

**WORKING IN THE SHADOWS: HOW
SOUTH KOREA’S BAN ON TATTOOING
WITHOUT A MEDICAL LICENSE
INFRINGES ON TATTOOISTS’ HUMAN
RIGHTS**

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INTRODUCTION

In most developed countries, tattoos are widely accepted as a way of expressing one's interests, personality, and individuality, and are proudly shown off. Signs advertising tattoo shops can easily be seen on the streets. This form of art has become such an enormous part of social culture that even massive international tattoo conventions are held all over the world.¹ Many countries respect the individualism that tattoos represent, and acknowledge the craft and skill of the artists who bring, through communication with their clients, ideas, and designs to "life." Despite it being a modern, innovative, technology-forward, and developed country, South Korea stands with only a few other countries that have yet to accept this form of expression as art.

Tattoo artists, or "tattooists," deal with various struggles related to their occupation due to the current ban of tattooing performed by anyone without a medical license under Article 27, Paragraph 1 of the Medical Services Act.² The Supreme Court of Korea, in 1992, heard a case involving an eyebrow tattoo procedure performed by a non-medically licensed person.³ In its decision, the Court ruled that a medical act was not limited to the prevention and treatment of diseases but included any act that is closely related to human life, body, or general public health and is likely to pose a serious risk unless performed by a doctor with highly professional knowledge and experience or medical personnel.⁴ While the tattoo industry has been flourishing, legally nothing has changed since the Supreme Court's decision to mirror or make space for this growing industry.

In addition to Article 27, Paragraph 1 of the Medical Services Act, Article 5 of the Special Measures for the Control of Public Health Crimes Act (hereinafter referred to as the "Health Crimes Control Act") enforces and penalizes unlawful actors practicing in medical acts with a statutory penalty of a fine, and sometimes imprisonment of anywhere between "more than two

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¹ WORLD TATTOO EVENTS, <https://www.worldtattooevents.com/2024-tattoo-conventions-calendar/> (last visited Feb. 10, 2024) (*World Tattoo Events* provides an online comprehensive tattoo convention calendar featuring over 1600 events worldwide, and is used as a tool for enthusiasts and tattoo professionals to keep track of upcoming shows, conventions, and other tattoo-related events).

² Euiryeobeob [Medical Services Act] art. 27 para. 1 (S.Kor.).

³ Daebeobwon [S. Ct.], May 2, 1992, 91Da3219 (S. Kor.) (rejecting the defendant's claim that because the tattoo was injected into the epidermis, it was not subject to the same risks associated with injections into the dermis.).

⁴ *Id.*

years” and life.⁵ The Health Crimes Control Act encompasses any “act of practicing medical treatments by a profession by a person who is not a doctor.”⁶ It has been noted that since the Act of Controlling Public Health Crimes criminalizes the violation of Article 27 of the Medical Services Act and also requires a minimum fine in addition to a possibility of imprisonment, violation of these Acts are taken seriously. The legislative intent of these Acts is to criminalize fraudulent medical practices that could cause harm to the public.⁷

The Constitutional Court’s decision in March 2022 in 2017 Hunma 1343, upholding the Supreme Court’s 1992 ruling is flawed in several ways. The dissent in the opinion argue that the qualifications of the tattooist are limited to the scope necessary for safe tattooing.⁸ Further, there are more efficient ways to safeguard the hygiene and health of the public such as requiring a clean tattooing environment, regulating the maintenance of hygienic tools, and providing guidelines of safe tattooing procedures and methods. Next, it fails to consider the level of artistic talent, skill, and technique that is required for tattooing, and demonstrated by tattooists. Tattooing is far more than a pure medical act. There is a continued increasing demand of artist-performed tattoos, and denying tattooists’ a legitimate profession will not quell this demand. If the Court continues to uphold a law where only medical professionals are permitted to tattoo, the system will only fall behind on its ability to monitor and protect hygiene, health, and safety.

Further, the Court must reconsider its ruling because the current ban on non-medically licensed tattoo services violates the Korean Constitution; tattoos are a form of creative expression protected by international law; and there are no health or safety justifications that reasonably or sufficiently support the ban.

While there are various constitutional claims made by the petitioners and examined by the Constitutional Court, this note will focus mainly on the violation of tattooists’ human rights including the constitutional right to work, freedom of occupation, freedom of speech and expression, and

⁵ Act on Special Measures for the Control of Public Health Crimes Act, Act No. 1252, art. 5, Dec. 19, 2017 (S.Kor.). (The article relating to punishment for illegal medical practitioners stating that a person who practices a medical act for the “purpose of commercial gain in violation of Article 27 of the Medical Service Act shall be sentenced to imprisonment for life or for not less than two years” and provides a minimum fine of one million won.)

⁶ *Id.*

⁷ Jin Kuk Lee, *The Interpretation of § 5 of the Act on Special Measures of the Control of Public Health Crimes with Regard to the Practice of Medicine Without License*, 30 KOREAN J. MED. & L., 7-24 (2022).

⁸ Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531) (S. Kor.).

freedom to enjoy the arts.⁹ Section II will provide background information about the history of tattoos, how it was introduced into South Korean society, how it was perceived, and how this perception has changed from one of social stigma to a form of art and self-expression. Section III will highlight the ways in which current classification of tattooing as a “medical act” violates the Constitution of the Republic of Korea and deprives tattooists of their constitutional rights to work, freedom of occupation, freedom of speech, and freedom to enjoy the arts. The section will also discuss the various serious negative consequences the law creates, and how it forces tattooists to live on the fringe of society. Section IV will discuss how international law and other countries including Japan, the United States, and European countries treat tattoos as art, and as a form of artistic expression that should be protected under freedom of expression. Section V will highlight why there are no real health or safety justifications as the Constitutional Court claims there to be, that supports the outright ban of tattooing by non-medical professionals. In addition, it will discuss the practices of other countries, which have a better balance of respecting tattooist’s freedom of artistic expression while also taking measures that adequately consider hygiene, health, and safety issues that may arise in connection with tattooing. Lastly, Section VI will reiterate why the Constitutional Court must reconsider its ruling.

I. BACKGROUND

The practice of tattooing can be traced back thousands of years when people would permanently mark and pigment their bodies with designs that would often serve as amulets, “protect from evil, declare love, signify status or religious beliefs, as adornments and even forms of punishment.¹⁰ There is evidence of tattoos being used as a way for one to express oneself and one’s beliefs in ancient civilizations including the ancient Egyptians, the Scythian Pazyryk, and the ancient Britons.¹¹ In addition, evidence shows that tattoos were also fashioned during the Greco-Roman civilization,¹² and can even be traced to East Asia as early as 5,000 BCE.¹³ However, at some later point in

⁹ *Id.* (The Constitutional Court also addresses other claims brought by the claimants such as the violation of the principle of clarity and the constitutional violation by legislative omission and found there to be no such violations.).

¹⁰ Cate Lineberry, *The World Wide History of Tattoos*, SMITHSONIAN MAGAZINE (Oct. 18, 2023).

¹¹ *Id.*

¹² *Id.*

¹³ Morgan MacFarlane, *Tattoos in East Asia: Conforming to Individualism*, 1 THE COMMONS: PUGET SOUND J. OF POLITICS 1, 3 (Sept. 2020).

time, tattoos in East Asia were growingly used for punishing criminals and also symbolizing one's ties with organized crime.¹⁴

In Korea in particular, tattoos have a long history tied to crimes and other negative social stigmas. During the Goryeo dynasty, tattoos were given as punishments and were meant to mark and outcast people from society.¹⁵ The social stigma surrounding tattoos may have become more solidified during the Japanese occupation. Korea and Japan developed similar views toward people with tattoos: they were seen as someone with criminal ties, as tattoos inked into their skin were used to intimidate, as well as indicate membership in mobs or gangs.¹⁶

Within the past decade however, there has been an enormous shift in the way tattoos are viewed in Korea.¹⁷ More delicate, creative, and intricate tattoo designs began replacing the fear that was previously associated with the bold, large, intimidating images often seen on the arms or backs of gangsters. And as more artistically talented and skilled tattoo artists, or tattooists, emerged in Korea, the more the industry and demand for tattoos continued to grow. Further, known for their delicate, fine-lined, and artistically advanced designs, Korean tattooists have also gained attention abroad, gaining the respect and admiration of other tattooists, and gaining fans and clientele internationally. The artists' skills and abilities bring in foreign tourists and contribute to the continued growth of the industry. Despite this, tattooists in South Korea are still not acknowledged by the legal system or legislature.

Tattoos are an internationally recognized form of body art requiring artistic talent and skill. Tattooists are no less an artist than the traditional artist. The process of tattooing requires just as much creativity, precision, and artistic knowledge. In fact, some Korean tattooists even have backgrounds or majored in Korean traditional art.¹⁸ Instead of being treated as artists, Korean tattooists risk facing a minimum two-year prison or a fine up to \$40,000 if caught practicing their craft without a proper medical license, which requires attending and completing medical school.¹⁹

In March 2022, the Constitutional Court of Korea upheld the Korean Supreme Court's 1992 ruling in 2017 Hunma 1343, considering tattooing a

¹⁴ *Id.*

¹⁵ Chang W. Lee, *Tattoos, Still Illegal in South Korea Thrive Underground*, NEW YORK TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/world/asia/south-korea-tattoo-artists.html>.

¹⁶ MacFarlane, *supra* note 13.

¹⁷ Lee, *supra* note 7.

¹⁸ Eugene Lee & Joe Park, *In the Studio with Hongdam*, NEOCHA (July 2, 2018), <https://neocha.com/magazine/in-the-studio-with-hongdam>.

¹⁹ See Na Young Park, *Illegal Tattoo Treatment During the Probation Period Imprisoned for 30 Years and Fined*, YONHAP NEWS, (Apr. 25, 2019), <https://www.yna.co.kr/view/AKR20190425122200056>; Lee, *supra* note 7.

“medical act” rather than artistic expression, and continuing to make it illegal for tattooists who are not licensed doctors to give tattoos.²⁰ The Constitutional Court of Korea’s recent ruling upholds a law that infringes on tattooists’ human rights, including tattooists’ right to freedom of speech and expression, and the right to occupation. The decision fails to consider any actual remedies that may address its concern and instead perpetuates a law based in historical and cultural ideas of taboo.

In making its decision, the Constitutional Court considered several cases consolidated into one.²¹ In each of these cases, the defendants who were tattooists challenged the constitutionality of Article 27 of the Medical Services Act and the Health Crimes Control Act.²² In December 2017, the petitioners of 2017 Hunma 1343 filed a constitutional complaint, contending that the legislative omission to violate the freedom of choice of occupation and further, the legislative omission to establish the qualifications and requirements for the tattooing business so that the petitioners could conduct their tattoo businesses were unconstitutional.²³ In September 2019, the claimants in 2019 Hunma 993 contended that Article 27 Paragraph 1 of the Medical Act in the Health Crimes Control Act violated the principle of “clarity of criminal justice,”²⁴ and argued that the freedom of choice of profession was violated and that legislative omissions in relation to the tattoo industry was unconstitutional.²⁵ In July 2020, the claimants in 2020 Hunma 989 who were trying to operate a tattoo business filed a constitutional complaint also arguing that the provisions in Paragraph 1 of Article 27 violated the principle of clarity, violated their freedom to choose their occupation, and that the legislative omission in relation to tattooing and the tattoo business was unconstitutional.

In addition to the claims above, the claimants also argued that the consequences of considering tattooing a medical act, which is subject to criminal punishment, violated their freedom of art and freedom of occupation and that restricting the act of receiving tattoos from a person without a

²⁰ Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531) (S. Kor.).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Compilation of Judicial Reports [Const. Ct.], Jan. 31, 2002, 14-1, 1, 8, 2000Hun-ga8 (“‘The principle of clarity,’ an expression of the principle of a constitutional state, is required for all legislation restricting basic rights. If a criminal cannot know what is prohibited and what is allowed in accordance with the meaning of norms, this will lead to weakened legal stability and predictability and enable arbitrary enforcement by law enforcement authorities.”).

²⁵ Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531)(S. Kor.).

medical license violated the freedom of expression, the right to self-determination of the body, and the general right to freedom of action.²⁶

While the claimants of each case had varying arguments and constitutional claims for each case, the Constitutional Court addressed all claims in its March 2022 ruling.²⁷ In its decision, the Court determined that the provision subject to adjudication was the provision which prohibits unlicensed persons from engaging in tattooing as a business by only permitting medically licensed doctors to perform medical activities.²⁸ The Court determined that the issue was whether the concept of “medical practice” or a medical act is unclear and thus violates the principle of clarity, and whether the provision subject to trial violated the principle of excessive prohibition, thus infringing on the freedom of the petitioners to choose their occupation.²⁹ In its ruling, the Court determined that in cases where multiple fundamental rights are simultaneously restricted by one regulation, the Court would look to the fundamental right most closely related to the case and the degree of infringement while balancing the intentions of the claimants and the objective with the legislative intent behind restricting such fundamental rights.³⁰

In performing such a balancing test, the Constitutional Court decided that the primary intention of the provision subject to judgment and the subject matter of judgment was to regulate conduct that may harm public health and sanitation.³¹ The Court ultimately decided that the fundamental right being examined was the freedom to choose an occupation, and that restrictions on freedom or art of freedom of expression was only indirectly restricted through the freedom of the profession of tattooing.³² As a result, the Court determined that it would not decide claims of whether the freedom of art and freedom of expression were violated.³³ Furthermore, the Constitutional Court decided that the constitutional claims in 2020 Hunma 1486 regarding the right to receive tattoos (thus, that the provisions violated the freedom of expression, right to self-determination, and general freedom of action) was not subject to trial because the provision at issue did not directly restrict the

²⁶ *Id.*

²⁷ *Id.* (The Constitutional Court “merged” the cases mentioned when it made its ruling in 2017 Hunma 1343.).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

act of receiving tattoos by the tattoo recipient and this was only an indirect effect of the provisions subject to judgment.³⁴

Finally, in examining the violation of the principle of excessive prohibition claim, the Court examined the legitimacy of the legislative purpose and the suitability of the means. In its reasoning, the Court determined that the legislative intent to prevent harm to life, body, or public health of the people by limiting those who can perform medical practices to medical personnel and referred to the Supreme Court precedent which broadened the scope of “medical acts.”³⁵ Further, the Court reasoned that even if one with special ability could “practice medicine” without any side effects, it would be “practically impossible to distinguish them” and deemed that because of the challenge of identifying such unlicensed medical practitioners there was no other alternative other than a “method of certification of a certain form in the country” – here, a medical license.³⁶

While the Constitutional Court briefly considered the fact that there is a class of people that are not medically licensed but have “excellent medical skills in a certain field,” the Court decided that it is the responsibility of legislators to provide certain qualifications in order to provide for a wider range of “medical services.”³⁷ Further, the Court ultimately ruled that the provision at issue was within the legislature’s scope since the “nature of medical practice that targets human life and body” always comes with risks that, if not confirmed and verified by the state, may cause harm to public health.³⁸

II. THE CURRENT BAN ON UNLICENSED TATTOO SERVICES VIOLATES THE KOREAN CONSTITUTION

The Constitutional Court’s ruling that tattooing is a medical act and requires a medical license violates the Constitution and denies tattooists their constitutionally guaranteed rights. The Constitution of the Republic of Korea, the supreme law of South Korea, protects certain rights including freedom of occupation, the right to work, freedom of speech, and freedom of

³⁴ *Id.* See also Constitutional Court Act art. 45 (S.Kor.) (“When the Constitutional Court decides on the constitutionality of a statute, the decision shall be made only for the statute or a provision of the statute for which a review is requested.”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

the arts.³⁹ While these rights are not absolute, the act of tattooing and working as a professional tattoo artist do not fall under any of the exceptional categories.

The judicial interpretation and classification of tattooing as a type of medical act that is illegal when performed without a medical license denies tattooists their right to engage in an occupation. While South Korea's judicial and legislative bodies refuse to recognize the profession, the occupation is fast-growing, with even the Ministry of Employment and Labor, a government agency, including the profession in its "Selection of Promising New Jobs" in 2015.⁴⁰ However, despite the booming industry, tattooists are not guaranteed their constitutional rights as workers, and are given no protection by the State.⁴¹

The failure to give any legal recognition to the "tattooist" occupation forces thousands of tattooists to work secretly. This leaves artists in a legally and societally vulnerable position. First, tattooists are at risk because there are no labor laws that apply to and set the standard for the profession. Thus, artists lack any legal protections that are constitutionally afforded to workers in other fields of officially recognized work.⁴² There are no standards that protect tattooists' legal working hours, their right to certain medical benefits and regular health checkups, or regulations that ensure acceptable and fair working conditions. Further, because tattooing without a medical license is illegal, tattooists deal with the risk of running into trouble with the law. This includes the risk of punishment by a fine, being imprisoned, and ultimately losing their source of income.⁴³

In addition to risk of losing their income, tattooists also face other difficulties that affect their livelihood and quality of life. Since their occupation is not recognized as a legitimate one, tattooists are prevented from

³⁹ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 15 (S.Kor.) ("All citizens shall enjoy freedom of occupation."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(1) (S.Kor.) ("All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(1) (S.Kor.) ("All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.").

⁴⁰ Seung Hyun Baek, *Tattooist, Corporate Manager... Launching 17 New Jobs*, THE KOREAN ECONOMIC DAILY (Dec. 15, 2015, 5:51 PM), <https://www.hankyung.com/politics/article/2015121523281>.

⁴¹ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(2) (S.Kor.) ("The State shall prescribe by the Act the extent and conditions of the duty to work in conformity with democratic principles."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(3) (S.Kor.) ("Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(4) (S.Kor.) ("Special protection shall be accorded to working women and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.").

⁴² *Id.*

⁴³ Euiryeobeob [Medical Services Act] art. 27 para. 1 (S.Kor.).

reporting their income or paying their share of taxes.⁴⁴ As a result, artists are often forcibly prevented from securing loans or obtaining financial assistance from banking institutions.⁴⁵ Many, if not most, tattooists wish to pay their taxes through personal income taxes and through a long-desired state licensing system that would also help regulate and set standards for the profession.⁴⁶ While this proposal is feasible and highly beneficial in many aspects, South Korea's judicial branch continues to reject these ideas.

The serious negative consequences of the Constitutional Court's ruling are clear. The Court was swift in deciding that skills and medical knowledge limited to and involved in tattooing cannot guarantee the same level of safety that a medical professional can provide, for treatments that may be needed before or after a tattoo session.⁴⁷ While it is highly unlikely that a tattoo artist will have the equivalent medical knowledge and abilities of a medical professional, the Court does not identify or offer any data to show that medical treatments are so often needed before or after a tattoo procedure that only one who has extensive medical knowledge, skill, and a medical license should be able to perform the actual procedure.⁴⁸

Even the Court recognized the possible alternatives to entirely banning non-medical tattooing by noting that there are different systems in place that allow non-medical professionals to practice tattooing in foreign cases.⁴⁹ Despite this, the Court reasoned that introducing alternatives, such as a tattoo procedure qualification system that regulates and manages tattoo artist qualifications and other possible regulations, was within the scope of legislative discretion.⁵⁰ Thus, the Court concluded that legislature's decision to restrict tattooing to medically-licensed professionals for the benefit of

⁴⁴ Jessica Laura Holmes, *Yeomi*, YEOJA MAG. (Sept. 14, 2021), <https://yeoja-mag.com/yeomi>.

⁴⁵ *Id.*

⁴⁶ *Id.* See also TATTOO UNION, *Branch Introduction* (Feb. 27, 2020), <https://m.koreatimes.co.kr/pages/article.amp.asp?newsIdx=165377>.

⁴⁷ Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531)(S. Kor.).

⁴⁸ Iliana A. Rahimi, Igor Eberhard & Erich Kasten, *Tattoos: What Do People Really Know About the Medical Risks of Body Ink?*, JCAD (Mar. 1, 2018), <https://jcadonline.com/tattoos-medical-risks-body-ink> (there are two levels of medical complications: mild and advanced. Mild complications are “any unusual condition, sensation or visible reaction in the tattooed skin that differs from normal skin of the same person.” Mild side effects are common and most often treated at home. Meanwhile, advanced complications are side effects that typically include “significant discomfort (i.e., events that would typically lead a patient to consult a physician).” Advanced complications can include aseptic inflammation, allergic reactions, and hypersensitivity to the in used on the skin. These complications are not as common and usually noninfectious).

⁴⁹ Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343 (consol.) (Hungong 306, 531) (S. Kor.).

⁵⁰ *Id.*

public health and hygiene and the failure to select an alternative did not make the law unconstitutional.⁵¹

Along with the restrictions and difficulties that the law creates for all Korean tattooists, female tattooists are specially at risk. This is because the ban deprives female artists from their guaranteed constitutional protections under Article 32(4) which provides working women with special protections so that they are protected from employment discrimination, wages, and unfair working conditions.⁵² Since tattooing and working as a tattoo artist is an illegal occupation because artists typically work out of discrete spaces and because artists meet with their clients secretly, they are at risk of improper conduct by potential clients, such as assault or harassment.⁵³ However, because tattooing is a source of income and affects a tattoo artist's livelihood, the fact that it is illegal would prevent a female artist from reporting any such incidents to the proper authorities. The failure to recognize the profession as a legitimate one unnecessarily places women at risk and offers a female artist no protection from dangerous or unfair working conditions.

Lastly, the law banning tattooists from tattooing without a medical license is a violation of artists' freedom of speech and freedom to enjoy the arts. The Oxford English dictionary defines art as "the expression or application of human creative skill and imagination, typically in a visual form...producing works to be appreciate primarily for their beauty or emotional power."⁵⁴ Tattoos require incorporation of an artist's ideas, creativity, and technique, and is performed and expressed in an artist's personal style. It is a part of one's right to free speech through artistic expression. Article 21(2) of the Constitution prevents the licensing or censorship of speech.⁵⁵ However, the law at issue does just that. Though the Constitution restricts speech in certain instances, tattooing in general does not meet this criterion because it is generally not thought to violate the honor or rights of others, or undermine public morals or social ethics.⁵⁶ The Court may view tattoos as undermining public morals due to the social stigma that sometimes still surrounds them, particularly with older generations. However, the law does not prevent certain types of tattoo designs, but instead bans all tattoo art without a medical license with one broad stroke, thus infringing on one's right to freedom of speech and freedom to enjoy the arts.

⁵¹ *Id.*

⁵² DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(4) (S.Kor.).

⁵³ Lee, *supra* note 7.

⁵⁴ *Art*, OXFORD ENG. DICTIONARY.COM,

<https://www.oed.com/search/dictionary/?scope=Entries&q=art> (last visited Dec. 6, 2024).

⁵⁵ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 15 (S.Kor.);

DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(2) (S.Kor.).

⁵⁶ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S.Kor.).

The Court's concerns about health and hygiene may be partially justified. However, the Court offers no convincing information supporting the ban, and instead upholds an arbitrary law that violates the Constitution and the rights it guarantees its citizens including the freedom of occupation, the right to work, and the freedom of speech.

III. TATTOOS ARE A FORM OF CREATIVE EXPRESSION PROTECTED BY INTERNATIONAL LAW

Today, tattoos are widely considered its own form of art. In fact, most countries recognize tattoos as a form of creative expression, deserving protection under the freedom of expression. In addition, South Korea is a party to the International Covenant on Civil and Political Rights (ICCPR)⁵⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) treaties adopted by the U.N.,⁵⁸ which protect the individual's civil and political rights. This includes the freedom of expression and the right to work.⁵⁹ Further, Article 19 of the ICCPR guarantees the right to freedom of expression through the form of art or any other media of one's choice.⁶⁰ With this in mind, instead of the current legislation, South Korea should receive guidance from countries like Japan, the United States, and European states.

A. Japan

In terms of culture and social construct, South Korea shares many similarities with Japan. Japanese law considered tattooing a "medical act," making it illegal for anyone other than a doctor with a medical license to partake in the act of tattooing others.⁶¹ Medical acts were those considered medical treatment that could cause harm if not performed by doctors.⁶² This definition is almost identical to that given by the Korean Supreme Court in 1992. Japanese law, like South Korea's, was also concerned with the potential hygiene, health, and safety issues that could arise related to tattooing.

⁵⁷ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁵⁸ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁵⁹ ICCPR art. 19(2), *supra* note 57; ICESCR art. 6, *supra* note 58.

⁶⁰ ICCPR art. 19(2), *supra* note 57.

⁶¹ SaikōSaibansho[Sup.Ct.]Sept.16,2020, 2018 (A) 1790, 74Keishu (Japan).

⁶² *Id.*

However, in 2020, the Japanese Supreme Court ruled that tattooing without a medical license did not constitute a violation of its “medical practitioners law.”⁶³ In its ruling, the Japanese Supreme Court determined that the distinction between a medical act and tattooing is that the latter requires artistic skill, and it could not be assumed that tattooing was something practiced exclusively by doctors.⁶⁴ Unlike the Korean Constitutional Court, the Japanese Supreme Court acknowledges the level of artistic skill and craft that is more often than not necessary in the tattooing process.⁶⁵

B. The United States

Next, courts throughout the United States have determined that tattoos, the process of tattooing, and business conducted relating to tattoos are “pure expressive activities” protected under the First Amendment.⁶⁶ In *Anderson v. City of Hermosa Beach*, the Ninth Circuit decided that tattoos of symbols, words, and abstract images, express an endless variety of messages and serve various functions, noting that people get tattoos for various reasons including the “symbolization of interpersonal relationships, participation in a group, representation of key interests and activities, self-identification, and making a decorative or aesthetic statement.”⁶⁷ Further, the Ninth Circuit took judicial notice of the “skill, artistry, and care that modern tattooists have demonstrated.”⁶⁸

In its decision, the Ninth Circuit first goes through an analysis of tattoos themselves, then examines whether the process of tattooing is a purely expressive activity.⁶⁹ The Court determined that the process of expression through a medium could never be thought of as distinct from the expression itself, and that because the purpose of tattooing is to produce the tattoo itself, the tattooing process itself is also entitled to protection under the First Amendment.⁷⁰ Furthermore, the Court determined that it was irrelevant

⁶³ THE JIJI PRESS, *In First, Japan Top Court Finds Tattooing Not Medical Act*, Nippon.com, (Sept. 17, 2020), <https://sp.m.jiji.com/english/show/7359>.

⁶⁴ SaikōSaibansho[Sup.Ct.]Sept.16,2020, 2018 (A) 1790, 74Keishu (Japan).

⁶⁵ *Id.*

⁶⁶ *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010); *See also* *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012) (ruling that tattooing and engaging in the business of tattooing were exercises of free speech entitled to protection as a fundamental right under the First Amendment of the U.S. Constitution).

⁶⁷ *Anderson*, 621 F.3d at 1061.

⁶⁸ *Id.* *See also* FED. CIV. TRIALS & EV. (Rutter Grp. Prac. Guide). (“Judicial notice is a court’s recognition of the existence of a fact without the necessity of formal evidence and is limited to matters that are not subject to reasonable dispute.”).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1062.

whether the client has the ultimate control over the design which they desire, and the mere fact that the tattooist applied his “creative talents” during the process was sufficient to protect the process of tattooing under the First Amendment.⁷¹

Finally, in *Anderson*, the Ninth Circuit further extended First Amendment protections to the business of tattooing. The Court determined that a ban relating to the business rather than the tattooing process itself did not affect whether the activity regulated is guaranteed First Amendment protections.⁷² The Ninth Circuit determined that because the business of tattooing is so closely connected or intertwined with the process of tattooing, the business is entitled to full constitutional protection.⁷³ Thus, the Court concluded that the business of tattooing qualifies as a purely expressive activity.⁷⁴

In most countries around the world, tattooists are acknowledged as legitimate artists. In fact, when tattooists travel internationally for guest work, they are required to apply for “artist” visas.⁷⁵ In the United States, the artist visa is also called the “O-1 Visa” for “Individuals with Extraordinary Ability or Achievement, and includes individuals who possess extraordinary ability in the arts and “has been recognized nationally or internationally for those achievements.”⁷⁶ Specifically, tattoo artists can apply for the O-1 visa or the EB-1 Green Card. The O-1 Visa requires demonstration of distinguishment in the field including “proof of prizes, press articles, work at prestigious studios, recommendation letters from fellow artists” and more.⁷⁷ The EB-1 Green Card holds a higher standard, requiring an artist to be able to show proof through “press articles in major publications, top prizes at the leading conventions and competitions . . . testimonials from fellow leading artists . . . work displayed at exhibitions, sponsorships, judging tattoo conventions, high salary” and more.⁷⁸ This only strengthens the claim that

⁷¹ *Id.*

⁷² *Id.* at 1062-63; *See also* *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (holding that “an artist’s sale of his original work constitutes speech protected under the First Amendment.”).

⁷³ *Id.*

⁷⁴ *Id.* at 1063.

⁷⁵ TATTOO UNION, *supra* note 46.

⁷⁶ *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGR. L. SERV. (West) (2024), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement>.

⁷⁷ *Services*, TATTOO VISA (Jan. 10, 2024, 10:14 AM), <https://www.tattoovisa.com/how-we-can-help>.

⁷⁸ *Id.* *See also* *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZEN & IMMIGR. SERV., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Dec. 6, 2024).

tattooists are internationally recognized, and the title is regarded as a legitimate artistic occupation.

C. The European Convention on Human Rights and the European Court of Human Rights Protects Tattooing Under Artistic Freedom

Further, most European states have also acknowledged tattoos fall under the freedom of artistic expression. Similarly, the European Convention on Human Rights has stated that Article 10 includes “[a]rtistic freedom, which affords the opportunity to take part in the public exchange of cultural . . . and social information and ideas of all kinds.”⁷⁹

The European Court of Human Rights has often stated that that “freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfillment.”⁸⁰ Further, the Court views artistic creation, performance, and distribution as a crucial part of democratic society.⁸¹ While there are certain restrictions permitted, these exceptions are very limited.⁸² In fact, the European Court of Human rights in *Tatár and Fabar v. Hungary* even found that hanging dirty laundry near the Parliament as form of response to an ongoing political crisis is protected as expressive conduct, under Article 10.⁸³ Unless there are serious issues relating to societal wellbeing, national security, or there are moral or personal rights at risk, the Court has found that artistic speech falls within Article 10 and thus, is entitled to protection.

Japan, the United States, and European states, and the European Court of Human Rights have all demonstrated the respect given to artistic speech. This artistic speech that is entitled to protection under freedom of speech or freedom of expression includes tattoo art, and the artists that create them. Though the Constitutional Court may try to disregard the level of creativity

⁷⁹ European Convention on Human Rights, art. 10.

⁸⁰ *Lingens v. Austria*, Appl. No. 9815/82, Series A no. 116 (1986); *Sener v. Turkey*, Appl. No. 26680/95, judgment of 18 July 2000 (unpublished) (2000); *Thoma v. Luxembourg*, Appl. No. 38432/97, Reports of Judgments and Decisions 2001-III (2001); *Maronek v. Slovakia*, Appl. No. 32686/96, Reports of Judgments and Decisions 2001-III (2001); *Dichand and Others v. Austria*, Appl. No. 29271/95, judgment of 26 February 2002 (unpublished) (2002).

⁸¹ Monica Macovei, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2d. ed., Council of Europe (Jan. 2004), <https://rm.coe.int/168007ff48>.

⁸² European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2 (“The exercises of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

⁸³ *Tatár and Fáber v. Hungary*, 26005/08 ECHR 984 (2012).

and artistic ability that is required for tattooing, most of the rest of the world does not.

Tattoos are a form of creative expression, specifically art, protected by international law. In addition, because South Korea is a party to the ICCPR and the ICESCR treaties that protect certain individual rights, such as freedom of expression through the form of art, its laws should be consistent with the protections the treaties afford.

IV. THERE ARE NO HEALTH OR SAFETY JUSTIFICATIONS THAT REASONABLY OR SUFFICIENTLY SUPPORT THE BAN

While the ICCPR places a longer list of restrictions on the right to freedom of expression, the Korean Constitution only permits restrictions on free speech when the speech violates the rights of others or undermines public moral or social ethics.⁸⁴ As a result, there are no health and safety justifications here, for more than modest regulation as is present in most countries.

Rather than aiming to effectively prevent or address the said risks it associates to the highly popular and growing tattoo industry, the Court's decision upholding the Supreme Court ruling may be detrimental to the public if it does not reconsider. Although the Court points to public health, hygiene, and safety as its one and only reason for its decision, the outright ban of tattooing without a medical license creates a bigger risk to tattooists, and especially to the country's citizens. Just as the Japanese Supreme Court had ruled in its decision, tattooing cannot be assumed to be exclusive to doctors. Restricting tattooing to doctors ignores the fact that the most demanded tattooists do not and will not ever go through medical school.

While the Korean Constitutional Court attributes the necessity of deeming tattoos a medical act to matters of health, hygiene, and safety, it is crucial to weigh how common and serious these risks may be. For instance, in New York City in 1961, the act of giving someone a tattoo was illegal.⁸⁵ There were several reasons as to why this ban was put in place. One of the reasons was that making tattooing illegal was meant to be a solution for the hepatitis B outbreak in the city.⁸⁶ Another was that the city wanted to "clean

⁸⁴ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S.Kor.).

⁸⁵ Jennifer Nalewicki, *Tattooing Was Illegal in New York City Until 1997*, SMITHSONIAN MAGAZINE (Feb. 28, 2017), <https://www.smithsonianmag.com/travel/tattoos-were-illegal-new-york-city-exhibition-180962232>.

⁸⁶ Lawrence O'Kane, *City Bans Tattoos as Hepatitis Peril; Board of Health Orders 8 Parlors Shut by Nov. 1 – Spread of Disease Cited City Board Votes Ban on Tattooing*, N.Y. TIMES, (Oct. 10, 1961, at 45.

up” for the prestigious upcoming World’s Fair in 1964, and there was still a social stigma attached to tattoos.⁸⁷

A. New York City

It was not until 1997 that the New York City Council passed a bill that legalized and regulated tattooing in the city since 1961, noting that tattooing ban remained even when the Health Department had not documented any cases of hepatitis B “transmitted by tattooing in the city since the ban was enacted.”⁸⁸ Instead of outright banning tattooing, the bill required artists to be licensed and made tattooing anyone under the age of 18 illegal.⁸⁹ Further, artists were required to successfully pass an examination with the Health Department and pay \$100 every two years.⁹⁰ It took New York City 31 years to lift what it realized to be a pointless ban. Thus, the South Korean Constitutional Court should take note of such cases, and like New York City, should aim to regulate rather than ban tattooing if it is truly only troubled by health and hygiene-related concerns.

B. The United States More Broadly

The regulation of the legally accepted practice of tattooing promotes public health and safety more reasonably and effectively than banning the conduct. In addition to the state of New York, all states in the United States have varying procedural requirements, including licensing and registration requirements for tattoo artists and tattoo shops, and most states place age limits on recipients.⁹¹ Further, the Occupational Safety and Health Administration (OSHA), a federal regulatory agency of the U.S. Department of Labor, sets a standard to protect people with its Bloodborne Pathogens standard which by statute prescribes and regulates safeguards to protect workers who anticipate exposure to blood or other potentially infectious materials in their line of work, including tattooing.⁹² Although there may be

⁸⁷ *Id.*

⁸⁸ Randy Kennedy, *City Council Gives Tattooing Its Mark of Approval*, N.Y. TIMES, Feb. 26, 1997.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *State Laws on Tattooing and Body Piercing*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 2012),

<http://web.archive.org/web/20121228011556/https://www.ncsl.org/issues-research/health/tattooing-and-body-piercing.aspx>.

⁹² *See* 29 C.F.R. § 1910.1030 (1991).

some risks involved with tattooing, the level of risk is not any higher than other body modifications such as piercings.⁹³

C. Europe

A study conducted in Germany and Austria found that there are two levels of risks and complications due to tattooing.⁹⁴ The first, mild complaints, are “any unusual condition, sensation or visible reaction in the tattooed skin that differs from normal skin of the same person.”⁹⁵ While these side effects are common, they are often treated at home and do not cause any serious problems. The second type, advanced complaints, are “more serious adverse reactions in tattoos, associated with object symptoms and significant discomfort (i.e., events that would typically lead the patient to consult a physician).”⁹⁶ These side effects are not as common and typically non-infectious.⁹⁷ Commonly, these side effects are reactions including “aseptic inflammation, allergic reactions, and hypersensitivity to the tattoo ink.”⁹⁸ However, studies have found that more often than not, problems typically arise due to the lack of aftercare by tattoo recipients.⁹⁹

In addition to advanced side effects being uncommon, studies have found that the risk for adverse effects on health “increases in individuals who obtain tattoo in an unauthorized facility.”¹⁰⁰ Tattoos are becoming increasingly popular in South Korea. This means that more people will continue to look for tattoo shops where they can get them. Instead of turning a blind eye to the rising demand, it is in the best interest of public health for South Korea to acknowledge these businesses as legitimate, and in turn register tattooists and tattoo shops in order to better monitor and regulate them.¹⁰¹

⁹³ *Tattoos and Piercings Go Mainstream, But Risks Continue*, NORTHWESTERN MEDICINE (Jun. 1, 2006), <https://news.feinberg.northwestern.edu/2006/06/01/tattoos-2/>.

⁹⁴ *ECTP 2013 European Congress on Tattoo and Pigment Research*, BfR, <https://www.bfr.bund.de/cm/343/allergies-and-tattooing.pdf> (last visited Jan. 23, 2024).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Iliana A. Rahimi, Igor Eberhard & Erich Kasten, *Tattoos: What Do People Really Know About the Medical Risks of Body Ink?*, JCAD (Mar. 1, 2018), <https://jcadonline.com/tattoos-medical-risks-body-ink>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“[A]mong 597 tattooed adolescents, 23.4 percent reported complications more frequently if their tattoos were obtained in unauthorized facilities compared to those who obtained their tattoos in professional, regulated studios (35.3% vs. 15.9%, respectively). Unsterile equipment and needles can transmit infectious diseases, such as hepatitis or human immunodeficiency virus.”).

In Europe, although the European Union (EU) does not share common legislation regarding tattoos, most European states have their own regulations and restrictions to minimize the health and safety risks of tattoos. However, the practice itself is not banned.¹⁰² Instead, European countries addressed risks by publishing a CEN standard, which specifies certain hygiene requirements before and after tattooing. In addition, it provides the guidelines for procedures to be used “to ensure optimum protection of the client, the tattooist and others in the tattoo work area.”¹⁰³ The standard is not legally binding, but is open for countries to adopt to be made binding.

The EU, in addition to providing member states with procedural and health guidelines, is also able to regulate other risks that are associated with tattooing. At first in 2008, the EU released a revised resolution on permanent inks in 2008 which was suggestive but not legally binding that member states implement legislation regarding tattoo inks. In 2022 however, the EU under Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) prohibited some pigments because the chemicals commonly found in certain colored inks were found potentially hazardous to people.¹⁰⁴

Although the EU has the ability to prohibit certain aspects of the tattooing process that is meant to protect public health and safety, it has not done so by taking such an extreme stance as banning tattooing by professionals without medical licenses.¹⁰⁵ Thus, most European states recognize artists’ human rights, while still prioritizing health and safety.

Although the Constitutional Court’s primary concern is the ability of tattooists to safely perform tattoos without the medical knowledge and skill of medical professionals, its concern is baseless. While there are certain risks and side effects associated with tattoos, as is normal with any other form of body modification, it is in the public interest to regulate rather than ban tattooing by non-medical professionals.

Most countries that allow tattooing allows it to be done by artists without medical licenses. First, the Court’s medical license requirement is unrealistic in that it would require all tattooists to complete medical school and become a doctor before being able to practice his or her craft. Next, countries that have regulations are in a better position to create requirements and standards

¹⁰² *Landscape of legislation and safety efforts in the European Union*, EUROPEAN SOCIETY OF TATTOO AND PIGMENT RESEARCH <https://estp-research.org/facts-science/tattoo-legislation/> (last visited Nov. 10, 2024).

¹⁰³ DIN EN 17169 (*Tattooing – Safe and hygienic practice*), https://www.en-standard.eu/din-en-17169-tattooing-safe-and-hygienic-practice/?srsltid=AfmBOouHPfHL1cAt7Lb5WDLt7gm68GXM-Yg6QoIjRNIOyjgtVIg9N_R.

¹⁰⁴ *Substances Restricted Under REACH*, EUROPEAN CHEMICALS AGENCY, <https://echa.europa.eu/substances-restricted-under-reach> (last visited Nov. 10, 2024).

¹⁰⁵ *Europe’s tattoo artists fear for future after EU ink ban*, BBC NEWS (Jan. 4, 2022), <https://www.bbc.com/news/world-europe-59871779>.

for hygiene that effectively target and address various health concerns. Whether or not the Constitutional Court accepts the changing times, tattoos are becoming more common, demand for them continue to grow, and banning non-medically licensed artists from giving them will not stop people from seeking them out. The best way to monitor and actually protect the health and safety of its citizens is for the Constitutional Court to consider the act an artistic expression rather than a medical act.

South Korea's ban on tattooing by non-medically licensed persons is unjustified by any legitimate health or safety concerns. There are no justifications that reasonably or sufficiently support the ban any more than they support regulations as practiced in other parts of the world.

CONCLUSION

In order to remedy the infringement on tattooists' rights in South Korea, the Constitutional Court's ruling must be reconsidered. The current law treating tattooing as a medical act is unjustified: it violates the Constitution while depriving tattooists of their human rights and leaves them in a vulnerable position, both economically and societally. Second, most countries including Japan, the United States and most European countries consider tattooing as a form of artistic expression more than just a mere procedure that can be performed by anyone, and that requires a certain degree of skill, technique, and creativity. As a result, tattooing and tattoos themselves are viewed as an exercise of the right to express oneself and is thus protected under freedom of speech or freedom of expression. Finally, in order to address the Constitutional Court's primary concern of public health, South Korea should adopt a practice similar to that of Japan, the United States, or the European states, which protects health and safety by setting standards and placing regulations and restrictions where they are needed without overstepping and infringing on the rights of tattooists.