

Case on Prohibiting Non-Medical Providers from Performing Tattooing Procedures

[2017Hun-Ma1343, 2019Hun-Ma993, 2020Hun-Ma989, 2020Hun-Ma1486, 2021Hun-Ma1213, 2021Hun-Ma1385 (consolidated), March 31, 2022]

* First Draft

The Court held that the following do not violate the Constitution: the first portion of the main clause of Article 27, Section (1) of the Medical Service Act, and the part of Article 5, Item 1 of the Act on Special Measures for the Control of Public Health Crimes concerning the above portion of the Medical Service Act; and the legislative omission to prescribe by statute the qualifications and requirements for the professional practice of tattooing procedures by non-medical providers.

Background of the Case

Complainants seek to professionally perform a procedure that marks the skin by pricking with a needle and inserting pigment into the skin (hereinafter referred to as a “tattooing procedure”).

They filed the constitutional complaints in this case, arguing that their freedom of occupational choice and other rights are infringed by 1) the first portion of the main clause of Article 27, Section (1) of the Medical Service Act, and the part of Article 5, Item 1 of the Act on Special Measures for the Control of Public Health Crimes concerning the above portion of the Medical Service Act (all two provisions hereinafter collectively referred to as the “Provisions at Issue”) and 2) the legislative omission to prescribe by statute the qualifications and requirements for the professional practice of tattooing procedures by non-medical providers (hereinafter referred to as the “Legislative Omission”).

Subject Matter of Review

The subject matter of review in this case is whether the following violate the fundamental rights of Complainants: 1) the first portion of the main clause of Article 27, Section (1) of the Medical Service Act (wholly amended by Act No. 8366 on April 11, 2007), and the part of Article 5, Item 1 of the Act on Special Measures for the Control of Public Health Crimes (amended by Act No. 10579 on April 12, 2011) concerning the above portion of the Medical Service Act and 2) the legislative omission to prescribe by statute the qualifications and requirements for the professional practice of tattooing procedures by non-medical providers.

The Provisions at Issue read as follows:

Provisions at Issue

The Medical Service Act (wholly amended by Act No. 8366 on April 11, 2007)

Article 27 (Prohibition against Medical Acts without a License, Etc.)

(1) Any person who is not a medical provider shall not perform a medical act, and even the medical provider shall not perform any medical act other than those licensed: (*Proviso omitted.*)

The Act on Special Measures for the Control of Public Health Crimes (amended by Act No. 10579 on April 12, 2011)

Article 5 (Punishment for Persons Providing Illegal Medical Services)

A person, who commits an act referred to in any of the following Items for the purpose of commercial gain and in violation of Article 27 of the Medical Service Act, shall be sentenced to imprisonment with labor for life or not less than two years. In such cases, a fine not less than one million won but not more than 10 million won shall be concurrently imposed.

1. The act of professionally performing a medical act by a person who is not a physician

Summary of the Decision

1. Assessment of the Provisions at Issue

A. Assessment of Whether the Freedom of Occupational Choice Is Infringed

A tattooing procedure—which impairs the integrity of the skin by injecting pigment using a needle—entails risks, including infection and side effects resulting from the injection of dye. Potential risks of this method of procedure could affect not only the receiver but also the public sanitation and hygiene. Such risks do not necessarily decrease in the case of semi-permanent makeup, which uses a tattooing technique. The Provisions at Issue guarantee the safety of a tattooing procedure by allowing only medical providers to perform it.

It is suggested as an alternative that non-medical providers be allowed to perform a tattooing procedure by establishing a qualifications framework for tattooing procedures. However, adopting the alternative requires society to take risks in health, hygiene, and sanitation, because the medical knowledge and skills limited to tattooing procedures alone are not sufficient to guarantee that tattooing performed by non-medical providers will be as safe

as that by medical providers, and that medical measures will be fully taken, where necessary, both before and after tattooing.

Additionally, the alternative involving the qualifications framework for tattooing procedures incurs substantial social and economic costs, because it is premised on the creation and administration of a completely new system that regulates and manages, *inter alia*, the qualifications of a person performing a tattooing procedure, and the environment and process of tattooing procedures.

Thus, the decision on whether to implement this alternative is within the discretion of the legislature. It is not unconstitutional for the legislature to allow, in the interests of national health, hygiene, and sanitation, only medical providers to perform a tattooing procedure, rather than to opt for the alternative. Therefore, the Provisions at Issue do not infringe the freedom of occupational choice of Complainants by violating the rule against excessive restriction.

B. Assessment of Whether the Void-for-Vagueness Doctrine Is Violated

In view of, *inter alia*, the legislative purpose of the Medical Service Act, a number of provisions of this act concerning professional duties of medical providers, and the judgments of the Supreme Court regarding the concept of “medical act,” the phrase “medical act” in the Provisions at Issue is definitely construed as referring to an act that may pose hazards to health, hygiene, and sanitation if not performed by a medical provider—as well as an act that prevents or treats illness by applying experience and skills based on medical expertise to diagnosis, external postmortem examination, prescription, medication administration, or surgical procedure. Therefore, the Provisions at Issue do not violate the void-for-vagueness doctrine.

2. Assessment of the Legislative Omission

Nowhere in the Constitution do we find that the matter of statutorily prescribing the qualifications and requirements for the professional practice of tattooing procedures by non-medical providers is explicitly delegated to the legislature. It is up to the legislature to consider social and economic factors and determine whether to establish a qualifications framework for tattooing procedures. In this regard, we find that no obligation for such legislation is derived through constitutional interpretation. For these reasons, with respect to the argument against the Legislative Omission, we do not recognize the obligation to act on

the part of the legislature.

Summary of Dissenting Opinion of Four Justices

A tattooing procedure is distinguished from a medical practice without a license to the extent that the tattooing procedure is not for treatment purposes. Also, the demand for tattooing increased with a change in the social perception thereof. In this context, there is a need to examine the tattooing procedure from a new perspective not suggested by the precedent.

As in the case of legislation in countries including the United States, France, and the United Kingdom, the safety of a tattooing procedure can be guaranteed, without the requirement of the qualification as a medical provider, through the following: the regulation of, *inter alia*, the qualifications for performing a tattooing procedure—which are confined to the scope necessary for safe tattooing—, sanitary tattooing environment, hygienic management of equipment, and process and methods of the tattooing procedure; and the regulation of dyes. This approach is less intrusive than requiring a physician’s license for the professional practice of tattooing procedures, and is also a more effective alternative that can achieve the legislative purpose of preventing hazards to the persons of citizens or public hygiene and sanitation.

Creative or aesthetic expression, not to mention techniques for safe tattooing, is necessary for conducting a tattooing procedure. If emphasis is placed solely upon safety and only medical providers are allowed to perform a tattooing procedure, this would, on the contrary, lead to illegal and dangerous procedures by falling short of the growing demand for tattoos. Thus, as in the case of legislation in other countries, there is a need to permit non-medical providers with a strong artistic sense to perform a tattooing procedure in a hygienic, sanitary, and safe manner.

Allowing the professional engagement in tattooing only after a physician’s license is obtained represents, in essence, a prohibition on the professional practice of tattooing procedures by non-medical providers, infringing the freedom of occupational choice of Complainants. Therefore, the part of the phrase “medical act” in the Provisions at Issue concerning a tattooing procedure violates the Constitution.