

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3) See Nak-In Sung, CONSTITUTIONAL STUDY 1601 (20th ed. 2020) (In Korean); Constitutional Court [Const. Ct.], 2008Hun-Ma514(consol.), Oct. 28, 2010, (22-2(B) KCCR 180) (S. Kor.). These literatures state that since state compensation and criminal compensation have different purposes, it shall not necessarily be deemed unjust just because all causal damages are not compensated as a criminal compensation procedure.

4) Article 5 of the Criminal Compensation Act and Article 2 of the Enforcement Decree of the same Act stipulate that the upper limit of daily compensation is five times the daily minimum wage. Rather than compensating for all causal damages, it seeks to compensate for more uniform and minimal losses within a certain range.

5) Article 29 (1) of the Constitution stipulates that "people who have suffered damages due to illegal activities of public officials" are the claimants of national compensation. This phrase means that the responsibility for national compensation is the responsibility for damages caused by the nation's negligence. Therefore, the State shall compensate for all causal damages., Article 3 of the National Compensation Act also stipulates that the State shall compensate for casual damages and seeks to individualize the amount of compensation in consideration of the economic and social status, living conditions, etc.

Civil Procedure Act) is accepted, and (3) that the extinctive prescription has been completed since five years have passed since the illegal act took place. Procedural issue of compromise was settled in 2018Hunba180, in which the Constitutional Court ruled Democratization Compensation Act Article 18 Paragraph 2 that considered consent of victims to receive compensation as compromise is unconstitutional. However, the general requirements for tort – the intention or negligence, and extinctive prescription for tort (Article 766 of the Civil Act) – are still remaining issues.

As for the extinctive prescription, the judiciary has been working on its own legal principles to address such irrationalities. The Supreme Court has developed its own logic to reject the claim of the extinctive prescription of the right to claim State Compensation based on the theory of abuse of rights.

Furthermore, in 2018, the Constitutional Court ruled that the objective basis of the extinctive prescription should not be applied to past history cases. However, the Supreme Court is still reluctant to consider the president, judges, and investigators' acts to be scienter.

This article criticizes the current attitude of the Court in compensating victims of State Crime in consideration of the legal and historical uniqueness of the state crime and proposes alternatives to amend the attitude of the Supreme Court on interpreting the requirements of the state compensation claim.

Firstly, in Chapter 2, we briefly introduce background of Yushin Constitution and Emergency Measures. In Chapter 3, we claim that the existing theory of extinctive prescription should be amended by focusing on the uniqueness of State Crime. Chapter 4 criticizes the irrationality of the Supreme Court's decisions that denied the president's legal obligations for issuing emergency measures and imposed strict requirements on admitting tort of judge and investigators. Finally, Chapter 4 introduces several alternatives to restore damages to victims of State Crime.

## II. Yushin Constitution and Emergency Measures

President Park Jung-hee issued a special presidential declaration which limited legal force of some provisions of The Constitution of the Republic of

Korea on October 17, 1972, declaring emergency martial law across the country, dissolving parliament, and suspending political and political activities. The so-called Yushin Constitution was enacted by announcing a new constitutional amendment and passing it by putting it to a referendum on November 21 of the same year. The Constitution came into force on December 27 of the same year. Article 53 of the Yushin Constitution stipulates the president's right to take emergency measures as follows :

1. In time of natural calamity or a grave financial or economic crisis, and in case the national security or the public safety and order is seriously threatened or anticipated to be threatened, thereby making it necessary to take speedy measures, the President shall have power to take necessary emergency measures in the whole range of the State affairs, including internal affairs, foreign affairs, national defense, economic, financial and judicial affairs.

2. In case of Paragraph (1), when the President deems it necessary, he shall have the power to take emergency measures which temporarily suspend the freedom and rights of the people prescribed in this Constitution, and to enforce emergency measures with regard to the powers of the Executive and the Judiciary.

3. The President shall notify the National Assembly without delay of such an emergency measure taken according to Paragraphs (1) and (2).

4. The emergency measures set forth in Paragraphs (1) and (2) shall not be subject to judicial review.

5. When the cause for the emergency measures ceases to exist, the President shall terminate these measures without delay.

6. The National Assembly may recommend to the President to lift the emergency measures with the concurrence of a majority of the total members of the National Assembly, and the President shall Comply with this recommendation unless there are any special circumstances and reasons.

A total of nine presidential emergency measures were issued under the Yushin Constitution, and emergency measures No. 1, No. 4 and No. 9, which contained punishment regulations, were controversial over whether

they were unconstitutional.

Emergency Measure No. 1 was promulgated on January 8, 1974. Under Emergency Measure No. 1, all acts of denial, opposition, distortion, or slander of the Constitution of the Republic of Korea, and any act of claiming, proposing, proposing, or petitioning for its revision or abolition, and any act of fabricating or disseminating false rumors are prohibited. It shall not recommend, instigate, advertise, broadcast, report, or publish any prohibited act, or make any announcement to others by means of publication. No one shall recommend, instigate, advertise, broadcast, report or publish prohibited acts. Those who violate the measure and those who vilified the measure will be arrested, seized and searched without a warrant from a judge, sentenced to up to 15 years in prison, and suspended for up to 15 years.

Emergency Measure No. 4 was promulgated on April 3, 1974. Under Emergency Measure No. 4, organizing or joining the National Federation of Democratic Youth Students, and praising and encouraging its activities were prohibited. Those who violated the law were sentenced to death, life imprisonment, or imprisonment for more than five years.

Emergency Measure No. 9 was promulgated on May 13, 1975. Under Emergency Measure No. 9, it was prohibited to fabricate, disseminate, or false rumors, to deny, oppose, distort, or slander the Constitution of the Republic of Korea, or to assert, petition, incite, or advertise its revision or abolition. Those who violated the law were sentenced to at least one year of imprisonment.

According to the data analyzed by the Truth and Reconciliation Commission, the number of people punished for violations of the emergency measures reached 1,140, and the number of cases reached 585 cases.<sup>6),7)</sup>

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6) TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, 2006 NYEON HABANGI JOSABOGOSEO [REPORT ON SECOND HALF OF 2006] 291-296 (2007) (In Korean), [http://coreawar.or.kr/xe/board\\_DIQI63/78613](http://coreawar.or.kr/xe/board_DIQI63/78613)

7) At that time, the court convicted them by applying emergency measures routinely. See SABEOMBALJEONJAEDAN, YEOKSA SOGEUI SABEOBBU [THE JUDICIARY IN HISTORY] 419-432 (2009) (In Korean).

### III. Extinctive Prescription

#### *1. Regulation of Extinctive Prescription of State Compensation Under the Korean Legal System*

Article 29 Clause 1 of the Constitution guarantees the right to claim state compensation. However, the State Compensation Act, which legislated such a right, does not stipulate the extinctive prescription for state liability, but stipulates that the provisions of the extinctive prescription under the Civil Act and the National Finance Act shall apply in Article 8.

Article 766 of the Civil Code stipulates the extinctive prescription of three years from time when the victim becomes aware of such damage and of the identity of the person who caused it, and ten years from time when the unlawful act was committed. Article 96 paragraph 2 of the National Finance Act stipulates a five-year short-term extinctive prescription for the rights to claim payment against the State. Therefore, the relationship between Article 766 of the Civil Act and Article 96-2 of the National Finance Act needs to be clarified.

The Supreme Court ruled that “The term ‘provision in any other Act’ in Article 96 of the National Finance Act refers to cases where other laws have provisions for the extinctive prescription for a period shorter than the five-year period prescribed in Article 96 of the National Finance Act. And Article 766(2) of the Civil Act, which stipulates a 10-year extinctive prescription longer than that, does not correspond to the provisions of other Acts referred to in Article 96 of the National Finance Act” (Supreme Court Decision 2000Da57856, Decided on April 24, 2001).

Thus, the subjective starting point, that is, extinctive prescription from time when victim becomes aware of such damage and of the identity of the person who caused it, is three years by Article 766 (1) of Civil Act. The objective starting point, that is, the extinctive prescription from the time when the unlawful act was committed, is five years by Article 96 (2) of the National Finance Act.

## 2. Decisions of Courts

### 1) The Supreme Court

The Supreme Court ruled that the defendant, the State does not hold a duty to provide state compensation for the victim of human rights violations by the State, for the reason that the victim did not exercise his right in a considerable period, which was within five years after the violation. The Court made it clear that the fact the state is obligated to protect basic rights does not exclude the court from applying extinctive prescription, by dismissing the rebuttal of plaintiff that extinctive prescription should not be applied on compensation of State Crime. (Supreme Court Decision 2010Da53419, Decided January 13, 2011)

However, State Crime related to the emergency measure was committed in the 1970s. Thus, a five-year extinctive prescription from the time the unlawful act was committed – the so-called objective starting point – is already completed. It makes the right to claim State Compensation on State Crime completely nominal. The Supreme Court has solved the problem by applying the principles of prohibiting the abuse of rights. The Supreme Court presents four types of cases in which claims of extinctive prescription become abuse of rights. (1) Where a debtor has made it impossible or significantly difficult to exercise or suspend a creditor's rights before the prescription is completed, (2) when there was an obstacle for the creditor to objectively exercise its rights, (3) once the debtor has shown an attitude that seems unlikely to be able to claim the extinctive prescription after the extinctive prescription has been completed, (4) the need for creditor protection is great and other creditors have received reimbursement of the same conditions. (Supreme Court Decision 2002Da32332, Decided October 25, 2002 ; Supreme Court Decision 2009Da103950, Decided January 13, 2011, etc.) (From now on, these are called Type 1, 2, 3, 4 for each). The Supreme Court has changed its internal logic of applying the principles of prohibiting abuse of rights on extinctive prescription of compensation on State Crime in three phases .<sup>8)</sup>

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8) Sang-Hoon Kim, *Gwageosa gukgabaesangsageoneseo gukga-ui somyeolsihyo hangbhyeon jehanbeonmi* [Jurisprudence Limiting Counterplea of Statue of Limitation on State Crime], 22 PRIV. L.

The so-called 'First Phase' decisions (Supreme Court Decision 2010Da53419, Decided January 13, 2011; Supreme Court Decision 2009Da103950, Decided January 13, 2011; Supreme Court Decision 2010Da6680, Decided January 27, 2011; Supreme Court Decision 2010Da1234, Decided January 27, 2011) considered rebuttal of extinctive prescription by the State to be Type 2 or Type 4. That is, the Supreme Court (2010Da53419)<sup>9)</sup> ruled that "It should be considered that there was an objective obstacle that the victim could not exercise the right to claim damages until the judgment of acquittal was confirmed in the retrial." or "There is a great need to protect the victims, and the defendant(state) seriously infringed on human rights through unconstitutional or illegal acts. Thus exempting liability for compensation of State Crime by acknowledging the rebuttal of extinctive prescription will have a remarkably unjust result." The court did not impose any restrictions on victims exercising their rights. In these decisions, the Supreme Court stated that the extinctive prescription is applied in the case of State Crime, but ruled that the state's rebuttal of extinctive prescription is abuse of rights. In addition, the Supreme Court did not set aside restrictions on the duration of the exercise of the right to claim state compensation, which correspond to Type 2 and 4 above. At first glance, this does not seem to be much different from excluding the application of the extinction prescription itself, but this means that the extinction prescription is already completed. Suppose the abuse of rights is reviewed on such a premise. In that case, all the specific applications will be left to the court's judgment of facts, so the

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23, 36-50 (2014) (In Korean).

9) The plaintiff in the case made a false confession due to illegal arrest, torture, and intimidation by the military investigator of the security unit, a state official belonging to the defendant. He was convicted of 10 years in prison and sentenced to seven years in prison before being paroled. Since then, he's been under security surveillance and illegal house search. The original trial found it reasonably difficult to expect the plaintiff to file a lawsuit seeking damages against the perpetrator, the state, until it is found to be a false confession by illegal torture and the conviction is canceled. Consequently, the original trial decided that there was an obstacle for the creditor to objectively exercise its rights (Type 2). It was also declared (Type 4) that accepting the defendant's refusal to fulfill the liability for damages would have significantly unfair consequences. This is because the state which has an obligation to protect the human rights of the people, rather violated the human rights of the people with unconstitutional acts.



relief of rights of victims will be determined not by institutional guarantee but only by the judgment of the court.<sup>10)</sup> These concerns became a reality in the Second and Third Phase decisions.

The 'Second Phase' decisions (Supreme Court Decision 2012da202819, Decided May 16, 2013; Supreme Court Decision 2013Da16602, Decided July 25, 2013; Supreme Court Decision 2013Da203911, Decided July 25, 2013; Supreme Court Decision 2013Da200568, Decided August 22, 2013) correspond to Type 3, which requires the victim to exercise his or her rights in a considerable period from the date of the fact-finding decision of TRC. A considerable period here is a short period(6 months) from the time when the rights can be exercised, and the extension is allowed if there are special circumstances. But in this case, it cannot exceed three years.

The Second Phase decisions explicitly stated that Type 2 and Type 4 could not be applied on State Crime without any reasons. These were unreasonable judgments that did not take into account the gravity of national crime and the circumstances in which victims were impossible to claim rights.

Also, the Supreme Court argued that the issue of extinction prescription for State Crime should be considered to be of Type 3. The reason is that the state accepted victims seeking compensation for damages through state compensation claims by enacting Framework Act on Settling the Past History for Truth and Reconciliation. However, if that was the case, the enactment of Framework Act on Settling the Past History for Truth and Reconciliation should be regarded as a 'waiver of extinctive prescription.'<sup>11)</sup> If the state comes to a belated rebuttal of extinctive prescription, this action contradicts the antecedent behavior, and should be regarded as a breach of

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10) Constitutional Research Institute, *Baningwonjeok Gukgabeomjoewi Gaenyeomgwa Somyeolsihyo Jeogyonge Gwanhan Heonbeopjeok Geomto* [Constitutional review on the concept of anti-humanitarian state crimes and the application of extinctive prescription] 71 (2019) (In Korean), <https://ri.ccourt.go.kr/cmmn/downloadAttachFile>

11) Jin-su Yune, *Gwageosa Jeongniwa Somyeolsihyo* [Past History Cases and Extinctive Prescription] in MINSAJAEPANUI JEMUNJE [ISSUES REGARDING CIVIL COURT], 831-832 (2015) (In Korean); Chang-Ho Choi, Jin-You, Sung-Hwan Jeon, *Gwageosa Sageone Isseo Beobwonui Somyeolsihyo Namjongnone Daehan Bipanjeok Gochal* [A Critical Review of the Abuse of Extinctive Prescription in Past History Cases], 62(11) K.L.A ,46, 79-84 (2013) (In Korean)

the principle of estoppel.<sup>12)</sup> Thus, the attitude of the ruling, which states that the rebuttal of the extinctive prescription against State Crime is an abuse of rights on the premise that the extinctive prescription has been completed, is unreasonable.

In addition, it is difficult to understand that it was set to six months in accordance with the Interruption of Prescription under the Civil Act in determining a considerable period for the exercise of rights. Interruption of Prescription happens only when it is impracticable or impossible to exercise creditors' rights due to reasons that are not deemed to be responsible for both the debtor and the creditor.<sup>13)</sup>

The most recent 'Third Phase' decisions (Supreme Court Decision 2013Da201844, Decided December 12, 2013; Supreme Court Decision 2011Da59810, Decided January 23, 2014; Supreme Court Decision 2013Da209916, Decided January 29, 2014; Supreme Court Decision 2013Da215973, Decided April 10, 2014 ; Supreme Court Decision 2013Da210428, Decided December 24, 2014) required the exercise of the rights within six months from the confirmation of the judgment of the retrial and the decision of criminal compensation, while regarding rebuttal of extinctive prescription by state to be Type 2. As time went by, the Supreme Court interpreted the extinctive prescription more strictly.

This decision is unreasonable for two reasons. First of all, it required victims to exercise their rights in excessively short period. Also, although the exercise of rights within a considerable period of time is logically related to Type 3, the court insisted that it is related to Type 2 without specific explanations.

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12) Kwang-Joon Choi, *Ingwonchimhae Daehan Gukgawi Chaegim, Somyeolsihyowanseongui Gangbyeongwa Sinuichik – Daebeobwon* 2013. 5.16. *Seongo 2012da202819 Jeonwonhabuiche Pangyeoreul Jungsimeuro [State Liability for Human Rights Violations, Claim of Expiration of Limitation Period and Principle of Good Faith – An Analysis of Supreme Court Decision 2012 Da 202819 Decided May 16, 2013 ]*, 51(2) *Kyung Hee L.J* 335, 356 (2016) (In Korean).

13) Kwan-Pyo Hong, *A Research on the Issue of Extinctive Prescription for Past Human Rights Violation Cases and Principle of Good Faith: Focused on the Changes in the Supreme Court's Rulings*, 65(2) *K.L.A.* 112, 154-55(2016) (In Korean).

2) *The Constitutional Court (Constitutional Court Decision 2014HunBa148, Decided August 30, 2018)*

(1) Content of Judgment

August 30, 2018, the Constitutional Court ruled that applying the objective starting point of the extinctive prescription in the case of State Crime is unconstitutional. The Court focused on the difference between State Crime and other general crimes; the victims of State Crime could not have brought claims within a considerable period due to several impediments caused by the State itself.

The claimants in the case are those and their families whose convictions were confirmed between 1982 and 1986, during the Fifth Republic of Korea which was established by Coup d'état of December Twelfth and Coup d'état of May Seventeenth followed by it ending a brief democracy after the assassination of former dictator Park Chung-hee, after being charged with crimes such as violation of the National Security Law fabricated by state agencies and sentenced to prison terms based on evidence made illegally. At that time, the investigative agency illegally detained innocent people for a long time, forced them to make false confessions through harsh torture, and, based on this, forced the existence of spies. The prosecution indicted the claimants on the basis of illegal evidence, and the court also repeatedly sentenced them to conviction based on said illegal evidence. Although he was released from prison after serving a prison term, he suffered from surveillance and social discrimination under the name of a security guard even after his release. Families also had to live with discrimination and trials throughout their lives.

The Constitutional Court acknowledged that it is reasonable in general to apply the provisions on extinctive prescription in Civil Law – starting point and period – on state compensation. The Court mentioned three intentions of extinctive prescription: to prevent double indemnity, to protect reliance of debtor and punish forbearance of creditor, and to protect legal certainty. However, the Constitutional Court ruled that applying the objective starting point of extinctive prescription seemed to satisfy none of these intentions, and therefore was unconstitutional.

As for the State Crime, preventing double indemnity does not matter since it is obvious that the state has so far failed to reimburse the victims for

damages. Also, since the state systematically mobilized its public officials to commit illegal acts and to undermine the rights of victims for a long time through manipulation and concealment of such matters, reliance of state must not be protected in this case. Thus, only legal certainty should be considered as legislative intent.

However, the right to claim state compensation is a basic right specially guaranteed under Article 29 (1) of the Constitution and is a special right designed to restore or relieve illegal acts by the state obligated to guarantee basic rights by individuals under Article 10 of the Constitution. Therefore, the request for legal stability cannot be considered important, as it completely sacrifices the obligation of the state under Article 10 of the Constitution and Article 29 paragraph 1 of the Constitution.

## (2) Procedural Issues

There was a debate on whether the Court is bound by 2018Hunba148. First, the Constitutional Court and the Supreme Court take different positions on whether the decision of “Unconstitutional, in certain context” binds the Court. The Constitutional Court ruled that the decision of “Unconstitutional, in certain context” binds the court. The Constitutional Court stated that is a type of constitutional review included in power of the Constitutional Court stipulated in the Constitution, not just the Constitutional Court’s view on the interpretation of Law, because interpretation of a law or a provision of a law presupposes the constitutional review of the law (Constitutional Court Decision 96Hunma172, 173, Decided December 24, 1997). On the other hand, the Supreme Court has so far maintained its attitude of denying the binding force of decision of “Unconstitutional, in certain context”, arguing that the decision of “Unconstitutional, in certain context”, is an interpretation of law which is an exclusive authority of the court, since it does not change legal text (Supreme Court Decision 2012JaeDu299, Decided March 28, 2013). However, there are some exceptions to the attitude of the Supreme Court.

The Supreme Court acknowledged the binding force of some decisions of “Unconstitutional, in certain context” (Constitutional Court Decision 89Hunga97, Decided May 13, 1991. and Supreme Court Decision 90Da8716, Decided December 24, 1991; Constitutional Court Decision 2003Hunma226, Decided December 16, 2004 and Supreme Court Decision 2004Ma494,

Decided August 2, 2005; Constitutional Court Decision 2010Hunga2, 2012Hunga13, Decided March 27, 2014 and Supreme Court Decision 2011Do1602, Decided July 10, 2014). On this issue, a view that the Supreme Court acknowledges the binding force of the decision of “Unconstitutional, in certain context” only when it is regarded as partially unconstitutional in a quantitative manner,<sup>14)</sup> a view that the binding force of decision of “Unconstitutional, in certain context” about the interpretability of the law is denied, but about the applicability of the law is acknowledged,<sup>15)</sup> exists.

It is difficult to judge whether the unconstitutionality in each case can be divided in a quantitative manner, since the concept itself is obscure and the Constitutional Court has not been explicitly judging whether it is partially (in a quantitative manner) unconstitutional. However, the intention of the Constitutional Court can be inferred in the form of the order of decision.

The Constitutional Court ruled in 2014Hunba148; “In the Article 166 paragraph 1 and 766 paragraph 2 of the Civil Act (1958, 2.22. Enacted as Act No. 471), the portion applied to cases prescribed in Article 2 (1) 3 and 4 of the Act on the Settlement of Past History for Truth and Reconciliation is unconstitutional”. The expression ‘portion applied to... unconstitutional’, which is different from the order of the usual Constitutional Court decision (e.g. constitutional court Decision 91Hunba17, Decided May 13, 1994), is interpreted as the decision intended to partially exclude the subject or scope of application of the clause.<sup>16)</sup>

Recently, the Supreme Court ruled that the 2018Hunba148 decision affected the case, which was continuing in the court at the time the decision was made. This ruling was based on the premise of acknowledging that 2018Hunba148 binds the court (Supreme Court Decision 2018Da233686, Decided November 14, 2019).

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14) Kyung-Tae Jeon, *Review of the Supreme Court's Decisions on the binding force of the decision of “Unconstitutional Limitedly”* 1 CONS. L. 205, 205-249 (2014) (In Korean).

15) Wan-Jung Heo, *Das Verhältnis zwischen die bedingte Verfassungswidrigerklärung und die Teilverfassungswidrigerklärung*, 20 CONS. L. 64, 64-103 (2014).

16) Bo-Yeong Park, *Application of the Extinctive Prescription in Past Human Rights Violation Case*, 173 JUST. 460, 479-482 (2019) (In Korean).

### 3. *Distinct Characteristics of State Crime*

We would like to focus on the distinct characteristics of State Crime, which differ from general tort liability or general national liability burdens. The Supreme Court failed to observe the basic principle of law of equality: 'Same for same, different for different rule'.

General tort liability relies on two features<sup>17)</sup>; i) fortuity of tort and ii) one-off damages. However, State Crime relies on different features: i) deliberate and systematic tort, ii) continuous damages, and iii) constitutional illegality. Generally, by the principle of separation of powers, the judiciary as a judge has a separate independent status from the state as the subject of compensation. In the case of State Crime, it is important to note that the defendant, the State itself, is the judge of the game.

#### 1) *Paradox of Passage of Time*

The "paradox of the passage of time"<sup>18)</sup> exists in State Crime. Since it takes considerable time for truth to be revealed in State Crime, extinctive prescription should not be applied.

#### (1) *Deliberate and Systematic Tort*

State Crime is different from other cases of state compensation, in which the State unintentionally commits faults out of mere negligence when exercising its legitimate power. Comparatively, State Crime is carried out in a total, systematic, and deliberate manner by mobilizing all organizational power and public officials. State crime involves express scienter, which is more intentional and deliberate than mere recklessness or negligence. Such deliberate illegality presupposes an illegal state system in which constitutional democracy does not work properly, so it is only after a long period, when the liberal democratic order is restored, that the state can be held liable.

The irony of State Crime is that the assailant is the state, which means

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17) *Id.* at 479-482.

18) Yong-Whan Cho, *Victims of History and Law : Application of the Statute of Limitation to Gross Violation of Human Rights*, 1 L.R. 8, 84-100 (2010) (In Korean).

that it also retains the monopoly of violence and rights to punishment. For victims to be innocent, it must be objectively, clearly, and officially confirmed by the State itself that the victims are not criminals but rather are the victims of crimes committed by state power. Before its confirmation, no one can deny the effect of excluding further litigation of judgment of the victim's conviction.

These official declarations were not made immediately after the collapse of the illegal state system. Even though the Yushin regime, the harsh dictatorship of President Park Chung-Hee who invoked the emergency measure, collapsed itself in the late 1970s, it was not until 1987 that the democratic order was restored, and it was not until 2005 that the Truth and Reconciliation Commission (TRC) was launched. The launch of the commission was the result of national aspirations to properly investigate State Crime committed during the Yushin Regime.<sup>19)</sup>

## (2) Fear of Retaliation and Victim Mentality

The State constantly justifies State Violence by continuously defining victims as criminals even after execution, and implicitly proclaims to people that anyone can be potential victims. Retaliation toward victims by the State often occurred at that time. According to the TRC data, many victims were found not to have applied for the retrial process due to fear of the nation's retaliation and the implicative system.<sup>20)</sup> This is because there were many cases in which family members of the victim were disadvantaged in the reference checks for employment of civil servants and teachers because they had a family member who was a political criminal during the authoritarian regime.<sup>21)</sup>

Not all victims are in a position to proudly pursue their rights, and some even show compromises and reversals to live in silence, conform to the nation's ideology, or deny themselves, saying that being convicted by the state is a sin. Therefore, the victims cannot start a fight for rights immediately after the tort, and an absolute amount of time is necessary to

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19) MINJU SAHOEREUL WIHAN BYEONHOSA MOIM[LAWYERS' GATHERING FOR DEMOCRATIC SOCIETY], *supra* note 1, at 466-467.

20) *Id.* at 479.

21) SUNG-HOON HAN, GAMYEONKWONRYEOK [MAKSED POWER] 205 (2014) (In Korean).

recover from victim mentality and trauma and to have confidence that the state no longer treats them as criminals or retaliates ever again.

### (3) Continuous Concealment of Truth by State

State Crime is not easily revealed. The State continuously conceals and manipulates events. For example, the TRC on the genocide on Geochang was formed after the April 19 revolution in 1960, but the Lee Seung Man government kept the media from covering it.<sup>22)</sup> Also, the victims of the Yushin regime had to undergo three years of continuous security surveillance even after sentencing. Police officers watched them closely at all hours, and the victims had to report their daily routines, which were then handed over to the Central Intelligence Agency of Korea and the Blue House.<sup>23)</sup> It would have been hard for victims to exercise their rights under this circumstance within the extinctive prescription.

### (4) Burden of Proof<sup>24)</sup>

It is not easy to prove evidence of State Crime such as torture, which is done in secret. Since the victims had no living expenses due to their old age, low education, and sudden detention, it was not easy to afford attorney expenses. Also, the court demands a strict burden of proof without considering the specificity of the State Crime. While TRC completed the truth ascertainment with the testimony of two professional witnesses in the case of constraint companion by military and police, the court dismissed the testimony, demanding the same burden of proof as in general civil or criminal cases.<sup>25)</sup> It takes absolute preparation time to prove past events against the State, which monopolizes all investigative powers, information,

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22) *Id.* at 305.

23) YTN radio, *Bag Daetonglyeongi Igeoseul Pul Him-eun Eobsgo, Baggeunhye Jeongbueseo Haejungdago Hae Bwassa...-OJongSangssi (YuSinginguebjochi Pihaeja)* [President Park Doesn't Have Power to Resolve This, and There's No Way It'll Work Out... (Mr. O-Jong-Sang, Victim of Emergency Measure Under Yushin Regime)], YTN(Mar. 22, 2013, 13:50) [https://radio.ytn.co.kr/program//index.php?f=2&id=23768&page=521&\\_mcd=0214&\\_hcd=01](https://radio.ytn.co.kr/program//index.php?f=2&id=23768&page=521&_mcd=0214&_hcd=01) (In Korean).

24) HAENGJEONGANJEONBU[MINISTRY OF THE INTERIOR AND SAFETY], GUNGNIPGUKGAPONGNYEONG TRAUMA CHIYU CENTER JOSEONG BANGAN YEONGU [A STUDY ON THE ESTABLISHMENT OF NATIONAL HEALING CENTER OF STATE CRIME TRAUMA] 152 (2019) (In Korean).

25) *Id.* at 158.



and manpower.

### (5) Conclusion

As the paradox of time plays a role in State Crime, the Constitutional Court's decision to exclude the application of the objective calculation point of extinctive prescription is meaningful. If a fearsome gangster frames a powerless child, continues to define him or her as a criminal, and keeps hovering around them and observing their every move, the child has no choice but to hide. There is notable asymmetry between the victim and the state.

### 2) *Continuous Damages*

State Crime has two types: factual cases, such as the civilian massacres of Geochang, and cases of convictions, which are completed by tortures and unlawful judgments under a authoritarian regime.<sup>26)</sup> The victims of the latter, in particular, continue to suffer losses throughout their lives as the judicial power of conviction continues.

The state constantly defines victims as internal enemies. According to TRC data, the victims received an average of 8.5 years of continuous inspection after execution, as well as disadvantages for employment.<sup>27)</sup> This led to separation from the community and social stigma.

The aftereffects of torture lead to unstable livelihoods, triggering subsequent problems such as divorce, family collapse, movement, and job restrictions. Oh Jung Sang, a victim of the Emergency Measure under the Yushin regime, suffered from back pain which made it difficult for him to get a stable job; another victim had to give up his dream of becoming an overseas sailor because of his convictions under the Yushin regime.<sup>28)</sup> And according to the Institute of Human Rights and Medicine, most victims of torture suffer from post-traumatic stress disorder. Many victims do not seek their rights at all due to the issue of re-emergence of trauma during

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26) Park, *supra* note 5.

27) NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, GOMUNPIHAEJA INGWONSANGHWNAG SILTAEJOSA [SURVEY ON THE HUMAN RIGHTS SITUATION OF VICTIMS OF TORTURE] 10 (2011) (In Korean).

28) YTNradio, *supra* note 12.

lawsuits.<sup>29)</sup>

Since the starting point of the extinctive prescription is based on the time when the damage occurs or when the occurrence of the damage is known, it can be seen that the most important component of tort is the occurrence of damages. Thus, in the case of continuous damages, the extinctive prescription shall be calculated from the time the continuous damages occur respectively.

The Supreme Court ruled that if the aftereffects result in unpredictable damages, the new extinctive prescription proceeds when such reasons are found. (Supreme Court Decision 93Da59304, Decided April 26, 1994) This ruling intends to prevent the perpetrator's legal status from becoming too unstable by inducing legal settlement of damages at once. However in the case of State Crime, there is no need to stabilize the legal status of the perpetrator, the Korean Government. Thus, the extinctive prescription of State Crime should be extended regardless of whether the victims' physical disabilities and mental trauma were predictable.

As long as the victims' rights of honor are violated, new tort arises every day. Since State Crime was committed in the form of judgement, *Res Judicata* (Article 216 of the Civil Procedure Act) made it impossible for victims to take relief measures to restore honor. The state also continued to conceal the truth for a long time, suppressing the freedom of expression of victims. The Supreme Court (Supreme Court Decision 2006Da35865, Decided April 17, 2006) ruled that if the building is illegally constructed, the starting point of the short-term extinctive prescription of the right to claim compensation for damages caused by the infringement of the right of light proceeds from when the plaintiff knows each damage. This decision should be also applied to State Crime since the right of honor and the right of property are both absolute rights, which cannot be easily suspended or restricted.

### 3) *Unconstitutionality*

State Crime has a dual illegal structure that also constitutes unconstitutionality as well as criminal law illegality.<sup>30)</sup> In other words, the

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29) NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, *supra* note 16.

30) Seung-Don Kim, *Guggapoglyeoggwa hyeongbeob, geuligo heonbeob [State Violence,*

more essential characteristic of State Crime other than those pointed out earlier lies in the unconstitutionality; the entity that is supposed to protect basic rights has reneged on its duty.

The defenses, such as the extinctive prescription, can only be applied to people who have basic rights and cannot be used by the state that has abandoned its duty to protect people's basic rights. Comparatively speaking, it's just like a company with a security contract suddenly claiming consumer rights on its own after trespassing into a customer's home.<sup>31)</sup>

The dissenting opinion of Constitutional Court Decision 2000HunMa192, decided on May 15, 2003, is in the same vein. In this case, the claimants were the surviving heirs to the residents massacred by those presumed to be members of the Korean Army during the Korean War. The claimants filed a constitutional complaint seeking declaration that such legislative omissions were unconstitutional, on the grounds that the legislative omissions by the National Assembly failing to enact any special act for factfinding, restoration of reputation, and compensation with respect to the subject civilian massacre infringed upon human dignity, the right to pursue happiness, the right to know, the right to seek compensation, and the right to equality of the complainants. While the majority opinion of the Court dismissed the case, the dissenting opinion of the judge Kwan Sung focused on the unconstitutionality of State Crime and urged the exclusion of extinctive prescription in State Crime cases.

“ [...]

Especially in this case, the state under the obligation to protect its citizens is suspected to have killed, in an organized fashion, innocent civilians by way of military power during the war. If proven to be true, such conduct would be a genocide-like act and, as such, would duly be treated similarly to a genocide or treated as a crime against humanity.

Then, a normal system of law such as the extinctive prescription under the State Compensation Act is not applicable in this case. In

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*Criminal Law, and Constitution*],731 L.A. 7, 22 (2018) (In Korean).

31) *Id.* at 30.

such a situation of nonexistence of law, a special obligation to enact law to redress (especially an obligation to effectively guarantee the right to request state compensation) arises for the National Assembly through constitutional interpretation based on the obligation to guarantee basic rights under the second provision of Article 10 of the Constitution.”

#### 4) *Conclusion*

Paradox of time, continuous damages, and constitutional illegality are distinct features of State Crime, which differ from other cases of liability of tort. We expect the 2014HunBa148 decision, which focused on these differences and modified the theory of extinctive prescription, and the 2018Da233686 decision, which admitted the binding force of 2014HunBa148, will provide a starting point for relief of victims of state crime and may lead to the complete exclusion of the application of extinctive prescription on state crime.

## **IV. Issues on Intentional or Negligent Tort**

### *1. Requirements for State Compensation Claims*

Article 2 paragraph 1 of the State Compensation Act, which materializes the constitutional right to claim state compensation, stipulates that “Where public officials or private persons entrusted with public duties inflict damage on other persons by intention or negligence in performing their official duties, in violation of the statutes,” the State or local governments shall compensate for such damage. That is, the State Compensation Act requires the act must be performed by civil servants, as part of performing the duties of said civil servants, to inflict damage, to be illegal, and to be of intention or negligence. Of these, particularly important are the requirement of illegality and of intention or negligence.

The acts of public officials involved in the State Crime by emergency measures are divided into those of the president who issued emergency measures, those of investigators and judges who have conducted illegal investigation and convicted illegally by unconstitutionally applying

emergency measures, and those of state agencies, such as the Central Intelligence Agency, who had no investigative authority but committed arrest, detention, or seizure. However, the Supreme Court ruled that the acts of the president, investigative agencies, and judges on emergency measures did not constitute an illegal act by intention or negligence, which resulted in unreasonable results that led to the omission of the core of State Crime from the scope of state compensation. These rulings are reviewed in more detail below.

## *2. The Rule of Supreme Court*

### *1) Invocation of Emergency Measures by President (Supreme Court Decision 2012Da4 8824, Decided March 26, 2015)*

On whether the president's actions, which issued Emergency Measures No. 9, constituted a tort, the Supreme Court ruled that "Despite the fact that the emergency measure is unconstitutional and thus invalid, the president's invocation of emergency measures is a highly political act, which does not take legal but only political responsibility in relations with the whole nation." However, it "not only lacked the requirements in Article 53 of the Yushin Constitution, which was the basis for its issuance, but also lacked the freedom of expression, the freedom of residence, and the freedom of the body, and the freedom of speech which are the essential elements of democracy, and prescribed by the Yushin Constitution and current Constitution(Supreme Court Decision 2011ChoGi689, Decided April 18, 2013)." This is based on Judicial Restraint under Separation of Powers.

### *2) Illegal Investigation by Investigators and Conviction of Judge (Supreme Court Decision 2013Da217962, Decided October 27, 2014)*

The Supreme Court ruled that the act of judge and investigator constitute a tort only when he or she clearly abused authority. More specifically, "even if a judge's trial is to blame for failing to follow the provisions of the statute, this is not an illegal act as referred to in Article 2 (1) of the State Compensation Act, which results in the state's liability for damages, and if the liability for compensation is to be acknowledged, the judge has made a trial with an illegal or unjust purpose, or has clearly exercised his authority such as significantly violating the standards that the

law requires him to comply with the performance of his duties. (Supreme Court Decision 99Da24218, Decided July 11, 2013)” In addition, “if a judicial police officer or prosecutor, an investigative agency, has a criminal charge against a suspect and is likely to be found guilty of a specific crime, he or she can file an indictment by concealing or arresting the suspect’s arrest under the prescribed procedure, so when there is considerable reason for the judicial police or prosecutor to be suspected of being guilty of the crime, the agency’s acquittal of the case is confirmed on the grounds that there is not sufficient evidence to prove the existence of the case through the court later. (Supreme Court Decision 93Da20924, Decided August 13, 1993)”

Based on these strict standards, the Court ruled that the investigator’s illegal act and the judge’s conviction based on the emergency measure cannot be recognized as intentional negligence, since Article 54 (4) of Yushin Constitution stipulated that emergency measure was not subject to judicial review and emergency measures were not declared as unconstitutional at the time of illegal investigation and conviction.

### *3) Illegal Investigation by State Agency Without Investigative Powers (Supreme Court Decision 2013Da217962, Decided October 27, 2014)*

The Supreme Court ruled that torture by agents of the Central Intelligence Agency is an illegal act; however, the Supreme Court required victims to prove the causal relationship between illegal activities and a conviction.

### *3. Uniqueness of Past History Cases*

The danger of violence by the state still lurks today. Barbaric dictatorship is also an existing threat that can reappear at any time. The National Intelligence Service’s fabrication of espionage in 2014 is evidence of the existing danger.

Since punishment of those responsible was not properly executed, state compensation for illegal emergency measures has more than just the relief of the victims’ rights. It is the only way remaining to build social consensus on preventing this from happening again. Therefore, the emergency measure and act of institutions based on it must be judged thoroughly by today’s most reasonable standards.

#### *4. Whether Each Agent Committed Intentional Tort*

##### *1) President Who Invoked Emergency Act*

As previously stated, the Supreme Court ruled that presidents' invocation of emergency measures is a highly political act and does not incur legal obligation. However, it is unreasonable for four reasons.

First, every act of state should not exceed the limits set by the Constitution. However, the emergency measures invaded the liberty and security of the person by enabling arrest and detention without warrant issued by the judge, and invaded freedom of political expression by prohibiting any statement of opinion on the Yushin constitution, both of which are basic rights included even in the Yushin constitution. Thus, the emergency act exceeded the limit of political acts respected by the judiciary.

Second, in 2012Da48824, the Supreme Court cited 2004Da33469 (Decided May 29, 2008), in which the Supreme Court ruled that the judiciary should refrain from reviewing the political act of parliament. However, the president act should be considered different from the parliament act, since its democratic legitimacy is weaker than parliament, whose members represent people directly and whose decision comes from majority rule.

Third, the Supreme Court previously ruled that the emergency measures under Yushin constitution were unconstitutional (99Da24218). Since the President has an obligation to protect the Constitution, invoking unconstitutional emergency measures and infringing on people's basic rights is obviously illegal and satisfies requirements to constitute a tort.

Thus, the president's act of invoking emergency measures must not be immunized from the rule of judiciary and constitutes a tort. Recently, a lower court ruled that the president act invoking emergency measure no. 1 constitutes a tort, and thus the government should compensate about 700 million won to the bereaved family of Mr. Jang Jun Ha (Seoul Central District Court Decision 2013GaHab540797, Decided May 8, 2020).

In this case, the court ruled that "At the time, the president knew that the first emergency measure was not in line with the Yushin Constitution and that people's basic rights could be directly and seriously violated," and "It is reasonable to say that it was nevertheless issued to suppress public

resistance to the Yushin system.” Thus, it constitutes a tort.

### 2) *Investigator Who Illegally Arrested, Incarcerated, Tortured Victims*

First, the decision of the Supreme Court, which required stricter requirements for investigators’ act to be a tort, is unreasonable since investigators who participate in legal procedures have an obligation to refrain from illegal acts. Thus, the investigators’ illegal arrests, incarceration, and torture should be regarded as a tort.

Furthermore, even if strict requirements are applied, the investigators’ acts constitute a tort since there were issues on the unconstitutionality of emergency measures across the country and investigators were able to fully recognize the illegality of the emergency measures. There is a view that public officials should not be blamed for complying with emergency measures since they do not have the authority to review the unconstitutionality of law.<sup>32)</sup> However, since when the law is clearly unconstitutional, public officials are obliged not to apply the law in accordance with our legal order, which sets the Constitution as the highest standard. Even if each investigator’s act does not constitute a tort, the concept of organizational negligence, which has been applied in medical tort cases where multiple doctors are involved, may be introduced (Supreme Court Decision 2004Da52576, Decided September 30, 2005). The logic of indirect offender, in which government used agents as tool of their tort and thus intention or negligence of agents is not required, can also be applied in this case.

### 3) *Judge Who Convicted on the Basis of Emergency Measures*

The strict requirements imposed by the Supreme Court are also unreasonable in this case. As a member of the judiciary, judges are the last bastion of basic rights. The judge’s ruling should be held more accountable in that it deals a more important blow to the victim’s life and body than any administrative action. As experts of law, much more stringent standards than the normal people should be applied to judges.

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32) Jin-su Yune, *Wiheon-in daetonglyeong-ui gingeubjochi balyeong-i bulbeobhaengwi-leul guseonghaneun-ji yeobu* [Unconstitutional Presidential Emergency Decree as a Tort], 81 KOREAN J. OF CIVIL LAW 93, 144-145 (2017) (In Korean).



Although it was not possible to conduct a judicial review on emergency measures, judges were obliged to refrain from infringing on the basic rights of people by applying the unconstitutional emergency measure mechanically as long as the supreme rule of Korea is the Constitution of the Republic of Korea.

### *5. Conclusion*

Therefore, the president's issuance of emergency measures, illegal investigations by investigative agencies, and unconstitutional convictions by the court all constitute torts. The judiciary should reflect on its past neglect of its duty to protect the basic rights of the people by acting as a maid of dictatorial powers.

Also, logically, there is no reason to believe that an illegal act must be attributed to a particular entity to be subject to a state compensation claim. It is also possible to recognize the state's compensation claim for illegal acts based on a series of acts by the president, investigative agencies, and courts. The Seoul High Court's recent ruling (2019Na2038473) is noteworthy.

The court ruled, "the grave unconstitutionality of the emergency measure can be seen as concretely expressed by the conduct of the duties of the public officials who applied and enforced it during the investigation, trial and execution of the sentence," and added, "since there seems to be no reason for the public to specify only individual performance of their duties to exercise the right to claim compensation, there is no difficulty in recognizing the series of activity – invocation of the public emergency measure, illegal investigation, trial and detention based on them – are recognized as Public officials' performance of duties subject to the requirements of Article 2 of the State Compensation Act". This ruling is meaningful in that it provided logic to circumvent the tricky requirements imposed by the Supreme Court for activities of President, investigators, and judges to constitute tort.

## V. Alternatives to Relief of Victims of State Crime

### 1. Preservation of Oral and Microhistory Records of State Crime

It would be ideal if the state, the judiciary and the legislature take the initiative to take active relief measures for State Crime. But as it stands, the outlook seems grim. Only when the victims' stories are vividly captured and documented through oral history and factfinding campaigns can the liquidation of past work gain strength. It is important to note that the pleading for the unconstitutionality of the abortion law also contained vivid testimony from numerous women, which greatly affected the ruling.<sup>33)</sup>

The story of the victims of the massacre and of emergency measures is a subject that is likely to be concealed from the macroscopic and top-down perspective of the state. The opportunity to listen to the stories of those who have experienced the past or those who have experienced dictatorship becomes scarce over time. The materialization of vivid testimony is what brings the periphery of history to the center.

Under the theme of "Archives, Harmony and Friendship," the National Archives of Korea held the International Council on Archives (ICA) Seoul General Assembly in 2016, which exhibited vivid records and testimonies of State Crime around the world. One of the cases introduced was that a large-scale archive was established in Africa to preserve the testimony of women victims of sexual assault during the Rwandan massacre.<sup>34)</sup>

A systematic database can be used in various ways, such as public discussion, education, and research. In particular, the DB of the victims'

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33) Korean Lawyers for Public Interest and Human Rights, <Byeonlongi>, 'Nagtaejoe' johanng "Heonbeobbulhabchi" gyeol-jeong, [<Pleading Diary> "Unconformable to Constitution" Decision of 'Crime on Abortion' Clause] HOPEANDLAW (Apr. 24, 2020, 11:25 AM) <http://hopeandlaw.org/%EB%82%99%ED%83%9C%EC%A3%84-%EC%A1%B0%ED%95%AD-%ED%97%8C%EB%B2%95%EB%B6%88%ED%95%A9%EC%B9%98-%EA%B2%B0%EC%A0%95> (In Korean).

34) Jong-Chul Hyun, *Gwageosa cheongsangwa minjuhwaundong inmyeong deiteobiseu guchug* [Clearing the Past and Building a Database of Life for Democracy Movement], 31 Issue & Review on Democracy, 3, 3-13 (2018) (In Korean)

lives can be a comfort for the bereaved families.<sup>35)</sup> The “Finding Companion” content, which was once attempted by the Commission on the Investigation of the Forced Mobilization, is a good example.

Here is an example: The Committee on the Restoration of Honor and Compensation for Persons Related to the Democratic Movement (hereinafter referred to as the “Committee”) which was launched in January 2000 under the enactment of the Act on the Restoration of Honor and Compensation for Persons Related to Democracy Movement published the “Democratic Movement White Paper” (hereinafter referred to as the “White Paper”) with a record of 16 years. As the preface states, the white paper is the first record of the “living” history of the pro-democracy movement.<sup>36)</sup> The white paper contains a summary of 9,713 cases of people involved in the pro-democracy movement. These are the first basic data to pay attention to the lives of pro-democracy activists.

It is important to leave the pain suffered by the victims as public records through oral work and sublimate it into social memory. The database of scattered memories will also play a major role as evidence in the subsequent trial process.<sup>37)</sup>

## *2. The Need for Comprehensive Legislation of State Compensation of State Crime*

In South Korea, where perpetrators have neither been punished nor reflected on themselves, victims of state violence are exposed to reemergence of trauma. In particular, in the process of lawsuits, victims of state violence suffer from serious psychological pain. When the state denies a victim’s claim for reparation, the victims are thrown back into a terrible memory of past violence and torture. Non-judicial solutions such as comprehensive legislation by the National Assembly, rather than judicial

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35) *Id.*

36) *Id.*

37) Sang-Sook Kim, *Jinsil hwahae wiwonhoe-ui hwaldong-eul jungsimeulo bon hangugjeonjaeng jeonhu minganinhagsal* [Historical Truth-finding for Purge of the Past and TRCK’s Reports: Focused on the Part of Civilian Massacres before and during the Korean War] 20 (2014) (In Korean).

ones, should be preceded to compensate victims of the State Crime. It is worth noting that amendments to exclude extinctive prescription of tort in State Crime cases (amendments to Article 766 of Civil Code) were submitted in the 20th Assembly (bill number 17202, 17823), although discarded by expiration.

### *3. Constitutional Petition on Judgment*

Because of the validity of fixed judicial decisions, victims who previously got a judgment of defeat cannot file a litigation again, although the obstacles are being removed by amendment of courts' interpretation of requirements on state reparation. The only exception is retrial. However, the effect of an unconstitutionality decision binds a case in which Adjudication on Constitutionality of Statutes is requested, a case in which Adjudication on Constitutionality of Statutes of the same kind is requested, and a case in which the relevant law or legal clause is the premise of the trial and continues in the court, although the request for Adjudication on Constitutionality of Statutes is not filed(91Nu1462, 96Nu1627). Thus victims who have already settled in defeat on state compensation suits before the 2018Hunba148 decision cannot apply for a retrial. As a last resort, canceling the previous judgment by Constitutional Petition should be considered.

By Article 68 Paragraph 1 of the Constitutional Court Act, Constitutional Petition on judgment is generally prohibited. However, there is an exception to a judgment that infringes on the people's basic rights by applying a decree ruled unconstitutional by the Constitutional Court (2016Hunma33). The key is whether these exceptions include the rejection of national compensation claims of state reparation on emergency measures, based on stricter requirements stated by the Supreme Court.

The Constitutional Court's position was negative. In a case on which victims of emergency measure no.4, who were previously defeated in a trial on state reparation, filed a constitutional petition on the decision (2016Hunma56), the majority opinion of the Constitutional Court ruled that the decision of court was not on the premise that the emergency measure is constitutional, but made clear that despite its unconstitutionality, it was not subject to a state compensation claim.

However, a dissenting opinion by Judge Lee Seok Tae and Judge Kim Gi Yeong stated that if the court denies the state's responsibility for illegal acts that "intentionally and actively" violate the people's freedom and rights by abusing its power, in light of the nature of the judicial system that the state and the Constitution have put forward, it should be reviewed again in accordance with the ideal of guaranteeing people's basic rights.

The reasons for banning constitutional petitions on court decisions are to stabilize the other party's legal status, show respect for judiciary power, and prevent waste of administrative capacity of the Constitutional Court. However, these reasons cannot be applied to emergency measure cases because of their uniqueness. First, the opponent of state reparation is the state, different from the general civil proceedings, which infringed on the basic rights of victims by exploiting its superior power. Thus, the protection of opponents should not be considered normal in the reparation of emergency measures. Second, there are only a limited number of cases about emergency measures, which can be subject to constitutional petitions, and thus it would not be an excessive burden on the constitutional court. Third, as one of the perpetrators, the judiciary should take a humble attitude of self-reflection, rather than requiring respect for its authority on past history cases. Thus, constitutional petitions should be allowed on state reparation related to emergency measures under Yushin constitution, under adverse opinion in 2016Hunma56.

Further along, it may be desirable to revise the Constitutional Court Act so that constitutional petitions for trials are generally allowed. The Korean Constitution has a comprehensive basic right regulation (Article 10 of the Constitution), like Germany, which presupposes basic rights as a single shrewd system, not individual ones. From this point of view, it is a natural conclusion in our legal system that the Constitutional Court, the highest constitutional body, has the power to cancel the interpretation, application process, or court trial that infringes on basic rights.<sup>38)</sup>

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38) Grimm, Dieter, *Die Urteilsverfassungsbeschwerde und das Verhältnis von Verfassungsgericht und Fachgerichten in Deutschland*, 55 Seoul LJ. 360, 360-376 (2014).

## VI. Conclusion

In this article, we reviewed the requirements of State reparation on emergency measures. Fortunately, the court is gradually changing the interpretation of the requirements of state compensation in a way that facilitates victims' remedies. In particular, the Constitutional Court's decision to exclude the objective starting point of the extinctive prescription and the lower courts' rule that declared that the presidents' invocation of emergency measures constitutes a tort are worth noting.

However, the evolution of judicial precedent only leads to relief for some victims. Therefore, we proposed comprehensive legislation of the National Assembly and the introduction of a constitutional petition on trial as more comprehensive solutions, including relief of victims who had already been ruled defeated in the state reparation procedure. Furthermore, reservation of oral and microhistory records of State Crime was proposed to relieve the victims of a wider range of State Violence that was not included in the realm of illegal activities and to prevent such incidents from happening again in the future.

Some complain of "State Crime Fatigue" by asking how long they are bound by the past. However, one cannot move on to the future without correcting the past. We hope that this research will contribute to the wider range of compensation on State Crime as an important step toward the completion of the past liquidation.