

Discussion on the Scope of Legal Fictions to Assume Executives and Employees of Entrusted Agencies Are Civil Servants in the Application of Punishments

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1. The Origin of the Issue

Article 122 of the Atomic Energy Act sets forth that “executives and employees of an agency engaged in an entrusted work or its associated specialized agency, in the application of any punishment as per the Criminal Act or other laws, shall be regarded as civil servants,” stipulating that the scope of legal fictions to assume such persons are civil servants should be applicable to any punishment as per the Criminal Act or other laws. Accordingly, the executives and employees of an entrusted agency or its associated specialized agency are subject to the punishments not only for acceptance of graft but also for dereliction of duty or divulgence of classified information. In addition, they are also subject to increased punishment in accordance with other laws, for example, such special laws as Law Concerning Increased Punishment for Specified Crimes and Law Concerning Increased Punishment for Specified Economic Crimes.

2. Problems of the Current Legislation

With regard to criminal punishments, assuming the executives and employees of an entrusted agency are civil servants is aimed to ensure the fair handling of the entrusted work. In this light, the aforementioned scope of legal fictions seems too broad, going beyond the necessary range to ensure the fair handling of the entrusted work. For example, as regards dereliction of duty (Article 122 of the Criminal Act), the executives and employees of an entrusted agency, who are under the supervision and control of the Minister of Science and Technology, are supposed to observe the orders issued by the supervising agency. In the event they followed such an order and as a result made a decision or took action against their own judgment and/or intention, it would be problematic to punish such executives and/or employees for dereliction of duty. In respect to the divulgence of classified information in conducting public duty (Article 127 of the Criminal Act), there is no room for the application of the provision, as Article 116 of the Atomic Energy Act also lays down the crime of divulgence of classified information. Other crimes

like assault and cruel act (Article 125 of the Criminal Act), publication of criminal facts (Article 126 of the Criminal Act) and obstruction of an election (Article 128 of the Criminal Act) are deemed totally unrelated to the handling of an entrusted work. In short, the current scope for legal fictions to assume that such executives and employees are civil servants are too broad in that the scope imposes too heavy responsibility on them compared with the authority given to entrusted agencies for the performance of entrusted work, as well as in that the scope calls them to account for matters to which the scope is not applicable.

3. Legislation Cases of Legal Fictions to Assume that Certain People Are Civil Servants

Under the system of positive laws frequently found are provisions to define the scope of legal fictions to assume certain civilians are civil servants in the application of punishments, as with Article 122 of the Atomic Energy Act. Such provisions are classified into two groups in terms of their scope of legal fictions to regard civilians as civil servants. One group, as with the Article 122 of the Act, has a broader scope deeming a certain civilian is a civil servant in case he or she is subject to any “punishment as per the Criminal Act and other laws,” while the other group has a narrower scope to limit the range of punishments to any “punishment as per Articles 129 through 132 of the Criminal Act (acceptance of graft).” (In the latter case, the crime of divulgence of classified information by Article 127 of the Criminal Act is also occasionally included.)

Meanwhile, an analysis of laws that have provisions to assume certain civilians as civil servants in the imposition of punishment, like the above-mentioned, reveals the following:

A) Generally, as for members of a variety of commissions, committees and boards, it seems that the scope is as broad as to be subject to any “punishment in accordance with the Criminal Act and other laws.”

Examples include the Korea Media Rating Board (Article 38 of the Public Performance Act*), the

National Human Rights Commission of Korea (Article 62 of the National Human Rights Commission Act), the Gender Discrimination Improvement Committee (Article 19 of the Gender Discrimination Prevention and Relief Act), the National Labor Relations Commission (Article 29 of the Labor Relations Commission Act), the Korea Fair Trade Commission (Article 46 of the Monopoly Regulation and Fair Trade Act), the Korea Broadcasting Commission (Article 104 of the Broadcasting Act), the Korea Independent Commission Against Corruption (Article 23 of the Anti-Corruption Act), the Administrative Appeals Commission (Article 7-2 of the Administrative Appeals Act), the Korean Film Council (Article 37 of the Promotion of the Motion Pictures Industry Act*), and the Regulatory Reform Committee (Article 32 of the Framework Act on Administrative Regulation).

However, it is not rare to find commissions or committees that have a narrower scope, as in the cases discussed in B), to only include any “punishment as per Articles 129 through 132 of the Criminal Act. Examples are the Korea Communications Commission (Article 52 of the Framework Act on Telecommunications), the Korean Electricity Commission (Article 99 of the Electricity Business Act), the Copyright Commission for Deliberation and Conciliation (Article 97 -4 of the Copyright Act*), the Environmental Dispute Resolution Commission (Article 14 of the Environmental Dispute Resolution Act), the Construction Dispute Conciliation Committee (Article 90 of the Framework Act on the Construction Industry), and the Korean Commission for the Promotion of Cultural Industries (Article 39 of the Framework Act on the Promotion of Cultural Industries).

B) In comparison with A), it appears to be customary in Korea to confine the scope of legal fictions to any “punishment as per Articles 129 through 132 of the Criminal Act” for examining agencies, testing agencies, societies and associations as well as entrusted agencies that perform works commissioned by the state in assuming their executives and employees as civil servants.

Examples include Article 37-2 of the High Pressure Gas Safety Control Act (entrusted agencies and testing agencies), Article 32 of the Industrial Development Act (the Korea Productivity Center, the and Small Business Corporation, and business associations), Article 45-2 of the Urban Gas Business Act (entrusted agencies and testing agencies), the Article 57 of the National Measurement Act* (research institutes, designated examining agencies, and associations), Article 43 of the Industrial Development Act (the Korea Productivity Center and business associations),

Article 42 of the Industrial Standardization Act (entrusted agencies), Article 52-2 the Sea Traffic Safety Act (agencies performing others’ work on behalf of them), Article 8 of the Urban Development Act (associations) and Article 61 of the Urban Redevelopment Act (associations).

4. Recommendation for Improvement

In light of the legal reality of Korea, it is deemed that Article 122 of the Act is not compatible with general legislation conventions and is also a deviation from the principle that one’s responsibility should be aligned with one’s authority, as the provision stipulates that an executive or employee of an entrusted agency or its associated specialized agency, which has no decision making authority regarding permissions and the like, shall be regarded as a civil servant.

Furthermore, as mentioned earlier, it is evidently problematic to punish any executive or employee of an entrusted agency for dereliction of duty, when the agency is under the supervision and control of the Minister of Science and Technology and when the executive or employee concerned had to commit the act at issue against his or her judgment because he or she was ordered to do so by the supervising agency. Set aside the cases of the acceptance of a bribe, it is almost improbable in reality to apply the punishment provisions of the Criminal Act and other laws, except for Articles 129 through 132 of the Criminal Act, in consideration of the nature of the work entrusted to any executive or employee of an entrusted agency. Considering the aforementioned legislation conventions and practical problems, it is believed appropriate to confine the scope of legal fictions in Article 122 of the Atomic Energy Act to any “punishment as per Articles 129 through 132 of the Criminal Act”

The Current Provision	Proposed Revision
Article 122. (Legal Fictions of Civil Servants in the Imposition of Punishment) The executives and employees of any agency or its associated specialized agency that performs any work entrusted by the Minister of Science and Technology as per Article 111 shall be regarded as civil servants in imposing any punishment as per the Criminal Act or other laws to them.	Article 122. (Legal Fictions of Civil Servants in the Imposition of Punishment) The executives and employees of any agency or its associated specialized agency that performs any work entrusted by the Minister of Science and Technology as per Article 111 shall be regarded as civil servants in imposing any punishment as per Articles 129 through 132 of the Criminal Act to them.