

## **A Theological Critique of the National Security Act from the Perspective of Universal Human Rights**

Hyung-mook Choi\*

### **Abstract**

Freedom of thought and conscience are fundamental human rights and are guaranteed in a democratic society. The Constitution of the Republic of Korea states that “the state has the duty to affirm and guarantee the inviolable and fundamental human rights of individuals”(Article 10). However, in South Korean society, this common sense goes out the window the moment someone is labeled a “*bbalgaengyi*” (reds) or a “*jongbukjueuija*” (followers of North Korea). This is because the National Security Act legally supports a divided country with anti-communism at the forefront.

When it was first enacted in 1948, it was seen as a temporary device to maintain authoritarianism under the divided system, but the reality was different. Even as political democratization

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\* Ph. D. Pastor of Cheonan Salrim Church

has progressed and inter-Korean relations have improved, it has remained powerful as a device for restricting popular movements and unification movements and controlling ideas. It has not only restricted social movements but also controlled academic and artistic activities and regulated people's inner worlds. The National Security Act has been controversial since the 1987 democratization, but it is still alive and well in 2023.

For a long time, research on the National Security Act was a taboo subject that was not easily accessible because it could be considered a violation of the law. Adding to the difficulty of research was the lack of access to documentation of cases where the law was applied. With the democratization of 1987 and the development of the Northern Policy and inter-Korean relations in the early 1990s, the environment was ripe for rethinking the meaning of the National Security Act. Pioneering studies before and after 1990 and the Constitutional Court's unconstitutionality review process, which began in 1990, led to a serious examination of its legal issues.

Theological commentary on the National Security Act is scarce. Not only from the point of view of the church, which was responsible for integrating the public into the anti-communist ideology during the formation and development of the pro-American anti-communist state, but also from the point of view of Minjung theology. For theologians, too, it was not a simple matter to overcome the taboo of anti-communism. They were always conscious of the limits of that taboo, and when they crossed them, they were bound to face the swift blade of state power. In the absence of a theological response to the National Security Act, this article begins that discussion. Approaching it

from a theological position is based on an awareness of universal human rights that can no longer be avoided as a theological task today. After articulating that position, this article briefly reaffirms the problems with the National Security Act and addresses the issues of the rule of law and human dignity.

● Key Words

Anti-communism, *Bbalgaengyi*(빨갱이), Human Dignity, National Security Act, North-South Divide, Rule of Law, State Power, Universal Human Rights.

## I. Opening remarks

It is common knowledge that freedom of thought and conscience is a fundamental human right and is guaranteed in a democratic society. The Constitution of the Republic of Korea clearly states that “the state has the duty to affirm and guarantee the inviolable and fundamental human rights of individuals”(Article 10). However, in South Korean society, there is another “common sense” that becomes obsolete the moment someone is labeled a “*bbalgaengyi*” (reds)<sup>1</sup> or a “*jongbukjueuija*” (followers of North Korea). This is because the National Security Act is the legal backing of the divided state system with anti-communism at the forefront. Since its enactment in 1948, the National Security Act has been a fearsome shackle on those who dissent and resist the state’s measures, and it has the immense power to bind conscience and inner freedom.

Initially, it was seen as a temporary and incidental device to maintain authoritarianism under the North-South divide, but its effect was far from what was expected. Even as political democratization has progressed and inter-Korean relations have improved, it has remained powerful as a device for restricting popular and unification movements and controlling ideas. It has not only restricted social movements, but also controlled academic and artistic activities and regulated people’s inner

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1 In South Korea, the word “*bbalgaengyi*” (reds) is a slur against communists or socialists, but it’s also a name that has become synonymous with fear. Before and during the Korean War, being labeled as such could mean death. Many people who had nothing to do with communism or socialism were not only killed, but their families continued to suffer as a result of being labeled as such. Even today, the label is still applied to those who oppose government initiatives, and it means that a person who is labeled as such is denied basic rights as a human being. It encapsulates the tragedy of more than 70 years of division. It is difficult to express its meaning with any similar words in a foreign language. This is why I use the Korean word ‘*bbalgaengyi*’ as it is.

worlds. The National Security Act has been controversial since the 1987 democratization, but it is still alive and well in 2023.

For a long time, research on the National Security Act was a taboo subject that was not easily accessible because it could be considered a violation of the law. Adding to the difficulty of research was the lack of access to documentation of cases where the law was applied. With the democratization of 1987 and the development of the Northern Policy and inter-Korean relations in the early 1990s, the environment was ripe for rethinking the meaning of the National Security Act. Pioneering studies before and after 1990<sup>2</sup> and the Constitutional Court's unconstitutionality review process, which began in 1990, led to a serious examination of its legal issues. Since then, a number of studies have been accumulating in the legal and jurisprudential circles, and in recent years, the legal issues have been dealt with in earnest in works published by the Lawyers for a Democratic Society.<sup>3</sup>

Surprisingly, there are no theological treatises on the National Security Act. From the perspective of the church, which played a role in the formation and development of the pro-American, anti-communist divided nation,<sup>4</sup> it is understandable that there is no theological discussion of the National Security Act as a device that has kept the divided nation system strong. However, from

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2 Won-soon Park, *Studies on National Security Act 1: Changes in the National Security Act*, revision (Seoul: Yeoksabipyongsa, 1994); *Studies on National Security Act 2: the National Security Act Applicants* (Seoul: Yeoksabipyongsa, 1992); *Studies on National Security Act 3: The National Security Act Repeal Argument* (Seoul: Yeoksabipyongsa, 1992).

3 Lawyers for a Democratic Society, *A Bad Law Above the Constitution 1: Why the National Security Act Should Be Abolished* (Seoul: Samin, 2021); *A Bad Law Above the Constitution 2: National Security Act, Repeal is the Answer* (Seoul: Samin, 2022).

4 Won-don Kang, "The Reproduction of Dominant Ideology in the Korean Church," in *Korean Society and Ruling Ideology* (Seoul: Nokdu, 1991), 375-376.

the perspective of Minjung theology, it is surprising that there is no commentary on the law. It is even more unusual in light of the reality that many young people who had to stand in court for violating the National Security Act had to defend themselves with the logic of faith. While theologians have criticized the system of the North-South divide, they have not yet been able to shake off the compulsive discipline that has taken over. In reality, breaking the anti-communist taboo was not a simple task. Theologians always had to be conscious of the limits of that taboo,<sup>5</sup> and when they crossed it, they inevitably faced the swift blade of state power. For example, in 1988, Rev. Hong Geun-soo's remark "Why is communism a problem?" on KBS's "Late Night Debate" immediately became grounds for violating the National Security Act. He was detained in 1991 for that and other activities that violated the National Security Act. This happened not only under the previous authoritarian regime, but also after the democratization of 1987 and the progress made in inter-Korean relations in the early 1990s. Therefore, theologians would still have had a hard time pushing the envelope.

In any case, in the absence of a theological discussion of the National Security Act, this article attempts to begin that discussion. As mentioned above, the legal issues of the National Security Act have already been examined by legal scholars. In reviewing the results, this article seeks to clarify what is of particular interest in a theological approach. A theological approach can only be based on a recognition of universal human rights, which can no longer be avoided as a theological task today. This article will first clarify the position, then

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5 Nam-dong Suh, *Quest for Minjung Theology* (Seoul: Hangilsa, 1983), 197.

briefly reiterate the problems of the National Security Act, and conclude with a consideration of the most important issues for a theological approach.

## II. Universal Human Rights and Christian Theology

### 1. Theological basis for universal human rights

How to accommodate the demands of universal human rights from a Christian perspective has been an important theological issue.<sup>6</sup> It is true that there was a period of time when the Christian faith had difficulty accepting the idea of universal human rights that was raised with the rise of the modern Enlightenment and political revolutions. The concept of “human rights” in the modern world was foreign to traditional theology, and the anti-Christian character of a series of political revolutions that shaped the modern concept of human rights, such as the French Revolution, also contributed to the rejection.

This position began to change, however, not only because the Enlightenment itself, which underpinned the political revolutions of the modern era, was a reinterpretation of the biblical and theological heritage, but also because of a growing awareness of the Reformation’s role in the discovery of the individual as the true modern agent. The demand for universal human rights was increasingly seen as consistent with the truth of the gospel. Moreover, the terrible experiences of world wars and totalitarianism, which gave rise to the Universal Declaration

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6 For a detailed discussion, see Hyung-mook Choi, *Christian Ethical Assessment of Korean Modernization* (Seoul: Hanul, 2015), 72-112.

of Human Rights, provided a decisive impetus to Christian theology. As a result, Christian theology today firmly embraces the demands of universal human rights as not only biblical, but also as embodying the gospel. Of course, the relationship between the concept of natural rights and today's historically and socially shaped concept of human rights is not without controversy. However, differences in the grounds for justifying human rights are not a reason to deny the hard truth of human dignity. For theology today, the challenge of justifying human rights is to find a way to do so in a way that communicates with historically and socially shaped conceptions of human rights while also revealing its own uniqueness.

The most widely accepted basis for universal human rights in the Bible is the concept of the image of God (Genesis 1:26-27), which is the basis for so-called natural rights. An important focus of biblical creationism is that humans are endowed with the "image of God". According to this, humans are tasked with embodying God's image as responsible beings in solidarity with other creatures. In a theological sense, the image of God that humans are endowed with is the most fundamental basis for human rights. On the one hand, this concept is the theological basis for universal human rights in that it recognizes the nobility of human beings as image-bearers of God, despite their limitations as created beings.

In the midst of the historical reality of humanity struggling with domination and oppression, where the image of God is not fully realized, the Bible testifies that God chose an oppressed people, entered into a covenant with them, and liberated them. The biblical ethos of fulfilling God's will in human society by



ensuring the survival and freedom of the poor and oppressed is at the heart of the law and prophecy. Given that human rights have secured their universality through the process of being raised as the rights of those without rights,<sup>7</sup> the biblical ethos of emphasizing the rights of the excluded and ignored is an important foundation for universal human rights.

Jesus Christ taught us to love our neighbors as ourselves (Matthew 7:12, 19:19), creating relationships among human beings in which we are dignified by each other. He also sought to uplift those who had been denied their human dignity. He taught that to do unto the least of these is to follow the way of Christ (Matthew 25:40), and he identified himself with the sinner, the poor, the widow, the orphan, and the oppressed, and defended their rights. The many ways Jesus reminded us of the preciousness of a single soul (Matthew 10:28; Luke 12:4-5; Luke 15:1-7) also reminds us of the preciousness of human rights, which cannot be violated by any external violence. “Man is not made for the Sabbath, but the Sabbath is made for man”(Mark 2:27) reminds us that human life cannot be subjected to the violence of the legal system. That is the truth of the gospel.

The Apostle Paul emphasized that in Christ there is no distinction between Jew or Greek, slave or free, male or female (Galatians 3:28-29). The Apostle Paul’s doctrine of justification, which emphasizes that all people are one in Christ regardless of their qualifications or achievements, is an important basis for universal human rights.

In fact, the biblical and theological basis for universal human

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7 Ki-soon Park, “Modernity and the Politics of Human Rights,” in *Marxism and Politics*, edited by the Marxcommunnale Committee (Seoul: Munwhagwahaksa, 2009), 177; Hyung-mook Choi, *Christian Ethical Assessment of Korean Modernization*, 76.

rights is very strong and rich in antecedents. This was true even before the demand for universal human rights was accepted as a normative demand to be taken for granted on a global scale. In the formation of the Universal Declaration of Human Rights in 1948, not only were the wisdom of a wide variety of religious traditions consulted in defense of human rights, but the Christian heritage played an important role.<sup>8</sup> While the anti-Christian character of the French Revolution is often emphasized in modern political revolutions, the reinterpretation and influence of the Christian heritage in the English and American political revolutions cannot be overlooked. The Christian heritage has been actively reinterpreted in the formation of modern concepts of human rights.

The question is, what should we look for in a theological examination of the National Security Act, which is our topic now. While a concern for universal human rights should be the basis for such an examination, a different approach is required for systems and realities that violate human rights while absolutizing national security. In addition to confirming the theological basis for universal human rights, we need to further clarify the problematic relationship between the state and human rights.

## **2. God's sovereignty and earthly state power**

If we want to address National Security Act from a theological perspective, we should begin by reflecting on the legitimacy of national security over human life. We must ask whether laws

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8 Michelline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, Korean Translation by Cho, Hyo-je (Seoul: Ghil, 2005), 68-70.

that support the absolutization of state power can be justified. The Christian faith has a long history of deep insight and a wealth of wisdom in this regard, and it is no exaggeration to say that the history of Christianity itself has been shaped by the struggle over state power.

Despite the lack of theological commentary on the National Security Act in Korea, Korean Christians were already deeply troubled by it. Korean Christians made a clear theological statement in the 1970s, when the theocratic regime oppressed its people with the National Security Act and the Anti-communist Act.<sup>9</sup>

“The fundamental rights of human beings were given by God before there was a state. The state is a political unit that, under the sovereignty of God, guarantees the enjoyment of the blessed state of human beings by protecting his fundamental rights of life, property, and liberty. A government is a public entity entrusted with the governance of the country for this purpose. Therefore, the state and the government are different, and loyalty to the government is not loyalty to the state. The statement that “all authority comes from God”(Romans 13) defines the limits of government before it speaks of submission to authority. It means that those in power are entrusted with these functions and should only exercise their power within those limits. Any authority that takes away our basic rights to survival and freedom is a betrayal of God’s will. Absolute power belongs only to God. To prevent the

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9 Sam-wong Kim ed., *The National, Democratic and People’s Declaration* (Seoul: Ilwolseogak, 1984), 217.

danger of hijacking this absolute power and absolutizing the relative, we are commanded not to make any images of God on earth (the Ten Commandments). Christianity has a tradition of calling the absolutization of the relative into the absolute an idol and of making the struggle against it the Great Commission.” (<Theological Statement of Korean Christians> Nov. 1974).

The Christian position of setting the limits of earthly authority, or state power, under the sovereignty of God has a long history.<sup>10</sup> It stems from the original event that shaped the biblical faith, the Exodus, and was reinforced by subsequent confrontations with the tyranny of empire and state power.<sup>11</sup>

In the Bible, the concept of God’s sovereignty is the basis for the negation of domination and oppression in human society, and thus the guarantee that all of its people should be recognized as equal subjects before God. It is clearly established in the escape of God’s people from an imperial system of power and the realization of a liberated egalitarian community. Its significance is evident in the story of Gideon the Judge (Judges 6-8) and in Samuel’s warning against the demand for the establishment of a monarchy as a practical requirement (1 Samuel 8:4-17). The Bible rejects the idea that divine sovereignty justified the idea of an earthly state in the ancient Near East, and takes the position that power should be limited for the sake of the people. The Bible presents a concept of kingship limited by

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10 See Hyung-mook Choi, “Examining the Relationship between Church and State,” in *Christians in the Age of Candlelight Democratization*, edited by the NCCK Theological Committee (Seoul: Dongyeon, 2017).

11 Yeong-jin Min, “Biblical Perspective on the State Power,” in *State Power and Christianity*, edited by the Christian Institute for the Study of Justice and Development (Seoul: Minjungsa, 1982), 66.

the sovereignty of God.<sup>12</sup> The spirit of separation of powers that emerged during the political revolutions of the modern West and is now commonplace as a check on the unilateral concentration of state power is not unrelated to this biblical concept of limited power.<sup>13</sup>

The concept of God's sovereignty was also a consistent thread in the proclamations of the prophets, who emerged at the same time as the formation of state power. For the prophets, God's sovereignty was embodied in the demand for justice among the people. God's sovereignty was the basis for justice and a shield against the tyranny of state power. The prophets' condemnation of state power that tramples on the rights of the poor and perpetrates injustice is poignant. Any state power that makes itself absolute and commits injustice, even if it is a form of ethnic political community, is bound to be denounced (e.g., Jeremiah 21). Eventually, when the prospects for justice in the real world become slim, the concept of God's sovereignty is radicalized into an expectation of God's kingdom and messianic rule, symbolized by the "new heavens and new earth" (Isaiah 65:17, etc.).

The Old Testament position on the sovereignty of God was reaffirmed and strengthened in the New Testament by Jesus' proclamation of the kingdom of God. As the centerpiece of Jesus' words and life, the kingdom of God had an eschatological character as its ultimate end, and the kingdom and the earthly kingdom were irreconcilable. His criticism of the rulers of the

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12 George V. Pixley, *God's Kingdom*, Korean Translation by Chung Ho-jin (Seoul: Korea Theological Study Institute, 1986), 37.

13 Giorgio Agamben, *Il Regno e la Gloria: Per una genealogia teologica dell'economia e del governo*, Korean Translation by Park, Jin-woo and Jung, Moon-young (Seoul: Saemulgyul, 2016), 13.

world (Mark 10:42) and his statement in conversation with Pilate that his kingdom is not of this world (John 18:36) make clear his position on the kingdom of heaven and the kingdom of earth. The debate between Caesar's and God's (Mark 12:13-17; Matthew 22:15-22; Luke 20:20-26) is often interpreted as an acknowledgment of the reality of the coexistence of the earthly and heavenly kingdoms, but it should be seen as an emphasis on God's in the face of those who were preoccupied with the emperor's.

The apostle Paul argued for the rule of the world by the sovereignty of Christ as a basically eschatological ideal (1 Corinthians 15:24; Colossians 2:10,15, etc.), but also for submission to authority (Romans 13:1-7). This determined the attitude of the early Christians, who rejected Roman "emperor worship" but accepted "public order" within the empire.<sup>14</sup> The apostle Paul's insistence on submission to authority poses a constant exegetical problem,<sup>15</sup> and that insistence, along with Jesus' distinction between what is Caesar's and what is God's, has had a profound impact on Christian attitudes toward state power throughout church history. The position that state power could coexist with the sovereignty of God or the sovereignty of Christ was formed. This does not mean a renunciation of God's sovereignty. It is important to note that the existence of state power is acceptable as long as it serves the needs of realizing the common good or public good.

In Christian history, the question of the relationship between

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14 Ernst Troeltsch, *Die Soziallehren der christlichen Kirchen und Gruppen*, Korean Translation by Hyun, Young-hak (Seoul: Korea Theological Study Institute, 2003), 204-205.

15 Lutz Pohle, *Die Christen und der Staat nach Römer 13*, Korean Translation by Sohn, Kyoo-tae (Seoul: Korea Theological Study Institute, 1989), 14.

the kingdom of heaven and the kingdom of earth, the kingdom of God and the kingdom of man, has been an ongoing controversy, with different solutions being sought at different historical stages. The main concern has been how to distinguish the kingdom of God from the secular state and how God's sovereignty can be embodied in earthly reality.<sup>16</sup> Of course, in the Middle Ages, the church, which was considered to be the representative of the kingdom of God, became dogmatic and dominated the secular state. It was, in effect, a self-contradiction in which the kingdom of God was fully integrated into the attributes of secular state power. However, the question of God's sovereignty provided a basis for overcoming that error and for refining the Christian attitude toward state power. Accordingly, Christians had to constantly consider which authority to submit to and which to resist.<sup>17</sup>

Since the advent of modern constitutional states, the separation of church and state has been generally accepted. It refers primarily to the separation of the state from religion or the church (the end of the medieval order) and, conversely, to the exclusion of state interference in religion or the church (such as violations of religious freedom). However, this does not mean that politics and religion are unrelated. It means that while they are separate, they can cooperate in the realization of the common good, such as ensuring human rights, and conversely, that resistance and interference are inevitable when one or the other violates that goal. For Christians, in particular, the belief in

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16 Shigeru Nanbara, *The State and Religion: A Study of the Spiritual History of Europe*, Korean Translation by Yoon In-ro (Seoul: Somyungbooks, 2020), 62.

17 Hyung-mook Choi, "A Study of Luther's Two Kingdoms and the Modern State," *Christian Social Ethics*, 39(2017), 95.

God's sovereignty over all aspects of the world is important. The challenge for Christians today is to ensure that this is not done as an exclusive dogma, but in a way that embodies the universal common good in a reality of coexistence with people of other faiths and belief systems.

In short, from the perspective of the Christian faith, the very idea of "national security" as an end in itself is unacceptable. If it is acceptable, it is only on the condition that the state serves as a means of fulfilling God's justice by achieving justice that is consistent with the common good.<sup>18</sup>

Given this position, how can we evaluate the National Security Act? In order to do so, we will briefly examine the origins and application of the National Security Act and its problems.

### III. National Security Act violate universal human rights

#### 1. History of the National Security Act Enactment and Abuse

The National Security Act was enacted on December 1, 1948, as Law No. 10 of the Republic of Korea. Its purpose was to "secure the safety of the state and the survival and freedom of the people by regulating anti-state activities that jeopardize the safety of the state".<sup>19</sup> The law, which was modeled after a remnant of the Japanese Security Maintenance Law, was of a temporary nature as a "temporary measure law that only applied to emergencies in the early years of the country before the Criminal Act was

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18 How we define "justice that is consistent with the common good" is a very important issue. However, it is beyond the scope of this article and should be left as a separate task.

19 Dong-ha Hwang, ed., *Frightening and Ridiculous National Security Act* (Seoul: Grimssi, 2019), 4.



enacted".<sup>20</sup> There was a clear political motive behind its enactment. When the Anti-National Actors' Punishment Act was enforced immediately after the establishment of the government in August 1948, the crisis-ridden ruling power hastily enacted it in response to the Yeosu–Suncheon rebellion that broke out on October 19. The political motivation was to turn the anti-national actor punishment regime into an anti-communist regime.<sup>21</sup>

Despite the enactment of the Criminal Act shortly before the 1953 armistice, the National Security Act was maintained on the grounds that it took into account wartime security conditions and the psychological impact on the population.<sup>22</sup> The law, which originally had only six articles, was further expanded and strengthened during the authoritarian regime.<sup>23</sup> Park Chung-hee regime, which came to power in a coup on May 16, 1961, supplemented the National Security Act with a separate the Anti-Communist Act on July 3 of that year. While the National Security Act punished only those acts that had "the purpose of referring to the government or subverting the state," the Anti-Communist Act was comprehensive in nature, punishing overt speech without regard to its purpose. The comprehensive punishment provisions were reflected when the Chun Doo-hwan regime absorbed and integrated the Anti-Communist Act into the National Security Act in 1980. The notorious provisions include encouragement and praise, meetings and communications, accommodation, and the offense of disclosure.<sup>24</sup>

The National Security Act has become a powerful tool for

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20 Lawyers for a Democratic Society, *A Bad Law Above the Constitution* 1, 14.

21 Ibid., 13.

22 Lawyers for a Democratic Society, *A Bad Law Above the Constitution* 2, 14.

23 Dong-ha Hwang, ed., *Frightening and Ridiculous National Security Act*, 5.

24 Ibid., 9.

regime maintenance while restricting fundamental rights guaranteed by the Constitution. In fact, rather than protecting the country from enemy groups, it has been abused as a means of suppressing acts of resistance to the regime and popular movements, including the labor movement, and even controlling people's thoughts.<sup>25</sup> Not only does it institutionalize hatred and hostility by demonizing ideologically different others, but it also violates freedom of conscience by making thought and speech itself the object of control.<sup>26</sup> When it is said that the Republic of Korea is a society ruled by a "behind-the-scenes constitution"(Baek Nak-cheong), it refers to the power of the National Security Act, which goes beyond the Constitution. It is not only a secondary consequence of the systemic confrontation between the North and the South, but also promotes and produces various "divisive" ideologies within society. It not only fosters the so-called "South-South conflict," but also legitimizes various logics of discrimination. For example, the label of "*bbalgaengyi*" (reds) or "*jongbukjueuija*" (followers of North Korea) has the effect of suspending all rational and ethical judgment, and the logic of dehumanizing a specific target is applied to other social minorities as well.

Despite several opportunities to repeal the National Security Act since its enactment in 1948, it will remain in place until 2023, over 70 years later. The first opportunity came in 1953, when the Criminal Act was enacted, but it failed for the same reasons as mentioned above. The second opportunity came in 1988, when the government's 7.7 Declaration expanded inter-Korean

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25 Hee-kyung Seo, *The Birth of the Constitution of the Republic of Korea* (Seoul: Changbi, 2012), 436.

26 Lawyers for a Democratic Society, *A Bad Law Above the Constitution* 2, 15-70.

exchanges and declared its willingness to establish diplomatic relations with Eastern Bloc countries, and in 1991, when North and South Korea joined the United Nations simultaneously. It was also not repealed. With the Constitutional Court's 1990 decision on the limited application of Article 7 of the National Security Act, the National Security Act remained in force as a means of internal control. In 2004, the Roh Moo-hyun administration announced its intention to repeal the National Security Act for the third time, but the abolition of the National Security Act was stalled by opposition to several reform bills at the time, including the repeal of the National Security Act, the Past History Act, the Media Act, and the Private School Act. The National Security Act has remained in place to this day, exerting its power as a means of controlling people's speech and behavior.<sup>27</sup>

"The National Security Act is a law that has occupied the inner lives of all members of our society in the 76 years history of the Cold War and confrontation since liberation from Japan. It is a law that literally rises above the Constitution, destroying human dignity, undermining freedom of thought, freedom of conscience, and freedom of expression, violating the right to equality, and making it impossible to even feel the injustice of the violation."<sup>28</sup>

## 2. Legal Issues with the National Security Act

The problems with the National Security Act will become more

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27 Lawyers for a Democratic Society, *A Bad Law Above the Constitution 1*, 12-24; *A Bad Law Above the Constitution 2*, 15-70.

28 Lawyers for a Democratic Society, *A Bad Law Above the Constitution 1*, 21.

apparent when its origins, historical context, and especially its practical application are fully examined. The cases are already well known,<sup>29</sup> and this article will briefly examine the legal issues. This has also been well researched by the legal community,<sup>30</sup> but I will try to minimize it to the extent necessary for the development of this article's logic. If we pay attention to the legal issues, we will realize how such unreasonable law has been pressuring people's lives for a long time.

The legal problems can be divided into three main categories: unconstitutionality, redundancy, and conflict.<sup>31</sup> Unconstitutionality refers to the fact that it violates the Constitution, redundancy refers to the fact that it overlaps with the Criminal Act, and conflict refers to the fact that it conflicts with other laws such as the Inter-Korean Exchange Relations Act.

Although the National Security Act is subordinate to the Constitution, it effectively overrides it and severely restricts fundamental rights. For example, it has violated human dignity and values (Article 10), physical freedom (Article 12), freedom of conscience (Article 19), freedom of speech, press, publication, assembly, and association (Article 12), non-recognition of permits and censorship (Article 12), and academic and artistic freedom.<sup>32</sup> In addition, the National Security Act is often applied to some people and not others, violating the principle of equality

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29 Won-soon Park, *Studies on National Security Act* 2; Dong-ha Hwang, ed., *Frightening and Ridiculous National Security Act* etc.

30 Won-soon Park, *Studies on National Security Act* 1; 3; Lawyers for a Democratic Society, *A Bad Law Above the Constitution* 1; 2 etc.

31 Won-soon Park, *Studies on National Security Act* 3, 15-62.

32 Ibid., 16; Society for the Study of Democratic Jurisprudence, *Democratic Jurisprudence*, 1st issue(1989), 15.

before the law. There are countless examples of this, but the punishment of Lim Soo-kyung and the impunity of Park Cheol-eon, who was at the same site of the 1989 Pyongyang Festival, is a clear example. The so-called “governing act” logic is used to justify the suspension of judicial judgment, but it violates the modern rule of law principle of “The administration is bound by law”.<sup>33</sup> In addition, the National Security Act violates criminal justice through its abstract and vague provisions. Criminal justice means that the nature of the punishment must be clearly defined without any inferential interpretation, and the sentence must meet the requirement of being appropriate. The National Security Act does not meet these requirements and has been misused from time to time.<sup>34</sup> At the heart of this problem is Article 7, which punishes so-called praise and encouragement of anti-state organizations. This makes it possible to punish people for mere thoughts before they have committed a clearly present and dangerous act. Despite the fact that the restriction of fundamental rights on the grounds of national security must be strictly limited (Article 37, paragraph 2 of the Constitution), the National Security Act flagrantly violates this. It also violates international human rights treaties, which have the status of constitutional norms, and has been repeatedly called for repeal by various human rights treaty bodies to which Korea is a party.

The Constitutional Court’s first unconstitutional review in 1990 resulted in a decision of limited constitutionality, and the eighth unconstitutional review is currently underway and a decision is expected, but it is still pending. The argument for

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33 Won-soon Park, *Studies on National Security Act* 3, 27.

34 Ibid., 29-35.

limited constitutionality is based on the trust that the law is unconstitutional but is applied only when it harms the basic order of liberal democracy, and that it strictly follows the requirements of limiting the fundamental rights guaranteed by the Constitution when applied.<sup>35</sup> However, actual cases have shown that this trust is unfounded.

Nevertheless, the logic of limited constitutionality is based on contradictory provisions in the Korean Constitution itself. This is the conflict between the territorial provisions of Article 3 and the unification provisions of Article 4. There is nothing wrong with the unification clause, and the National Security Act is clearly unconstitutional in light of this clause. The question is whether the provision stating that the Korean Peninsula and its annexes are territory is actually effective. It is this clause that establishes the logic of viewing North Korea as an anti-state organization and thus justifies the National Security Act, and there are very different opinions on how to resolve this contradiction. Some argue that it should be abolished because it has already been codified due to changes in the historical environment, such as the simultaneous accession of North and South Korea to the United Nations, while others argue that even if it remains, it is possible to determine which provision has a superior effect on the concept of fundamental values of the Constitution. While complex legal discussions may be necessary, the core of the issue is how to define the relationship between North and South Korea, which are considered *de facto* sovereign states, and the constitutional norms should be changed accordingly.<sup>36</sup> As was

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35 Ibid., 43.

36 Ibid., 17-23.

the case with East and West Germany in the past, the current relationship between North and South Korea is characterized by mutuality as sovereign states, but also by the specificity of the relationship as divided states.<sup>37</sup> A solution to this problem is the challenge, and it is not valid to recognize the constitutionality of the National Security Act by relying on one side of the current contradictory constitutional provisions.

Next, most of the provisions of the National Security Act overlap with the Criminal Act and other special criminal statutes. It is worth recalling that the National Security Act was enacted as an interim measure before the Criminal Act was enacted. Therefore, it should have been repealed once the Criminal Act was enacted. This is because the National Security Act's provisions are sufficiently covered by the Criminal Act. Why does it still exist? There is only one provision that makes a difference. It is the crime of praise, encouragement, and sympathy in Article 7, paragraph 1.<sup>38</sup> This is the grounds for prosecution based on thoughts and words alone, prior to a clearly present and dangerous behavior. The National Security Act is an eloquent statement of the law itself that it exists for this very reason. Moreover, the National Security Act has a special criminal procedure code that provides a wide range of exceptions to the general criminal procedure law. Examples include recruiting and retaining witnesses, extending the period of detention, suspending prosecution, and even rewarding investigators. This is solely for the convenience of the public security investigative organization and is a factor that

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37 Lawyers for a Democratic Society, *A Bad Law Above the Constitution 1*, 286-291.

38 Won-soon Park, *Studies on National Security Act* 3, 48; Seong-woo Hong, "The Operation of the National Security Act and the Violation of Fundamental Human Rights," *Human Rights and Justice*, 145(1988), 28.

encourages the abuse of so-called public security cases.<sup>39</sup>

Finally, the National Security Act is in direct conflict with the Inter-Korean Exchange and Cooperation Act, which took effect on August 1, 1990. This law is particularly important because it reflects the changed inter-Korean relations and international order following the 1988 7.7 Declaration. However, the problem is that the law was actually intended as a way to carve out exceptions to the National Security Act. As mentioned earlier, the government has been justifying its officials' negotiation behavior through the "governing act" logic. This law was enacted as a means to fill in the gaps in that flawed logic. In order to reconcile the changed relationship between the two Koreas, the National Security Act could have been abolished, but a separate law was created to ensure exceptions to its application. Thus, a law based on a logic that presupposes the relationship between the two Koreas as equal legal parties coexisted with a law based on a logic of adversarial relationship.<sup>40</sup> This undermines the spirit of the rule of law, which is to realize equality before the law for all, and creates a situation where laws are arbitrarily applied according to their targets. A bizarre situation has arisen in which a contradictory reality is institutionally guaranteed, in which the government's negotiations and businesspeople's exchanges are legalized, but the civilian unification movement is subject to regulation.

There are many other legal problems with the National Security Act and its effectiveness that need to be pointed out. For example, the infiltration, escape, meeting, communication,

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39 Lawyers for a Democratic Society, *A Bad Law Above the Constitution* 3, 429-430.

40 Won-soon Park, *Studies on National Security Act* 3, 61.



accommodation, and no-notice provisions are very harmful. If helping someone is criminalized, it is against human nature, and if notifying a family member is criminalized, it can only be said to be inhumane. Historically, the National Security Act has been used primarily to regulate those who resist the regime. In recent years, however, there have been a growing number of cases where North Koreans who have fled the country have suffered under the law as they attempt to reunite with their families. How can we tolerate a reality where fundamental rights are restricted on such a broad scale, and even where inhumanity is justified in the name of national security?

#### IV. The rule of law and human dignity

Today, the existence of a law in a constitutional state means that it has a practical effect in and of itself. This is formalized in the concept of the so-called rule of law. Although the concept of the rule of law is seriously misused in Korean society, it is not limited to the submission of citizens to the legal order. It refers to the protection of the purpose of the law, the highest legal interest. The ideology of the rule of law, which prevents the arbitrary abuse of power, has as its basic purpose the realization of human dignity. The realization of human dignity, which is formed from the spirit of the Enlightenment and the reinterpretation of natural law, which is closely related to the modern political revolution, is the core of the rule of law that modern constitutional states aim for.

“Human dignity cannot be violated. It is the duty of all

state power to respect and protect it.” Today, Article 1(1) of the German Basic Law is the clearest example of its spirit. Of course, the German Basic Law reflects the historical context of responding to the specific inhumanity of the Nazi regime.<sup>41</sup> All countries with constitutional systems today have constitutions that reflect their own historical circumstances, and thus have their own unique differences.<sup>42</sup> However, in all cases, the core of the constitution is to guarantee the basic rights of its members without exception. As human rights based on human dignity, guaranteeing fundamental rights is a core obligation of constitutional states today. Each law has its own purpose, but it is indisputable that the spirit of human dignity must be at the center of it.

What human dignity actually means in this context is a matter of debate. What is clear is that human dignity is most intensely experienced in marginal situations, where its meaning is eroded to the extreme.<sup>43</sup> In common parlance, “inhumane behavior” or “inhumane conditions” means that a person reduces himself or herself to a less-than-human condition by his or her own actions, or is subjected to a less-than-human condition under certain circumstances. This is not called a “violation” of human dignity. The violation of human dignity protected by the law is when a person “jeopardizes or destroys another person’s dignity as a human being”. It is “not a consideration of an individual’s behavior or situation *per se*, but of a person’s behavior toward

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41 Werner Maihofer, *Rechtsstaat und menschliche Würde*, Korean Translation by Shim, Jae-woo and Yoon, Jae-wong (Seoul: Sechang, 2019), 20.

42 Byung-jik Cha, *The Birth of the Constitution: How the Nation’s Constitution Was Created* (Seoul: Badachulpansa, 2022); Myung-joo Kim, *A Walk Through Constitutional History: The Landscape of Sovereignty in the Constitution* (Seoul: Sansuya, 2010).

43 Werner Maihofer, *Rechtsstaat und menschliche Würde*, 20.

or relationship with others”.<sup>44</sup> It is a state in which the fate of a person is completely subjugated to the will of another against his will, and in which he is unable to appeal to anyone and must submit helplessly. In short, it is a state of denial of one’s fundamental personhood by another, and a state of destruction of the solidarity that would enable one to seek help in that state. It is the breakdown of “trust in myself and trust in others, which are the foundations of my existence and coexistence”.<sup>45</sup>

Today, the ideology of the rule of law in constitutional states seeks to “abolish all legal conditions that impose a life contrary to human dignity and to create legal conditions that enable a humane life”. This means protecting against certain actions that destroy human dignity, while at the same time creating certain conditions that guarantee human dignity.<sup>46</sup>

Is the ideal of human dignity justified from a theological standpoint? The answer is yes, it is justified from the theological standpoint already outlined above. The relationship between faith-based value norms, which are a kind of empirical certainty, and universal value norms, which are historically and socially shaped, is always subject to theological debate,<sup>47</sup> but an active relationship between the two is possible and necessary in practice. This is because theological judgment must always be grounded in historical and social reality.

In attempting to theologize about the ideal of human dignity, it is worth recalling the insights of Dietrich Bonhoeffer, who fought the Nazi state with all his might. This provides a very important

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<sup>44</sup> Ibid., 22.

<sup>45</sup> Ibid., 26-27.

<sup>46</sup> Ibid., 63.

<sup>47</sup> Hyung-mook Choi, *Christian Ethical Assessment of Korean Modernization*, 39.

source of inspiration as we attempt to make theological judgments about the reality of human dignity being violated by state power today.

In the contemporary historical horizon, Bonhoeffer revisits the neglected concept of the natural in the Protestant theological tradition, identifying the rights of “natural life” from the perspective of justification. For Bonhoeffer, “the natural is the form of life sustained by God in a fallen world, which is oriented toward justification, salvation, and renewal through Christ”.<sup>48</sup> According to Bonhoeffer, this form of life, the natural human being, exists for a purpose in any case. In order for that life, which is both physical and mental, to be guaranteed dignity, it must not only be guaranteed the right to physical life, but also the right to mental life. Bonhoeffer’s examples of physical life include the right not to be arbitrarily killed, the right to reproduce, and the right to be protected from rape, exploitation, torture, and arbitrary arrest, while mental life includes the right to judge, act, and enjoy.

Bonhoeffer’s emphasis on the natural and his defense of the right to natural life was intended to move away from an attitude that equated the natural with the Fall and viewed it only as negative, and to recover its meaning in the light of the gospel. This is evident in his definition of the “natural” as “that which is oriented toward the coming of Jesus Christ after the Fall” and in his contrast of the “unnatural” as “that which rejects the coming of Jesus Christ after the Fall”.<sup>49</sup> The “unnatural” refers

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48 Dietrich Bonhoeffer, *Ethik*, Korean Translation by Sohn, Kyoo-tae and Lee, Shin-geun and Oh, Sung-hyun (Seoul: Christian Literature Society of Korea, 2010), 201; Won-don Kang, “The Academic Position of Korean Christian Social Ethics in Relation to the Humanities and Social Sciences,” *Christian Social Ethics*, vol. 18(2009), 202.

49 Dietrich Bonhoeffer, *Ethik*, 199-200.

to arbitrary attempts to undermine the “natural,” of which the Nazis’ use of state violence is a prime example.

While we have already articulated the theological position, Bonhoeffer’s insights into resisting state power in its extreme destruction of human dignity further clarify the basis for a theological judgment about the reality of state destruction of human dignity in today’s historical context. From that theological position, upholding the value of human dignity does not mean rebellion against God, but restoring the image of God in human beings. It is from that theological position that we must speak out against the injustice of laws that violate human dignity.

## V. Closing remarks

From a theological perspective that embraces the value of universal human rights, this article points out the problems with South Korea’s National Security Act. The main focus has been on legal problems and the harmful effects of misuse in practical application. How can a law with such serious problems survive for so long? In fact, the answer to this question is not only a diagnosis of the legal problems of the law itself. A clearer answer can only be found by analyzing the nature of the ruling system that brought anti-communist ideology to the forefront in the divided country. In particular, the nature of the conservative church, which played a leading role in reinforcing the anti-communist ideology from a theological point of view, must be addressed. Therefore, this article is of a limited nature as it does

not fully address the historical context of the National Security Act.

However, this article is significant because it opens the door to a full-fledged discussion, as there is surprisingly little theological work on the National Security Act. The main argument is that the very concept of national security law is untenable from a biblical perspective. Historically, the relationship between church and state has been highly contextualized, but in all cases, there is no theological position that allows for unilateral state absolutism. This is another important point that this article confirms. This article is only a preface to the theological discussion on the National Security Act, but I look forward to further critiques and lively debate. Until the day we repeal it!

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