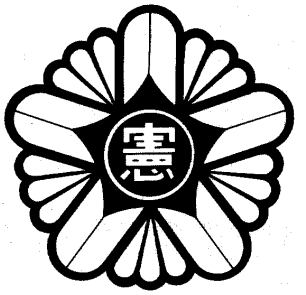
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2005)



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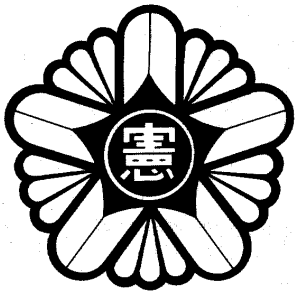

THE CONSTITUTIONAL COURT OF KOREA
2007

DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2005 to December 31, 2005 by the Korean Constitutional Court.

This volume contains 19 cases, 5 full opinions and 14 summaries.

I hope that this volume becomes a useful resource for many foreign readers and researchers.

Professor Park Kyung-sin, Korea University (Assistant Professor), translated the original. Constitutional Research Officer Lim Sung-hee proofread the manuscript. The Research Officers of the Constitutional Court provided much support. I thank them all.

March 31, 2007

Jung Hae-nam
Deputy Secretary General
The Constitutional Court of the Republic of Korea

EXPLANATION OF ABBREVIATIONS & CODES

- KCCR : Korean Constitutional Court Report
- KCCG : Korean Constitutional Court Gazette
- Case Codes
  - Hun-Ka : constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act
  - Hun-Ba : constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68 (2) of the Constitutional Court Act
  - Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68(1) of the Constitutional Court Act
  - Hun-Na : impeachment case submitted by the National Assembly against certain high-ranking public officials according to Article 48 of the Constitutional Court Act
  - Hun-Ra : case involving dispute regarding the competence of governmental agencies filed according to Article 61 of the Constitutional Court Act
  - Hun-Sa : various motions (such as motion for appointment of state-appointed counsel, motion for preliminary injunction, motion for recusal, etc.)

* For example, "96Hun-Ka2" means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

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I. Full Opinions

1. *Constitutional Review of Article 16(1) of Sound Records, Video Products, and Game Software Act*

(17-1 KCCR 51, 2004Hun-Ka8, February 3, 2005)

In this case, the Constitutional Court ruled that the relevant provisions of the Sound Records, Video Products, and Game Software Act requiring those wishing to import foreign video materials to obtain import recommendation by the Korea Media Rating Board constitute a form of censorship and therefore are unconstitutional.

Background of the Case

The Sound Records, Video Products, and Game Software Act, for the purpose of restricting import of obscene or violent foreign video materials, requires each import of foreign materials to be first recommended by the Korea Media Rating Board at the penalty of criminal punishment. The petitioners for constitutional review imported and distributed foreign video materials without first obtaining the Korea Media Rating Board's recommendation, and were indicted and imposed a fine by the court. The petitioner, on one hand, appealed to the Supreme Court, and requested to be referred for constitutional review the relevant provisions of the Sound Records, Video Products, and Game Software Act prescribing the import recommendation system. The Supreme Court referred those provisions to the Constitutional Court for constitutional review.

Summary of the Decision

The Constitutional Court found the provisions of the instant case unconstitutional with a decision of 8:1 for the following reasons:

1. Majority Opinion of Eight Justices

A. Paragraphs 1 and 2 of Article 21 of the Constitution state that all citizens shall enjoy the freedom of speech and press and that licensing or censorship of speech and press shall not be permitted. Censorship here means the inspection of a view or an opinion by the administrative authority before it is expressed, conducted as a preventive measure to judge and assort its contents and to prohibit the expression of un-endorsed opinion. The Constitution directly bans such censorship because it considerably impairs citizens' creativity and originality in their artistic activities. On top of that, the administrative authority may only permit to form pro-governmental or harmless public opinions by censoring opinions unfavorable to those in power.

B. The Sound Records, Video Products, and Game Software Act requires each import of foreign materials to be first endorsed by the Korea Media Rating Board, which may not endorse for import the materials deemed obscene and violent. Also, under the law, distributing or storing for distribution foreign video materials imported without import endorsement is imposed criminal punishment, and those un-endorsed video products may be confiscated for destruction by competent civil servants on behalf of the Ministry of Culture and Tourism.

C. Import recommendation of foreign video products demands submission of expressive materials before the publication of that expression - importation and distribution of foreign video products - to the KMRB, characteristically an administrative agency, in view of its structure and composition, and thus enables the administrative authority to decide whether to permit the publication. The KMRB can impose coercive measures such as criminal punishment on people in violation of the Act. Therefore, import recommendation satisfies all the elements of censorship: mandatory submission of the expressive materials for approval; prior inspection conducted by the administrative authority; prohibition of publication of an unapproved expression; and coercive measures to compel the inspection procedure. Import recommendation is a form of censorship banned by the Constitution.

2. Constitutionality Opinion of One Justice

Film, video, and other audio-visual materials, due to their influence and ripple effects, need prior content inspection at the pre-exhibition and pre-distribution stage. The KMRB is a civilian voluntary organization void of administrative coloring. Import

recommendation by the KMRB of foreign video materials constitutes a necessary and appropriate prior inspection procedure and does not constitute censorship banned by our Constitution.

Information

The import recommendation of foreign video materials was repealed upon the May 24, 2001 amendment of the Sound Records, Video Products and Game Software Act.

Parties

Requesting Court

Supreme Court (Request for Constitutional Review, 2001Cho472, April 13, 2004)

Original Case

Supreme Court 2001Do3495, Violation of the Sound Records, Video Products, and Game Software Act

Holding

The part of Article 16(1) pertaining to foreign video products, the part of Article 29(1)[4] referring to importation of foreign video products of Article 16(1) and the part of Article 30[5] referring to a person who has distributed or kept imported foreign video products of Article 24(3)[2] of the Sound Records, Video Products, and Game Software Act(Enacted by Act No. 5925 on February 8, 1999, and before wholly amended by Act No. 6473 on May 24, 2001) are unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) Petitioner Son ○-chul conspired with his brother non-party Son ○-Jin, during the period of early December, 1999 to November 22, 2000, and imported 600 copies of foreign motion picture DVDs by using websites such as "Amazon.com" and receiving them by mail at his office in ○○ Building in Yeouido-dong, Yeongdeungpo-gu, Seoul. He distributed the foreign video products via his internet homepage. He, in doing so, failed to obtain import recommendation by the Korea Media Rating Board (hereinafter referred to as the "KMRB"), and did not delete obscene, lascivious, or violent scenes from the motion pictures. For this failure, he was sentenced to a fine of Korean Won 5,000,000 by the Daegu District Court for the violation of the Sound Records, Video Products and Game Software Act (Daegu District Court, 2000Go-Dan8228).

(2) The petitioner's appeal to the appellate court was dismissed (2001No167) and he appealed to the Supreme Court. While the appeal was pending (2001Do3495), the petitioner made a request for constitutional review of Article 16(1) etc., of the Sound Records, Video Products and Game Software Act, which provide for the import recommendation procedure administered by the KMRB (2001Cho472). The Supreme Court recognized that the constitutionality of the part of Article 16(1) pertaining to foreign video products, the part of Article 29(1)[4] referring to the importation of foreign video products of Article 16(1) and the part of Article 30[5] referring to a person who has distributed or kept imported foreign video products of Article 24(3)[2] of the Act is a precondition of this trial, and thus requested this constitutional review.

B. Subject Matter of Review

The subject matter of review is the constitutionality of the part of Article 16(1) regarding foreign video products, the part of Article 29(1)[4] referring to the importation of foreign video products of Article 16(1) and the part of Article 30[5] referring to a person who distributed or kept imported foreign video products of Article 24(3)[2] of the Sound Records, Video Products, and Game Software Act(enacted by Act No. 5925 on February 8, 1999, and before wholly amended by Act No. 6473 on May 24, 2001, hereinafter referred to as the "Act"). The provisions are as follows(hereinafter referred to as the "instant provisions"):

Article 16 (Import of Sound Records, Video Products, or Game Software)

(1) A person who desires to import sound records (including

their originals; hereinafter referred to as "foreign sound records"), video products (including their originals, hereinafter referred to as "foreign video products"), or game software (hereinafter referred to as "foreign game software") that are manufactured abroad shall obtain recommendation thereon from the Korea Media Rating Board under Article 17 of the Public Performance Act, except as provided by Presidential Decree.

(2)~(4) Omitted.

(5) The Board shall not make recommendation on import as prescribed in paragraph (1) on the foreign sound records, foreign video products or foreign game software falling under any of the following subparagraphs:

(i) Where their contents may be in conflict with the basic democratic principles or may be detrimental to the national prestige;

(ii) Where they represent violence, sex, etc. in such an excessive manner that they may corrupt public morals and disturb social order; and

(iii) Where they so affect adversely the international diplomatic relations or the cultural subjectivity of the nation that they may do harm to national interests.

Article 29 (Penal Provisions)

(1) Any person who falls under any of the following subparagraphs shall be punished by imprisonment for a period of not more than five years or by a fine not exceeding 50 million won:

(i)~(iii) Omitted.

(iv) A person who has imported or manufactured foreign sound records, foreign video products, or foreign game software without obtaining recommendation as prescribed in Article 16(1) or (2).

(v)~(x) Omitted.

(2) Omitted.

Article 30 (Penal Provisions)

Any person who falls under any of the following subparagraphs shall be punished by imprisonment for a period of not more than two years or by a fine not exceeding 20 million won:

(i)~(iv) Omitted.

(v) A person who has distributed the sound records, video products, or game software falling under any of the subparagraphs of Article 24(3), or offered them to the public

for their viewing or amusement or, to this end, kept and exhibited them.

Article 24 (Closure and Removal etc.)

(1), (2) Omitted.

(3) When sound records, video products, or game software falling under any of the following subparagraphs have been discovered, the Minister of Culture and Tourism or the head of Si/Gun/Gu may direct the relevant public officials to remove and destroy them:

(i) Omitted.

(ii) Sound records, video products, or game software that have been imported, manufactured, or carried in without obtaining recommendation under Article 16 or 17.

(iii)~(v) Omitted.

(4)~(6) Omitted.

The constituting provisions of the KMRB are included as an appendix.

2. Opinion of the Requesting Court and the Related Parties

A. Reasons for Requesting Constitutional Review

(1) The appellate judgment, preceding the Supreme Court, upheld the decision of the court of first instance which applied the instant provisions upon the fact of this case - the petitioner importing foreign video products without obtaining the import recommendation and distributing or keeping the unrated foreign video products for distribution. Therefore, the constitutionality of the instant provisions is a precondition of our trial taking place due to the appeal of the petitioner.

(2) Article 21 (1) of the Constitution states "all citizens shall enjoy the freedom of speech and press," and the freedom of speech and press includes the freedom of expression. As video products are a means of expression, manufacturing, importing, and distributing them are protected under Article 21(1) of the Constitution.

The KMRB, practically an administrative body, inspects the contents of foreign video products before they are imported, and prohibits importation or distribution of foreign video products that fall under Article 16(5) of the Act. Moreover, when a person

imports or distributes foreign video products without the import recommendation, the person can even be subjected to criminal punishment. Therefore, the import recommendation procedure administered by the KMRB under Article 16(1) of the Act is a form of censorship absolutely banned under Article 21(2) of the Constitution.

B. Opinion of the Minister of Culture and Tourism

(1) The influence of films, due to the characteristic of audio-visual media which appeal to visual and auditory senses, is powerful: once they are shown, their impressions and shock effects are conveyed in a strong and direct manner, and the magnitude of its ripple effect has grown extensive with video equipment being wide spread. Accordingly, there is a certain need for inspection and regulation of films or videos before they are viewed or distributed, because there is no effective means of regulation once they are distributed to consumers.

(2) There is no room for the administrative authority to exercise power upon the composition of the KMRB. The members of the KMRB are primarily selected by the organizations consisting of bona fide civilians from specialized fields, and then the president of the National Academy of Arts recommends them to the President of the Republic of Korea, who then commissions them. Considering the legislative purpose of and the provisions of the Sound Records, Video Products, and Game Software Act, it is clear that the KMRB is an autonomous civilian entity.

Therefore, the import recommendation procedure, administered by the KMRB, does not constitute a form of censorship absolutely banned under Article 21 (2) of the Constitution, because only prior inspection conducted by the administrative authority is prohibited, and the KMRB is not an administrative agency, but an autonomous civilian entity.

3. Decision

A. Provisions of the Constitution Related to Ban on Censorship and the Concept of Censorship

The Constitution generally protects freedom of press under Article 21(1): "all citizens shall enjoy the freedom of speech and press, and the freedom of assembly and association," and expressly bans any forms of censorship under Article 21(2): "licensing or

censorship of speech and press, and licensing of assembly and association shall not be permitted."

The Constitution expressly bans censorship of the press, but does not specify what form of censorship is banned by the Constitution. In a constitutional review of Article 12, etc., of the Motion Picture Act (93Hun-Ka13 etc, October 4,1996), the Constitutional Court iterated reasons for banning censorship and outlined the concept of censorship banned under Article 21(2) of the Constitution as follows:

"Paragraphs 1 and 2 of Article 21 of the Constitution state that all citizens shall enjoy the freedom of speech and press, and that licensing or censorship of speech and press shall not be permitted. Censorship here means the inspection of a view or an opinion by the administrative authority before it is expressed, conducted as a preventive measure to judge and assort its contents and to prohibit the expression of an un-endorsed opinion. The Constitution directly bans such censorship because it considerably impairs citizens' creativity and originality in artistic activities. On top of that, it may result in the administrative authority allowing only pro-governmental or harmless public opinions by censoring opinions unfavorable to those in power

Article 21(2) of the Constitution declares that restricting the freedom of speech and press by censorship is not permissible, even if it is based on a statute, notwithstanding that Article 37(2) of the Constitution states that the freedoms and rights of citizens may be restricted by a statute only when necessary for national security, the maintenance of law and order or public welfare. Censorship here means anything that practically falls under the concept of censorship stated above, regardless of the term or form.

However, the principle banning censorship does not prohibit all forms of prior restrictions, but only those prior inspections under which the publication of an expression solely depends on whether it is approved by an administrative authority. Four elements of censorship banned by the Constitution are as follows: mandatory submission of the expressive materials for approval; prior inspection conducted by the administrative authority; prohibition of publication of an unapproved expression; and coercive measures to compel the inspection procedure." (8-2 KCCR 212, 222-223)

In the aforementioned decision, the Constitutional Court introduced four elements - mandatory submission of the expressive materials for approval; prior inspection conducted by the administrative authority; prohibition of publication of an unapproved expression; and coercive measures to compel the inspection

procedure - as the standard for review of censorship.

The standard, presented in the decision, was adopted in a series of Constitutional Court decisions where censorship was an issue, and in the Motion Pictures Rating Case (13-2 KCCR 134, 2000Hun-Ka9, August 30, 2001), provisions of the Motion Pictures Industry Act concerning the KMRB withholding rating of a film for a certain period were declared unconstitutional because such rating amounts to censorship banned by the Constitution according to the above standard.

B. History and Contents of Import Recommendation

(1) Legislative History

Import recommendation on foreign video products originated from the import licensing on foreign video products stated in the Sound Records and Video Products Act, enacted by Act No. 4351 on March 8, 1991. Article 13(1) of the Sound Records and Video Products Act stated that any person importing or carrying in foreign video products or reproducing them for the purpose of sale, lending, or distribution should obtain a license from the Minister of Culture and Tourism, and Article 24(1)[2] of the Act stated that any person in violation of Article 13(1) should be punished by imprisonment for a period of not more than three years or by a fine not exceeding 20 million won.

The Sound Records and Video Products Act was wholly amended by Act No.5016, on December 6, 1995, and the import licensing procedure administered by the Minister of Culture and Tourism was changed to import recommendation procedure administered by the Public Performance Ethics Committee, and since then, the distribution of imported foreign video products without obtaining the recommendation was also subject to separate criminal punishment.

The agency administering the import recommendation procedure was changed to the Korean Performance Arts Promotion Council when the Sound Records and Video Products Act was amended on April 10, 1997. It was again changed to the KMRB, and the punishment for importing foreign video products without the recommendation, distributing them or keeping them to this end became more severe when the Sound Records, Video Products, and Game Software Act was enacted by Act No. 5925 on February 8, 1999. The constitutionality of the provisions related to the import recommendation of the Sound Records, Video Products, and Game Software Act enacted by Act No. 5925 on February 8, 1999 is the

subject matter of this review (import recommendation was entirely abrogated when the Sound Records, Video Products, and Game Software Act was wholly amended on May 24, 2001).

(2) Contents of the Import Recommendation

Import recommendation, according to the instant provisions, can be summarized as follows:

A person who desires to import foreign video products must obtain an import, recommendation thereon from the KMRB, and the KMRB may choose not to make the import recommendation when the foreign video products fall under certain criteria set by the Sound Records, Video Products, and Game Software Act and the KMRB. A person should not import or distribute foreign video products without the import recommendation, and criminal punishment is imposed upon any person in violation of the law.

Judging from the history of the import recommendation on foreign video products and from Article 16(5) specifying the criteria for not granting such recommendation, the legislative purpose of the instant provisions is to protect minors and public morals against descriptions exceedingly sexual and violent by pre-inspecting the contents of foreign video products and prohibiting importation or distribution of them if they fall under certain criteria and to regulate foreign video products for the sake of national security and maintenance of order.

C. Whether the Import Recommendation is against the Constitutional Principle Banning Censorship

(1) Import of Foreign Video Products and the Freedom of Speech and Press

Article 21(1) of the Constitution states that all citizens shall enjoy the freedom of speech and press, and the freedom of speech and press includes the freedom of expression.

The Constitutional Court stated, in several decisions, that "sound records and video products are means of expression and communication as long as they play a role forming opinions, and manufacturing sound records and video products is thus protected under the freedom of speech and press." (5-1 KCCR 275, 284, 91Hun-Ba17, May 13, 1993; 8-2 KCCR 395, 401, 94Hun-Ga6, October 31, 1996)

Importation and distribution of foreign video products are obviously a means of expression and communication in light of their

contributions in forming opinions. Therefore, importation and distribution of foreign video products fall within the protected realm of the freedom of speech and press, and censorship of this realm is banned by the Constitution.

(2) Whether Import Recommendation Falls Under the Concept of Censorship

We need to review whether the import recommendation procedure, administered by the KMRB, under the instant provisions, is a form of censorship banned by the Constitution, which meets all four elements the Constitutional Court has prescribed as the standard of review when reviewing censorship cases: mandatory submission of the expressive materials for approval; prior inspection conducted by the administrative authority; prohibition of publication of an unapproved expression; and coercive measures to compel the inspection procedure.

(A) Article 16(1) of the Act stipulates that any person who desires to import video products manufactured abroad must obtain an import recommendation from the KMRB, and Paragraph 5 of the article provides for the standard of review for the contents and thereby selecting the video products that the KMRB will not make recommendations upon. Judging from the related provisions and the legislative purpose of the import recommendation, it is unquestionable that if the expressive materials - foreign video products - are to be domestically distributed, the materials should be submitted to the agency administering the import recommendation procedure beforehand.

(B) The Constitutional principle banning censorship only applies when an administrative authority conducts the censorship. Hence it matters whether the KMRB administering the import recommendation procedure is an administrative authority.

The Constitutional Court, in the decision of 2000Hun-Ga9 on August 30, 2001, stated the following in relation to the nature of the KMRB when it reviewed the constitutionality of withholding of film ratings under Article 21(4) of the Promotion of the Motion Pictures Industry Act (wholly amended by Act No. 5929 on February 8, 1999).

"The KMRB, which undertakes the task of reviewing and rating films and holds the power to withhold a rating, does not owe a duty to inform or report to the Minister of Culture and Tourism like the former Public Performance Ethics Committee or the former Korean Performance Art Promotion Council. However, the members of the KMRB are still appointed by the President of the Republic of Korea (Article 18(1) of the Public Performance Act), and details of

composition and procedures of the KMRB are to be stipulated by Presidential Decree (Article 18(2) of the Public Performance Act, Article 22 of the Enforcement Decree of the Public Performance Act). Furthermore, the State can subsidize the KMRB, for its necessary operation costs, from the national treasury (Article 30 of the Public Performance Act). Considering these facts, it is undeniable that the administrative authority can constantly influence the composition of the inspecting body and thus can censor. Although the independence of the KMRB in its reviewing and rating activities is guaranteed(Article 23 of the Public Performance Act), it does not essentially matter in determining whether it constitutes a censoring body, since the independence of the inspecting body is a precondition required, as a matter of course, in all kinds of inspection procedures to secure impartiality and objectivity in the inspection procedure and the outcome. Once the inspection procedure is designed and planned in a form of legislation by the State, the fact that the KMRB is composed of civilians and is guaranteed independence does not alter the legal nature of withholding of film ratings stipulated by the Public Performance Act. Accordingly, the withholding of film ratings by the KMRB of this nature also satisfies the element of censorship - prior inspection procedure conducted by the administrative authority."

The applicable provisions regarding the KMRB were originally stipulated in the Public Performance Act. Then with the amendment on May 24, 2001 the Sound Records, Video Products, and Game Software Act provided for the KMRB, and there also have been some changes in related provisions. However, the KMRB administering the import recommendation procedure of foreign video products, stipulated by the instant provisions, was established under the Public Performance Act before its amendment, and it is identical to the KMRB that the Constitutional Court reviewed and recognized its nature as an administrative agency when it withheld film ratings in the decision (2000Hun-Ga9, August 30, 20001) mentioned above.

In conclusion, as pertaining to censorship, the KMRB, in this case, is an administrative authority in its structure and composition.

(C) Next, let us review whether the instant import recommendation has other elements of censorship: prohibition of the publication of an unapproved expression and coercive measures to compel the inspection procedure.

According to the Sound Records, Video Products, and Game Software Act, an import recommendation must be obtained from the KMRB if foreign video products are to be imported for distribution (Article 16(1)), and the KMRB shall not make the recommendation if the contents of the foreign video products fall under certain

criteria(Article 16(5)). Criminal punishment is imposed on a person who has imported, distributed or kept foreign video products to this end without obtaining the recommendation(Article 29(1)[4] and Article 30[5]). The Minister of Culture and Tourism, etc., may direct the relevant public officials to remove and destroy foreign video products imported without the recommendation (Article 24(3)[2]).

Judging from these aspects, domestic distribution of foreign video products can be completely prohibited if some of the contents fall under certain criteria set by the Act and the KMRB, unless the importer voluntarily deletes or modifies the problematic contents. Although facially it takes a form of 'recommendation,' it restricts publication of expressions through foreign video products unless the recommendation is obtained from the KMRB. Therefore, import recommendation stipulated by the instant provisions, actually prohibits the publication of an unapproved expression.

In addition, as import recommendation of foreign video products, stipulated by the instant provisions, is followed by penal provisions and provisions stipulating coercive removal and destruction, it obviously possesses coercive measures to compel the inspection procedure.

(3) Sub-conclusion

According to what has been reviewed so far, import recommendation of foreign video products, stipulated by the instant provisions, demands submission of expressive materials before the publication of an expression - importation and distribution of foreign video products - to the KMRB, characteristically an administrative agency, and thus enables the administrative authority to decide whether to permit the publication. There are coercive measures such as criminal punishment for people in violation of the Act. Therefore, import recommendation is a form of censorship banned by the Constitution, because it satisfies all elements of censorship: mandatory submission of the expressive materials for approval; prior inspection conducted by the administrative authority; prohibition of publication of an unapproved expression; and coercive measures to compel the inspection procedure.

4. Conclusion

The instant provisions are unconstitutional, and the Court declares so by the consensus of all Justices except Justice Song In-jun who wrote a dissenting opinion in paragraph 5 below.

5. Dissenting Opinion of One Justice

I expressed my opinion with respect to the necessity of pre-inspection of audio-visual materials in my dissenting opinion in the decision (2000Hun-Ka9, August 30, 2001), mentioned in the majority opinion above, as follows (13-2 KCCR 134):

"Generally speaking, in the realm of speech and press, the State can not justify restriction on expression with the mere contention that the expression is without worth or is harmful. The state intervention can only be deemed necessary when the harm resulting from that expression cannot be ameliorated through the marketplace of ideas. Hence, in principle, the state intervention is a secondary solution in the realm of speech and press.

However, not every expression can be ameliorated by the self-correcting mechanism of the civil society. Some expressions, once published, cause harm that cannot be ameliorated by the free competition of ideas or harm too great to wait for other expressions or ideas to appear and dissolve the same. Such expressions are not protected under the freedom of speech and press, and the state intervention is allowed as a primary solution in this area.

Article 21(4) of the Constitution states, "Neither speech nor press shall violate the honor or rights of other persons, or undermine public morals or social ethics." This can be regarded as exemplifying expressions not protected under the Constitution, while setting a limit on the freedom of expression.

Obscene expressions, defined as 'a naked unabashed sexual expression which distorts human dignity or humanity and which appeals only to the prurient interest with no literary, artistic, scientific or political value' immensely damage sound sexual morals of the society and their harm cannot be easily ameliorated through the marketplace of ideas. Hence, obscene expressions are one example of expressions not protected under the freedom of speech and press.

Accordingly, if a certain expression does not fall under the freedom of speech and press protected under Article 21(4) of the Constitution, such expression should be inspected and filtered, in advance, in an appropriate manner.

The influence of films, due to the characteristic of audio-visual media which appeal to visual and auditory senses, is powerful: once they are shown, their impressions and shock effects are conveyed in a strong and direct manner, and the magnitude of its ripple effect has grown extensive with video equipment being wide-spread. Accordingly, there is a certain need for inspection and regulation of

films or videos before they are viewed or distributed, because there is no effective means of regulation once they are distributed to consumers. Moreover, there is a serious need to block minors' access to obscene or violent films in advance.

Some contend that withholding film ratings is not directly related to the public interest in the protection of minors since there already is a film rating system and therefore minors' access to harmful motion pictures is blocked. Such contention is overlooking the magnitude of the gap between statutory regulation and its execution in practice. Besides, the public interest in the protection of minors still retains a significant meaning at present when several films of different ratings are shown in the same theatre."

Today, video equipments are widely distributed and almost all films are repeatedly reproduced as video products. Therefore, the necessity of pre-inspection of video products is no less than that of films, considering their influence and the ripple effect. Rather, the necessity is greater, judging from the following reasons:

Since films are shown in confined space, i.e. theatres, films rated for "Restricted Showing" can be restricted to be shown solely in Restricted Showing theatres, and their advertisement restricted to be commenced or distributed only in these theatres. This enables access control of the users and regulation pertaining to the protection of minors, etc., effectively at the distribution stage. On the contrary, controlling video products, at the distribution stage, is relatively harder because video products can be easily accessed by any person at anytime and anywhere. Therefore, the necessity of pre-inspecting their contents prior to showing and distribution is much greater than that of films. Particularly in the case of foreign video products, it is impossible to bring criminal prosecution upon manufacturer for the contents of videos even though they often contain excessively profane or violent scenes that injure the character of minors. Considering these facts, it is highly necessary to prevent indiscreet importation of foreign video products and circulation of them to minors.

Moreover, recent rapid development of the Internet culture has accelerated the circulation speed at an unimaginable rate, and if video products containing illegal materials are circulated via the Internet, it would apparently result in extremely serious harm. A good example of this is a recent scandal of a secret file about entertainers. The file has been illegally spread over the Internet and has brought on much public criticism.

In the decision (2000Hun-Ka9, August 30, 2001), referred to above, I also mentioned the nature of the KMRB in charge of

making import recommendation of foreign video products: "the KMRB is an autonomous civilian entity independent from the administrative authority, as it was established without the administrative coloring found by the decision of the Constitutional Court that determined the nature of the Public Performance Ethics Committee and the Korea Performance Arts Promotion Council as the administrative authorities and adjudicated that they were censoring bodies." The reasons are as follows: Firstly, the prospective members of the KMRB are selected by organizations consisting of bona fide civilians from specialized fields. Then the President of the National Academy of Arts recommends them to the President who then, as a formality, commissions them; secondly, unlike the former KMRB, there is no longer a duty to report to the Minister of Culture and Tourism the inspection result and to receive approval of the chairman and the vice chairman; thirdly, the chairman and the vice chairman of the KMRB are mutually elected from among the members of the KMRB, the members of the KMRB do not receive any instructions or intervention in the exercise of their duties during their terms of office, and no member of the Board may be removed from office or suffer unfavorable treatment in his status against his will; lastly, the subsidy for the KMRB from the national treasury is less than 20% of its expenses.

Considering all these facts, I believe that the import recommendation by the KMRB under the instant provisions is a necessary and appropriate pre-inspection procedure for expressive materials and does not amount to censorship banned by the Constitution.

The majority opinion tries to apply a strong ban on censorship and it is understandable to the extent that it is a reaction to the past when the authoritarian government abused censorship to support and propagandize its position. However, preserving the soundness of the national society by protecting healthy social ethics and the juveniles against the harm that cannot be cured after publication is a minimum safeguard in this value-chaotic era, which should never be abandoned.

Accordingly, I believe the instant provisions are not unconstitutional.

Justice Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe(Assigned Justice), Jeon Hyo-sook and Lee Sang-kyung

[Appendix] Constituting Provisions of the KMRB

The KMRB was established by the Public Performance Act at the relevant time and the scope of its official functions was stated

in the Public Performance Act.

The Public Performance Act(Wholly amended by Act No. 5924 on February 8, 1999)

Article 17 (Korea Media Rating Board)

The Korea Media Rating Board (hereinafter referred to as the "Board") shall be hereby established to secure the ethical and public responsibilities of public performances and to thereby protect juveniles.

Article 18 (Formation)

(1) The Board is composed by 15 persons selected from those with expertise and experience in public performance such as films or videos and game by the entities chosen by the Presidential Decree in the fields culture and art, visual representations, juvenile affairs, law, education, and journalism etc.; who are then nominated by the president of the National Academy of Arts, and then commissioned by the President of the Republic of Korea.

(2) Such matters as may be necessary for the formation and procedures of the Board shall be determined by the Presidential Decree.

Article 19 (Chairman, etc.)

(1) The Board shall have a chairman and a vice chairman.

(2) The chairman and the vice chairman of the Board shall be mutually elected from among the members.

(3) The chairman shall represent the Board and have overall control of the affairs of the Board.

(4) In case the chairman is unable to perform his duties for an unavoidable reason, the vice chairman shall act in his place and, in case both the chairman and the vice chairman are unable to perform their duties, members of the Board in precedence of age shall act for them.

(5) The members of the Board except the chairman shall be non-standing members.

Article 20 (Terms of Office of Members)

(1) The terms of office of the members, the chairman and the vice chairman of the Board shall be three years.

(2) In case the office of any member is vacant, the supplementary member shall be commissioned pursuant to Article 18 within 30 days and his term of office shall be the remaining period of the term of his predecessor.

(3) The chairman and members of the Board shall continue to

perform their duties until their successors are appointed pursuant to Article 18 after their respective terms of office have expired.

Article 21 (Treatment of Members and Prohibition of Concurrent Office)

(1) Standing members of the Board shall be paid remuneration, while non-standing members of the Board are honorary posts but they may, nevertheless, be paid actual expenses necessary for performing their duties under the conditions as prescribed by the Board Regulations.

(2) Except as otherwise provided for in the Board Regulations, standing members may not concurrently hold another office for profit.

Article 22 (Disqualification for Members)

No person who falls under any of the following subparagraphs may become members of the Board:

(i) Public officials (excluding public officials in education and judges);

(ii) Members of political parties under the Political Parties Act;

(iii) Persons who fall under any of subparagraphs of Article 33 of the State Public Officials Act; and

(iv) Any other persons who are determined by the Presidential Decree.

Article 23 (Independent Exercise of Duties and Guarantee of Status)

(1) Members of the Board shall not receive any instructions or intervention in the exercise of their duties during their terms of office.

(2) No member of the Board shall be removed from office against his will unless he falls under any of the following subparagraphs:

(i) Where he falls under disqualification as referred to in Article 22;

(ii) Where he is unable to perform his duties for a long time because of serious mental or physical impairment.

Article 24 (Functions)

(1) The Board shall deliberate and decide upon matters set forth in the following subparagraphs:

(i) Matters concerning the rating of visual representations;

(ii) Matters concerning the formulation and enforcement of the Board Management Plans;

(iii) Matters concerning the establishment and amendment of the Board Regulations; and

(iv) Such other matters as determined by this Act or other Acts and subordinate statutes as the function or authority of the Board.

(2) The Board shall regularly survey public opinion on the visual representations, etc. already classified and take account of the results therefrom in carrying out the relevant matters, such as classification, etc.

(3) The Board may demand, if necessary, the submission of the relevant materials from related persons such as visual representations importer, manufacturer etc. to see whether they are in compliance with the deliberation and decision in pursuant to paragraph (1) 1 and may, if there exists any violation, demand correction therefor.

Article 25 (Quorum)

Decisions of the Board shall require the attendance of a majority of the total members and the concurrent vote of a majority of the members present: provided, that any decision on the matter as prescribed in paragraph (1) 3 of Article 24 shall require the concurrent vote of a majority of the total members.

Article 26 (Opening of Sessions to Public)

(1) Sessions of the Board shall be open to the public under the conditions as prescribed by the Board Regulations: provided, that sessions may be closed to the public by the decision of the Board if there exists any special reason.

(2) The Board shall record the proceedings of sessions under the conditions as prescribed by the Board Regulations.

Article 27 (Sectional Committees, etc.)

(1) The Board may form and operate sectional committees when necessary to perform its function as prescribed in subparagraphs 1 and 4 of paragraph (1) of Article 24.

(3) Such matters as may be necessary for the formation and operation of the sectional committees shall be determined by the Board Regulations.

Article 28 (Secretariat)

(1) There shall be established a secretariat of the Board in order to assist the Board in doing clerical work.

(2) A secretary general shall be assigned to the Board and the

chairman of the Board shall appoint him with the approval of the Board.

(3) Such matters as may be necessary for the formation and operation of the secretariat shall be determined by the Board Regulations.

Article 29 (Establishment and Amendment of Board Regulations etc.)

In case the Board Regulations are to be established or amended, the Board shall give an advance notice for a fixed period of not less than 20 days and may announce it officially by publishing it through the Gazette of the Government, etc when necessary.

Article 30 (Financial Assistance)

The State may assist the Board with such expenses as may be required for its operation.

2. *Constitutional Review of the Special Act Regarding the Procurement of School Site Article 2 Item 2*
(17-1 KCCR 294, 2003Hun-Ka20, March 31, 2005)

In this case, the Court found unconstitutional the relevant provisions of the former School Site Procurement Act, which imposed on the purchasers of collective housing units an excise of the fund necessary for procuring school sites.

Background of the Case

The relevant provisions of the Act on Special Cases of School Site Procurement (hereinafter referred to "as the Instant Provisions") imposes on those who purchased housing units from the developer of a collective housing project consisting of more than 300 units, the excise for the purpose of defraying the costs of procuring school sites. The purchasers (petitioners) purchased collective housing units (apartments). The competent administrative agencies imposed the school site procurement excise on the purchasers pursuant to the Instant Provisions. The purchasers filed a suit to cancel the imposition of the excise, and requested the suit to be referred for constitutional review. The court accepted the request and referred for constitutional review.

Summary of the Decision

The Constitutional Court found the Instant Provisions unconstitutional unanimously for the following reasons:

1. The Constitution states that all citizens who have children to support shall be responsible at least for their elementary education and other education as provided by law, and that compulsory education shall be free of charge (Article 31(3) of the Constitution). In such compulsory education system, rather than the aspect that it imposes on citizens the duties to send their children to school, the aspect that it imposes on the State the duties to provide adequate educational facilities and to improve educational environment is much more significant.

Providing school facilities required for compulsory education is a general goal of the State, and there is no doubt that school sites are

essential material foundation to execute compulsory education. Hence, the expenses required to accomplish such goal should be financed from the general budget of the State. Then, at least in cases concerning compulsory education, apart from the general treasury, additionally collecting required expenses from a certain group by employing extra financial measures, such as excises, is in violation of the Constitution which declares that compulsory education shall be free of charge.

2. Even if revenue-generating excises can be collected in relation to the educational finance concerning secondary education that is not compulsory, this may only be permitted when all the prerequisites of general revenue-generating excises is satisfied equally. The School Site Procurement Excise Tax is a means to finance general public projects or public projects having the characteristics of general public projects and a portion of the School Site Procurement Excise Tax is actually used to finance general public projects. Imposing the School Site Procurement Excise Tax uniformly on all the purchasers within the meaning of the Housing Construction Promotion Act, treating them as one homogeneous obligor group, constitutes discrimination without reasonable basis.

The payment obligors, as a whole, are not homogeneous as a group to be distinguished socially from the general public, especially the purchasers in other development projects. Furthermore, the need to procure school sites arises out of the construction and supply of new housing, and the extent of such need is proportional to the number of housing units newly supplied as a result of each development project, regardless of the purpose of or the process for that development project. The Instant Provisions impose the School Site Procurement Excise Tax not according to whether new housing units are supplied but according to under which law the housing is supplied. It constitutes unfair adverse treatment of the petitioners without any reasonable basis. The Instant Provisions violate the constitutional principle of equality.

Parties

Requesting Court

Incheon District Court

Original Case

Incheon District Court 2002Gu-Hap3878, Annulment of the Assessment of Excise Tax

Holding

The part of Article 5(1) of the former Act on Special Cases of School Site Procurement (amended by Act No. 6219 on January 28, 2000 and by Act. No. 6744 on December 5, 2002) stating that excise tax for school site procurement can be imposed and collected from a person who purchased . . . collective housing in the development project zone (as defined in subparagraph 2 Article 2 of the Act on Special Cases of School Site Procurement), under the House Construction Promotion Act, is unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) Petitioners are some of the purchasers of Geomam 2-Cha ○○Apts. on Lots 1,2, Block 11, Geomam Housing Site 2, Seo-gu, Incheon (718 Households), Geomam 3-Cha □□ Apts. on Lot 2, Block 30, Geomam Housing Site 2 above (341 Households), Geomam 2-Cha ○○ Apts. on Lot 1, Block 37, Geomam Housing Site 2 above (325 Households), and ○○ Apts. on Blocks 6,7, Samsan Housing Development Site 1, Bupyeong-gu, Incheon (2098 Households).

(2) The Heads of Seo-gu and Bupyeong-gu of Incheon Metropolitan City imposed the School Site Procurement Excise Tax, pursuant to Article 5(1) of the Act on Special Cases of School Site Procurement (hereinafter referred to as "the School Site Act"), upon the petitioners, when the development project executors of each apartment complex mentioned above submitted a list of purchase contract signers, which included the petitioners according to Article 5-2(1) of the Enforcement Decree of the Act on Special Cases of School Site Procurement (hereinafter referred to as "the Enforcement Decree").

(3) The petitioners, thereupon, filed a lawsuit with the Incheon District Court, 2002Gu-Hap3878, seeking annulment of the assessment of the excise tax, and made a request for constitutional review of subparagraph 2 of Article 2 and Article 5(1) of the School Site Act, which was granted by the presiding court.

B. Subject Matter of Review

The subject matter of review is the constitutionality of the part of Article 5(1) which states, "The Head of City/Do may impose and collect excise tax for the school site procurement from a person who purchased... collective housing in the development project zone" and the part of subparagraph 2 of Article 2 which defines development project as "a project undertaken to create and develop a housing construction site of more than 300 households among projects executed under the House Construction Promotion Act..." of the School Site Act (amended by Act No. 6219 on January 28, 2000, and before amended by Act No. 6744 on December 5, 2002).

In addition, the requesting court also made subparagraph 3 of Article 2 of the School Site Act the subject of this constitutional review. However, we do not need to review it separately because it merely contains a definition of the concept of the School Site Procurement Excise Tax, and ambiguity or comprehensiveness of the concept of the School Site Procurement Excise Tax is not relevant to the reasons for requesting constitutional review. Hence, excluding that provision, the statutory provisions that are the subject matter of review of this case, are as follows:

Article 2 (Definitions)

The definitions of terms used in this Act shall be as follows.

2. The term "development project" means a project undertaken to create and develop a housing construction site of more than 300 households among projects executed under the House Construction Promotion Act, the Housing Site Development Act and the Industrial Site and Development Act.

Article 5 (Imposition and Collection of Excise Tax)

(1) The Head of City/Do may impose and collect excise tax for the school site procurement from a person who purchased land for the construction of stand-alone houses excluding the land parceled out as a housing site for relocation under the Act on Special Cases concerning the Acquisition of Lands for Public Use and the Compensation for their Loss) or collective housing (excluding rental housing) in the development project zone.

2. Opinion of the Requesting Court and Other Related Parties

A. Reasons for Requesting Constitutional Review

The School Site Procurement Excise Tax, unlike tax, is a sort of special excise tax imposed for a particular economic or policy purpose or to achieve special goals. Therefore, with regard to its imposition and collection, it must be imposed only upon those groups who are much more specially and closely related to a particular social or economic goal to be achieved by the imposition (obtaining special gains or causing burdens) than general tax payers or other social groups, and who are capable of bearing the collective burden for such achievement.

The instant provisions restrict the range of development projects subject to the imposition of the School Site Procurement Excise Tax to those enforced by the House Construction Promotion Act, the Housing Site Development Act, and the Industrial Site and Development Act (these three statutes are hereinafter referred to as "the House Construction Promotion Act etc."). However, it is difficult to distinguish the need for school site procurement of development projects, under the House Construction Promotion Act etc., from that of development projects under the Building Act, the Urban Development Act, or the Urban Redevelopment Act, and even from that of rental housing construction projects under the Rental Housing Act. As a result, the instant provisions are in violation of the principle of equality since they restrict the property rights of the purchasers involved in development projects, pursuant to the House Construction Promotion Act etc., without reasonable grounds, compared to the purchasers of housing or land subject to development projects initiated under other statutes.

Moreover, the instant provisions impose the School Site Procurement Excise Tax on each development project according to the number of households (300 households) created by that development project. Imposing the excise tax solely according to the number of households, created by a development project, without taking into account the size of the purchased area or wealth of the purchasers is unjust, because it imposes a heavier burden upon the purchasers of small housing who are socially and economically weak, as the purchasers of collective housing of more than 300 households with smaller purchased area have to pay the excise tax while the purchasers of collective housing of less than 300 households, with larger purchased area, are exempt from payment. Furthermore, the School Site Act may distort the housing market by inducing the housing builders to consider the excise tax a more important factor than consumers' demand in planning the housing supply.

Additionally, people obliged to pay the School Site Procurement Excise Tax cannot be considered sufficiently homogeneous as a

group, to justify the purpose of the imposition.

For the above-mentioned reasons, it is difficult to consider the School Site Procurement Excise Tax an appropriate means of achieving the legislative purpose, and its imposition and collection are not based on reasonable standards.

B. Opinion of the Minister of Education & Resources Development

The purpose of imposing the School Site Procurement Excise Tax is justified for the School Site Procurement Excise Tax is imposed to flexibly cope with the rapid increase in demand for school sites and new school buildings resulting from various kinds of development projects.

The reason for imposing the School Site Procurement Excise Tax, upon development projects of more than 300 households, is that at the time of the amendment of the School Site Act, the circumstance was such that in the case of the development projects of more than 300 households, it was no longer possible to procure school sites or new school buildings through the general treasury, due to the rapid increase in school demand. Accordingly, it is just to restrict the scope of imposition to development projects of more than 300 households.

C. Opinion of the Head of Seo-gu and the Head of Bupyeong-gu of Incheon Metropolitan City

Although the Constitution, the Framework Act on Education, and the Elementary and Secondary Education Act state that the State and the local governments should conduct compulsory education free of charge, this is just a declaratory norm which does not take the actual financial conditions into account, and the decision of whether to impose the School Site Procurement Excise Tax, upon development projects exceeding a certain scale, belongs within the scope of legislative discretion.

Even if the School Site Act restricted the range of development projects, subject to the imposition of the excise tax to those enforced by the House Construction Promotion Act etc., it is to impose the minimum necessary excise tax by comparing educational demand and educational finance. Afterwards, the scope of imposition was extended to the case of development projects initiated under the Building Act, the Urban Development Act, and the Urban Redevelopment Act, to reflect the increase in demand for

educational finance and the improvement in the national income level.

Since the School Site Procurement Excise Tax is imposed when educational demand is induced or prompted by an un-natural cause, it is reasonable to determine the scope of imposition in accordance with the number of households. Besides, since the School Site Procurement Excise Tax is imposed upon those who purchased the collective housing at the same time, and they are homogeneous as a group as they induced the educational demand simultaneously.

3. The General Facts on the School Site Procurement Excise Tax

A. Legislative Background of the School Site Procurement Excise Tax

The School Site Act was enacted by Act No. 5072 on December 29, 1995 for the purpose of facilitating the smooth procurement of school sites by providing for special cases concerning the creation, development, and supply of school sites and the defrayment of expenses, as the procurement of school sites became difficult due to low local educational finances and the skyrocketing land prices while the demand for new schools has increased sharply as a result of housing site development projects etc.

According to a written opinion, by an expert advisor to the National Assembly, around the time of the enactment, the number of new schools to be built from 1996 to 1998 was three hundred and eighty three in total, the required budget was estimated to be three trillion and sixty four billion won and the school site purchasing expenses were estimated to be one trillion and eighty hundred and forty billion won. It was expected that if the School Site Act came into effect, it would contribute to the improvement of the educational condition, as the amount of the portion of the special accounts for educational expenses previously used to purchase school sites, which is equivalent to the sum of the School Site Procurement Excise Tax collected pursuant to the School Site Act, can be invested to relieve the problems of overcrowded classrooms and double-shift classes.

B. Payors and Calculation Method of the School Site Procurement Excise Tax

The person obliged to pay the School Site Procurement Excise

Tax is one who purchased land for construction of single-family housing or collective housing of projects to create or develop housing construction sites of more than 300 households among the projects executed under the House Construction Promotion Act etc (subparagraph 2 and 3 of Article 2 of the School Site Act).

The School Site Procurement Excise Tax is imposed at the rate of 0.8% of the sale price in case of collective housing and 1.5% of the sale price in case of land for the construction of stand-alone houses (paragraph 1 and 2 of Article 5-2 of the School Site Act).

C. Use of the School Site Procurement Excise Tax and Financing for School Site Procurement

The School Site Procurement Excise Tax is an expense collected for the procurement of school sites, and school site means the land required to build school buildings, playgrounds, and other school facilities such as practice areas for various kinds of schools (elementary schools, middle schools, and high schools) (subparagraph 1 and 3 of Article 2 of the School Site Act). The School Site Procurement Excise Tax can be used for paying the price of land required to build such school facilities stated above, the expenses such as appraisal fees incurred in purchasing the school site, and the expenses incurred in the imposition and the collection of the School Site Procurement Excise Tax.

Half of the expenses required for school site procurement is borne by the general account of the City/Do, and the other half by the special account for educational expenses of the City/Do (Article 4(4) of the School Site Act). The special account for educational expenses, concerning the building of new school facilities, is granted to the local government by the State according to Articles 1 and 5 of the Local Education Subsidy Act, and the amount the local government actually bears is half of the school site purchasing price. The expenses required for school site procurement, borne by the general account of the City/Do, may be raised from the amount of local tax imposed on and collected from the region where development projects are executed, as determined by the Presidential Decree, the amount of development charges imposed on and collected from the development project area, under the Restitution of Development Gains Act, as determined by the Presidential Decree, and the School Site Procurement Excise Tax imposed on and collected under the School Site Act (Article 6 of the School Site Act).

D. The Nature of the School Site Procurement Excise Tax

According to the classification by the basis of imposition, the School Site Procurement Excise Tax is a form of charge to those who created a demand : it is imposed to meet among the demand for public facilities increased by the construction of more than 300 households, the demand for elementary, secondary, and high school sites. In addition, the School Site Procurement Excise Tax also has the characteristic of a charge to beneficiaries as buyers of the housing receive a the special gain by their children being educated locally, owing to the execution of the particular public project - the establishment of schools.

On the other hand, according to the nature of the excise tax, the School Site Procurement Excise Tax is classified as a revenue-generating excise tax. It is because the School Site Procurement Excise Tax is imposed to defray the cost required to obtain basic school facilities and is unlikely to execute a policy or induce certain conduct such as restricting or banning housing site development or housing supply etc.

4. Constitutionality of the School Site Procurement Excise Tax

A. General Theory

An excise tax means an obligation to make payment, besides tax, imposed pursuant to statute in relation to a specific public project regardless of provision of goods or services, by the head of a national administrative agency, a local government agency, or a public organization or a corporation entrusted with administrative authority, etc., who are authorized to impose monetary obligations by statute. An excise tax may be labeled a cost-share fee, imposition, deposit, contribution, etc. (Article 2 of the Basic Act on Excise Tax Management). An excise tax is what was previously understood as a payment obligation imposed on those groups having special interests in a particular public project in order to charge them the necessary expenses for the project. However, and the current Basic Act on Excise Management excluded the guarantee of special economic benefit in return for a burden, from the prerequisites for the concept of excise tax, and thus comparatively widens the scope of an excise tax.

Meanwhile, since every citizen's right to property is constitutionally guaranteed (Article 23(1) of the Constitution), a

constitutional basis is needed when imposing financial obligations other than taxes on citizens. As the Constitution provides for a general reservation concerning the basic rights (Article 37(2) of the Constitution), the freedoms and rights of citizens may be restricted by Act when necessary for public welfare, and the same applies to restricting the right to property by the imposition of excise taxes. Therefore, establishing excise taxes by a statute also qualifies as a constitutionally permitted restriction on basic rights. Still, specific circumstances according to each kind of excise tax should be considered notwithstanding that the establishment of an excise tax is permitted pursuant to the general reservation.

Since revenue-generating excise taxes are very similar to taxes in that they can be imposed without any particular benefit in return to the obligors, the limits arise out of the principle of statutory taxation under Article 38 of the Constitution, the equity in bearing of public charges derived from the principle of equality under Article 11(1) of the Constitution, and the financial supervisory power pursuant to the National Assembly's right to deliberate and decide upon the national budget bill under Article 54(1) of the Constitution should be reviewed. Furthermore, general limits of the restriction on basic rights (the principle of proportionality) and especially in the case of the School Site Procurement Excise Tax, the relationship with gratuitousness of compulsory education under Article 31(3) of the Constitution should be additionally reviewed.

In the case of policy-executing excise taxes, apart from the basic constitutional financial order, they try to achieve social or economic policy goals by indirectly inducing and controlling the citizens' behavior through their imposition, instead of using direct means of regulation such as orders or restrictions upon individual actions. This often is more effective and using excise taxes as means of accomplishing social or economic policies does not automatically violate the Constitution (10-2 KCCR 819, 830, 98Hun-Ka1, December 24, 1998). However, it is needless to say that policy-executing excise taxes should, at least, be an appropriate means in accomplishing the social or economic policies and should maintain equity when imposing public charges derived from the principle of equality.

As previously stated, the School Site Procurement Excise Tax is close to a charge to those who create demand and is a revenue-generating tax. Giving this the primary concern, we will review its constitutional admissibility and the constitutionality of the instant provisions.

B. Review of the Constitutional Principle of Free Compulsory Education and the Prerequisites for the Legitimacy of an Excise Tax

(1) The Constitution states that all citizens who have children to support shall be responsible, at least, for their elementary education and other education as provided by Act (Article 31(2) of the Constitution), and that compulsory education shall be free of charge (Article 31(3) of the Constitution). Accordingly, Article 8(1) of the Framework Act on Education states that compulsory education shall be elementary education for a period of 6 years and secondary education for a period of 3 years, and compulsory education for secondary education for the period of 3 years shall be carried out in successive order, taking into account the financial conditions of the State under the conditions as determined by the Presidential Decree. The Elementary and Secondary Education Act states that the State shall take necessary measures such as securing facilities to conduct compulsory education (Article 12(1) of the Elementary and Secondary Education Act), and a local government shall establish and manage elementary schools, middle schools and special schools which teach elementary and middle school courses necessary for sending all persons subject to compulsory education to school in its jurisdiction (Article 12(2) of the Elementary and Secondary Education Act). In short, the Constitution imposes educational duties on citizens while declaring compulsory education free of charge to accommodate children in receiving required education and to enable impecunious parents to perform their educational duties. In such compulsory education system, rather than imposing on citizens the duty to send their children to school, the imposing on the State the duty to provide adequate educational facilities and to improve the educational environment is much more significant (refer to KCCR 3, 11, 19, 90Hun-Ka27, February 11, 1991).

Providing school facilities required for compulsory education is a general task of the State, and there is no doubt that school sites are the essential material foundation to execute compulsory education. Hence, the expenses required to accomplish such task should be financed from the general treasury of the State. Meanwhile, Article 31(6) of the Constitution stipulates that fundamental matters pertaining to educational finance shall be determined by statute, and it is meant to constitutionally provide for the minimum state obligation to ensure the effectiveness of the right to free compulsory education, and considering that the State bears heavier burdens than citizens in the free compulsory education system, it should be regarded as clarifying that the duty of the State is to accomplish free compulsory education as determined by the Constitution and laws, even by sacrificing other parts of the general treasury already secured or to be secured in the future. Then, at least in cases concerning compulsory education, apart from the

general treasury, additionally collecting required expenses from a certain group by employing extra financial measures such as excise tax is in violation of the Constitution that declares that compulsory education shall be free of charge.

Besides, even if revenue-generating excise taxes can be collected in relation to the educational finance concerning secondary education that is not compulsory, this may only be permitted when all the prerequisites of general revenue-generating excise taxes are satisfied equally.

(2) The Constitutional Court once stated that if the constitutional legitimacy of a revenue-generating excise tax is to be admitted, excise taxes must be permitted only exceptionally in relation to taxes and should not be abused to finance general public projects, the person obliged to pay excise taxes must have a specially close connection when compared to the general public, and when an excise tax is maintained for a long period, its reasonableness and appropriateness must be continuously monitored by the legislator (refer to Official Gazette 95, 722, 725-726, 2002Hun-Ba42, July 15, 2004). Yet, the prerequisites for the legitimacy of excise taxes can naturally be considered in the course of reviewing the limits of restriction on basic rights (refer to 15-1 KCCR 86, 95, 2002Hun-Ba5, January 30, 2003). In conclusion, the constitutionality of the School Site Procurement Excise Tax, which may infringe the right to property and the principle of substantially equal taxation, depends on whether it is in violation of the constitutional principle of equality and prohibition of excessive restriction.

C. Violation of the Principle of Equality

(1) Introduction

The prerequisites for the legitimacy of an excise tax are, in general, closely related to the constitutional principle of equality. An excise tax is a special financial burden imposed on a special group of obligors, not the general public, thereby restricting citizens' right to property. Therefore, there must be reasonable grounds in treating them unfavorably by discriminating against them from the general public, since arbitrary discrimination infringes on the obligor's right to equality. The School Site Procurement Excise Tax, like other general excise taxes, must be in conformity with the principle of equality. Therefore, we need to review whether the instant provisions conform to the principle of equality in justifying the imposition of the excise tax and selecting

the payment obligors by examining whether it is actually imposed in relation to a special public project proposed as the reasons for the imposition; whether the obligors are homogeneous as a group; and whether the group of obligors are specially related to the above public project.

(2) A Special Public Project

Article 31 of the Constitution states that all citizens have the right to receive education and it sets forth the State's duty to legislate concerning free compulsory education, promotion of lifelong education, the educational system and its operation, educational financing etc. The procurement of school sites is the most basic material foundation required before the establishment and operation of educational institutions for general formal education including compulsory education, and it is easily understandable that this is the most fundamental and general public project targeting all citizens among the State's duties regarding education. Therefore, in principle, its costs should be defrayed by the general treasury. Yet, the procurement of school sites required, in accordance with the increase in demand for educational facilities, due to a sudden increase in the housing supply in a certain area may fall under the scope of 'special' public projects in some regions.

However, the procurement of school sites pursuant to the School Site Act is not required only to cope with the simple increase in demand for schools in a particular region. The procurement of school sites is also required to cope with the increase in demands for general public projects for overall improvement in educational conditions such as abolition of double-shift classes, reduction in the number of students per class to relieve overcrowded classes, and procurement of facilities for other extra curricular activities etc. That is, even if the main purpose of the School Site Procurement Excise Tax is to meet demand for new schools in a particular region, the School Site Procurement Excise Tax actually collected is incidentally used to finance general public projects as well. A look at the legislative history leading to the School Site Act reveals that the School Site Procurement Excise Tax was contemplated together with an increase or possibility of an increase in the budget for the above-described general public projects and for the purpose of finances needed to procure new school sites.

The School Site Act enables financing of the expenses required in procuring school sites for elementary schools and some middle schools determined by the Framework Act on Education subject to compulsory education from the School Site Procurement Excise Tax.

Considering that compulsory education is a goal to be accomplished even by sacrificing other general goals of the State, and that all citizens are responsible for their children receiving compulsory education, even if citizens obliged to pay general taxes caused demand for compulsory educational facilities by purchasing housing in a particular region, it does not instantly render the procurement of compulsory educational facilities a special public project.

On the other hand, from the perspective of the payment obligors, the School Site Procurement Excise Tax collected is not always used to procure school sites for their children, since it is managed, not for each school site, but for the entire local government area (Special Metropolitan City/Metropolitan City/Do). Especially in case of elementary schools and middle schools, the unit area for the imposition of the excise tax is much greater than the unit area for student allotment. Therefore, in the perspectives of the payment obligors, the procurement of school sites by the local government has a strong characteristic of a general public project.

In the end, the School Site Procurement Excise Tax is a means to finance general public projects or public projects having the characteristics of general public projects and a portion of the School Site Procurement Excise Tax is actually used to finance general public projects. Then, it does not satisfy the prerequisite for the legitimacy of the excise tax, that excise tax must be imposed only for the purpose of financing a particular public project.

(3) Payment obligor's homogeneity as a group

The payment obligors must have a certain degree of homogeneity, and if they do, we can go on to review the closeness of the collective connection or the special collective responsibility of the payment obligors as a group to a public project. The element of homogeneity means not only that the group of obligors must be distinguished from the general public by the feature making them homogeneous as a group, but also that the degree of homogeneity, among the members of the group must be maintained to a certain extent.

Formally, it can be said that the payment obligors have a homogeneity which distinguishes them from the general public to the extent that they purchased new housing. However, the instant provisions are legal grounds for imposing the School Site Procurement Excise Tax on the purchasers of collective housing, and the focus of homogeneity among them should be whether they have induced demand for school sites. Nevertheless, apart from the

fact that they bought the collective housing at the same time, their interests in the procurement of school sites vary according to their specific circumstances: whether they will actually dwell in the housing once it is completed; whether or in what number they have children going to elementary or middle schools; whether they only have children going to high schools; whether they have both; and the varying number of children going to various kinds of schools. In general, it is unlikely that people who bought the collective housing of development project of more than three hundred households will have a similar degree of homogeneity in their demand for school sites. In other words, the chance of them having the same number of children attending schools is extremely slim.

Furthermore, we review whether the buyers of the collective housing of development projects, under the instant provisions, have homogeneity adequate to distinguish them from the general public, especially the purchasers of the collective housing of development projects not provided by the School Site Act. Not to mention development projects pursuant to other statutes concerning the construction of new housing such as the Building Act, the Urban Development Act etc, and even in case of development projects pursuant to the statutes concerning the redevelopment or reconstruction of existing housing such as the Urban Redevelopment Act, if the supply of new housing resulting from redevelopment or reconstruction exceeds the number of previous housing, the purchasers of the housing will give rise to the need for school site procurement like the purchasers of the development projects pursuant to the instant provisions. On the contrary, even if a development project is executed pursuant to the instant provisions, it hardly gives rise to the need for new school site procurement if the substance of the development project is merely reconstruction.

Then, from the perspective of an individual purchaser, comprising all purchasers collectively as an identical group of obligors and imposing the same School Site Procurement Excise Tax upon them while hardly considering their specific circumstances with respect to the need for school site procurement is discrimination without a reasonable basis. Even from the perspective of the group, as a whole, it is hard to say that they are sufficiently homogeneous, as a group, so as to socially differentiate them from the general public, especially from groups of purchasers of other development projects. Therefore, imposing the School Site Procurement Excise Tax upon the group of purchasers of development projects pursuant to the instant provisions infringes on the right to equality of each member in the group.

(4) Close Connection

The payment obligors must have a specially close connection to a particular public project, which is financed by their payment, compared to the general public. On the other hand, the Constitution guarantees every citizen the right to receive compulsory education, and even if some people incidentally induce demand for compulsory education or receive compulsory education under relatively good conditions, the fact alone does not make them closely related to the construction of new facilities for compulsory education.

As we have discussed so far, even in case of secondary education, which is not compulsory, school site procurement also assumes characteristics of a general public project. Therefore, the relationship between the payment obligors and such public project is weak. In addition, as indicated above, the payment obligors are not homogeneous as a group in relation to the public project and it is inevitable that the degree of closeness shall vary from one obligor to another depending on their individual circumstances.

The above two points alone compel us not to find that the petitioners are closely connected to the school site procurement project. Nevertheless, we examine whether the instant provisions that select only the purchasers of a particular public project as the payment obligors reasonably satisfy the requirement - close relationship to a public project.

With respect to the need for school site procurement, we need to review statutes concerning housing in light of construction and supply of housing, since the degree of intimacy between purchasers and public projects, pursuant to a statute, is determined by whether the statute is related to construction and supply of new housing or to redevelopment or reconstruction of existing housing.

Statutes regarding construction of new housing can be classified into (i) the House Construction Promotion Act, the Housing Site Development Act and the Industrial Site and Development Act referred to by the School Site Act, (ii) general building laws, (iii) and the Urban Development Act, the Rental Housing Construction Promotion Act, etc., concerning urban development methods. Statutes regarding redevelopment and reconstruction of exiting housing can be largely classified into (i) the Urban Redevelopment Act providing for urban redevelopment projects (ii) and the Temporary Measure Act for Improvement of Living Environment of Urban Low-Income People. However, even in case of statutes concerning redevelopment or reconstruction such as the Urban Redevelopment Act, development projects pursuant to any of the statutes mentioned above may result not only in the reconstruction of previous housing,

but also in the supply of additional new housing.

Meanwhile, the need for school site procurement is generated from construction and supply of new housing, and its degree is determined in proportion to the number of new houses created by a development project, without any relation to the purpose or the procedure of the development project. Therefore, not only in case of development projects, pursuant to other statutes, concerning construction of new housing such as the Building Act, the Urban Development Act etc., but also in case of development projects pursuant to statutes concerning redevelopment or reconstruction of existing housing, the purchasers of those development projects will have the same degree of intimacy to the public project of school site procurement as the purchasers of development projects under the instant provisions do, if the redevelopment or reconstruction results in the supply of new housing exceeding the number of previous housing. On the other hand, as we have previously discussed, even if a development project is executed pursuant to the instant provisions, it will hardly give rise to the need for new school site procurement if the substance of the development project is merely reconstruction as in the case of development projects executed by reconstruction associations.

Nevertheless, the instant provisions determine development projects subject to the imposition of the School Site Procurement Excise Tax not according to whether they supply new housing, but according to the statutes the housing supply is based on, and this is arbitrary and unfavorably treating the petitioners upon an unreasonable standard.

On the other hand, the Basic Act on Excise Tax Management defines excise tax as an obligation to make payment, besides tax, imposed pursuant to statute in relation to a specific public project regardless of provision of goods or services (Article 2 of the Basic Act on Excise Tax Management), and the guarantee of special economic benefit in return for the burden is not an essential prerequisite for the concept of excise tax. Therefore, revenue generated from an excise tax need not necessarily be used for the collective benefit of payment obligors. However, when it is used for the collective benefit of the payment obligors, the imposition of the excise tax can surely be justified (refer to 15-1 KCCR 86, 96, 2002Hun-Ba5, January 30, 2003).

The School Site Procurement Excise Tax collected pursuant to the instant provisions is not always used to procure school sites for the purchasers' children, since it is managed for the entire local government area (Special Metropolitan City/Metropolitan City/Do). Especially in case of elementary schools and middle schools, the

unit area for the imposition of the excise tax is much greater than the unit area for student allotment, and thus the relationship between the school site procurement project and the collective benefit of the payment obligors becomes less intimate.

In conclusion, imposing the School Site Procurement Excise Tax only upon the purchasers of new housing is a differential treatment without a reasonable basis, since the purchasers of new housing are not more intimately related to that public project than the general public is.

(5) Accordingly, the instant provisions are in violation of the principle of equality.

D. Violation of the Principle of Proportionality

(1) Legitimacy of the Legislative Purpose

The School Site Procurement Excise Tax has a legitimate purpose of achieving public welfare through school site procurement.

(2) Appropriateness of Means

The instant provisions impose the excise tax upon people who have not created the demand for school site procurement. The instant provisions also do not differentiate the facility expenses for compulsory education from the facility expenses for other education, and although the excise tax collected is formally used for school site procurement, it is actually used in achieving tasks that should be achieved by using the general educational treasury.

Moreover, the School Site Procurement Excise Tax is imposed on a person solely depending on the number of households supplied by the development project (300 households), without considering the actual scale of collective housing developed and the unit area per household. That is, if the scale of a development project is 300 households or more, the School Site Procurement Excise Tax is imposed upon all purchasers, and if it is less than 300 households, the excise tax is not imposed at all. However, in terms of inducing the need for school site procurement, there is no substantial difference between the purchasers of collective housing of less than 300 households and the purchasers of collective housing of 300 households. Furthermore, when we compare a housing development project of less than 300 households with large unit areas to a housing development project of 300 households or more with small

unit areas, the School Site Procurement Excise Tax is imposed in a way more unreasonable and disproportionate to the capacity of payment obligors. Hence, even if determining the standard and the method of imposing the School Site Procurement Excise Tax is within the scope of legislative discretion, more consideration should be given to the principle of equity when considering the imposition of the School Site Procurement Excise Tax. Other methods to prevent development projects designed to elude the imposition should be considered, such as exempting certain number of households from the imposition and imposing the total amount on the rest of the households.

Then, the School Site Procurement Excise Tax, in various aspects such as the selection of a group of obligors, determination of development projects subject to imposition, the standard of imposition, the usage of collected excise taxes etc., employs inappropriate means which do not consider the relevance to the obligors or the equity.

(3) Minimum Restriction and Balancing of the Interests

Now we review whether the School Site Procurement Excise Tax conforms to the principle of minimum restriction and the principle of balancing of interests. It is not easy to decide a specific amount or rate of excise tax that makes it reasonable or does not disturb the balance between interests. Nevertheless, an excise tax is an extra-taxation payment obligation, and must be permitted exceptionally and at the minimum compared to taxes. Therefore, enhanced principle of minimum restriction and balancing of interests should be applied in reviewing the constitutionality of an excise tax. Article 5 of the Basic Act on Excise Tax Management also states in relation to the requirement for imposing excise taxes, "Excise taxes shall be imposed to a minimum extent necessary for achieving the imposition purpose in a manner securing fairness and transparency, and shall not be imposed twice on the same object in the absence of special circumstances."

The purchasers under the School Site Act are charged acquisition tax and registration tax as general taxation when purchasing collective housing; separately, education tax calculated based upon registration tax (20% of registration tax amount); and on top of those, certain rate (0.8%) of purchasing price as the School Site Procurement Excise Tax. Meanwhile, half of the expenses required for school site procurement is borne by the general account of the City/Do, and the other half by the special account for educational expenses of the City/Do (Article 4(4) of the School Site Act). The expense financed by the general treasury is

composed of the School Site Procurement Excise Tax, the amount of local taxes as determined by the Presidential Decree, and the development charges under the Restitution of Development Gains Act. The local tax as determined by the Presidential Decree here means acquisition tax and registration tax, and the maximum amount that can be financed from the local tax is the sum of the expenses required for school site procurement minus the School Site Procurement Excise Tax and the development charge (Article 6 of the Enforcement Decree). However, the State already imposes an purpose-specific tax for the purpose of executing the public project of school site procurement, education tax; acquisition tax and registration tax as general taxation; and the development charges as charges to the beneficiaries of a development project, and imposing the School Site Procurement Excise Tax for the same purpose on top of all that can actually amount to double-taxation or double imposition of excise taxes. Moreover, as we have previously discussed, the excise taxes collected is not always used to procure the school sites for the payment obligors or their children. Then, the School Site Procurement Excise Tax does not conform to the principle of minimum restriction.

Although the instant provisions try to accomplish a very important goal, namely the procurement of educational facilities, additionally imposing the School Site Procurement Excise Tax is a disproportionate burden with respect to the accomplishment of the public project and thus not in conformity with the principle of balancing of interest, when elementary and middle schools are operated as compulsory education free of charge, and when, for high schools, despite the weak link between the payment obligors and the public project, education tax for the procurement of educational facilities, acquisition tax, and registration tax are already imposed as general taxation.

To conclude, the instant provisions do not conform to the principle of appropriateness of means, the principle of minimum restriction and the principle of balancing of interest, and therefore are in violation of the principle of proportionality under Article 37(2) of the Constitution.

5. Conclusion

Therefore, the instant provisions are unconstitutional, and the Court declares so by the consensus of all Justices.

Justice Yun Young-chul (Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il (Assigned Justice), Song In-jun, Choo Sun-hoe, Jeon Hyo-sook and Lee Sang-kyung

3. *Constitutional Review of Article 312(1) of the Criminal Procedure Act*
(17-1 KCCR 558, 2003Hun-Ga7, May 26, 2005)

In this case, the Constitutional Court found constitutional the relevant provisions of the Criminal Procedure Act ("Instant Provisions", hereinafter) that acknowledges the authenticity of a suspect interrogation transcript prepared by the public prosecutor even if the suspect later as a defendant denies its contents and especially grants admissibility as evidence when it has been prepared under specially credible circumstances.

Background of the Case

Under the current Criminal Procedure Act, the hearsay rule does not admit into evidence a document containing a testimony given in lieu of one given on the day of or in preparation of the trial or another's testimony describing that testimony, in absence of statutory exceptions.

The petitioner has been indicted and tried for fraud at the Haenam Branch of the Gwangju District Court. The petitioner then argued that the Instant Provisions granting the prosecutor-prepared suspect interrogation transcript the admissibility as evidence even if the suspect-turned-defendant denies its contents infringe on the petitioner's right to trial and equality and therefore are unconstitutional, and requested constitutional review, and the court accepted the request and referred for constitutional review.

Summary of the Decision

The Constitutional Court found the Instant Provisions constitutional with a decision of four Justices out of eight for the following reasons:

1. The Court's Decision

A. The main paragraph of the Instant Provisions admits into evidence a suspect interrogation transcript prepared by a prosecutor despite its nature as hearsay under the specially credible circumstances set forth in the provision of the Instant Provisions, while denying the admissibility of the suspect interrogation

transcript prepared by other investigation agencies. Such grant of admissibility takes into account the status of a prosecutor under procedural law and is geared toward the purpose of criminal procedural law - that is, the discovery of substantive truth through due process of law and an expeditious trial. Its purpose is legitimate and content reasonable. Furthermore, according to the new judgment of the Supreme Court, the prosecutor-prepared transcript is admitted into evidence and its genuineness acknowledged only when the person who has given the original statement establishes not just formal authenticity but also substantive authenticity by testifying on the day of or in preparation of a trial. Then, the main paragraph of the Instant Provisions do not interfere unduly with the defendant's right to defense or infringe on the right to receive a fair trial in violation of the principle of equality.

B. The proviso of the Instant Provisions acknowledging authenticity of a prosecutor-prepared suspect interrogation transcript even when the defendant (formerly the suspect) denies its contents, and admitting into evidence of that transcript in presence of specially credible circumstances also has the requisite legitimacy of its purpose. Also, it grants admissibility only when the court has made a finding of specially credible circumstances, and therefore the scope of its application is limited to the extent necessary for accomplishment of the purpose. Therefore, its content is reasonable and legitimate. In the end, the Instant Provisions do not infringe on the defendant's right to receive a fair trial exceeding the limits of the legislature's formative power and therefore are not unconstitutional.

2. Concurring Opinion of Two Justices

The courts' current practice of effectively presuming specially credible circumstances arises out of the courts' trial practices, not out of the uncertainty of the proviso of the Instant Provisions. However, the clarity of the Instant Provisions has been in controversy. These days, the principle of direct examination and the public-trial-oriented adjudication are being emphasized. There is a need for a legislative measure stating more clearly and concretely the prerequisites for granting admissibility to prosecutor-prepared suspect interrogation transcripts.

3. Dissenting Opinion of Four Justices

A. The Instant Provisions grant admissibility to the

prosecutor-prepared suspect interrogation transcript and thereby carve out an exception to the hearsay rule, which will become adverse to the defendant and therefore demand higher degree of clarity. The current practice of criminal procedure as a matter of fact presumes the existence of the specially credible circumstances, the element required by the proviso of the Instant Provisions, and puts the burden of disproving it upon the defendant. Such result arises out of the uncertainty of the meaning of the proviso of the Instant Provisions, and the lack of clarity of the legal jargon "specially credible circumstances" does not satisfy the mandate of the rule of clarity required by the Constitution.

B. The legislature, through the Instant Provisions, tries to grant the prosecutor-prepared suspect interrogation transcript superior effect to that of the police-prepared interrogation transcript upon the condition of meeting a heavier requirement - that is, the ambiguous requirement of "specially credible circumstances" set forth in the proviso of the Instant Provisions. The legislature should not stop there. It should have made clear that the procedure of informing the suspect of his or her right to request attorney participation or otherwise satisfying substantively the attorney's participation are the prerequisite to granting admissibility, and should have taken legislative measures of strengthening the procedural transparency of the suspect interrogation process conducted by prosecutors. The legislature's drafting of the proviso of the Instant Provisions constitutes dereliction of its legislative-formative duty in failing to provide clearly the prerequisite for granting admissibility of the prosecutor-prepared suspect interrogation transcript.

Parties

Requesting Court

Haenam Branch of Gwangju District Court

Petitioner

Moon ○-ok

Original Case

Haenam Branch of Gwangju District Court 2001Go-Dan416, Fraud

Holding

Neither the part of Article 312(1) of the Criminal Procedure Act (amended by Act No. 705, on September 1, 1961) stating, "A transcript which contains a statement of a suspect . . . or of any other person, prepared by a public prosecutor," nor its proviso is unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

Petitioner was charged with fraud at Haenam Branch of Gwangju District Court, 2001Go-Dan416. While the trial was pending, the petitioner made a request for a constitutional review of Article 312 (1) of the Criminal Procedure Act (amended by Act No. 705, on September 1, 1961, hereinafter referred to as the "Act") that allows the admissibility of a transcript of the interrogation of a suspect prepared by a public prosecutor where that suspect has later become a defendant (hereinafter referred to as the "Suspect Interrogation Transcript") even if the defendant denies its contents in court. The court accepted the request and thus requested this constitutional review.

B. Subject Matter of Review and Relevant Provisions

The subject matter of review is the constitutionality of the part of Article 312(1) of the Act (amended by Act No. 705, on September 1, 1961) stating, "A transcript which contains a statement of a suspect or of any other person, prepared by a public prosecutor" and its proviso (hereinafter referred to as the "instant provision"). Its contents and relevant provisions are as follows:

(1) Subject Matter of Review

Article 312 (Transcript Prepared by Public Prosecutor or Judicial Police Officer)

(1) A transcript which contains a statement of a suspect or of any other person, prepared by a public prosecutor, or a transcript

containing the result of inspection of evidence, prepared by a public prosecutor or judicial police officer, may be introduced into evidence, if the genuineness, thereof, is established by the person making the original statement at a preparatory hearing or during the public trial: provided that a transcript containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made under specially credible circumstances, regardless of the statement made at a preparatory hearing or during a public trial by the defendant.

(2) Relevant Provisions

Article 312 (Transcript Prepared by Public Prosecutor or Judicial Police Officer)

(2) A transcript containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the defendant who has been a suspect or the defense counsel verifies the contents of the transcript at a preparatory hearing or during a public trial.

Article 244 (Preparation of Transcript concerning Interrogation of Suspect)

(1) The statement of a suspect shall be written in the transcript.

(2) The transcript of the preceding paragraph shall be shown to the suspect for inspection or read to him, and he shall be asked whether or not there are miswriting in the transcript. In case there is a demand for amendment, deletion, or change by the suspect, the statement of the change shall be recorded therein.

(3) If the suspect indicates that there are no miswriting in the transcript, the transcript shall be signed or sealed with the signature of the suspect after placing a seal across the leaf and the contiguous leaf.

Article 308 (Principle of Free Evaluation of Evidence)

The probative value of evidence shall be left to the discretion of judges.

Article 309 (Admissibility of Confession Caused by Duress, etc.)

Confession of a defendant extracted by torture, violence, threat or prolonged arrest or detention, or which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admissible.

Article 310 (Admissibility of Confession)

When the confession of a defendant is the only evidence against

him, the confession shall not be admissible.

Article 310-2 (Hearsay Evidence and Limitation of Admissibility)

Except as provided for in Articles 311 through 316, any document, which contains a statement in place of the statement made at a preparatory hearing or during public trial, or any statement the import of which is another person's statement made outside a preparatory hearing or at the time other than the public trial date, shall not be admissible.

Article 317 (Voluntary Statements)

(1) Oral statements given by a criminal defendant or a person other than the defendant shall not be admitted as evidence unless the statements are made voluntarily.

(2) A document that contains oral statement referred to in the preceding paragraph shall not be admissible unless it is proved that the statement was made voluntarily.

(3) In case the part of the transcript that refers to evidence by inspection is taken from the oral statement given by the defendant or a person other than the defendant, only the part thereof shall be governed by the preceding two paragraphs.

2. Opinion of the Requesting Court and the Related Parties

A. Reasons for Requesting Constitutional Review

The instant provision is against the principle of public-trial-centered adjudication which is a part of the right to a fair trial by judges, because it puts more creditability on the Suspect Interrogation Transcript than a statement made in court by a defendant who is presumed to be innocent. Moreover, it is in violation of the presumption of innocence and due process, as it amounts to institutionally guaranteeing the likelihood that a prosecutor may distort a trial, which should be conducted by a neutral adjudicating body, a judge.

According to the instant provision, under certain circumstances, the Suspect Interrogation Transcript is admissible even if the defendant denies its contents. It is an infringement on the right to equality since it disturbs the framework of a fair trial by unfairly favoring a prosecutor, a party in a criminal suit with the burden of proving guilt, by reducing his responsibility to establish the burden and thus putting the defendant at a disadvantage.

The easy admissibility of the Suspect Interrogation Transcript, acknowledged by the instant provision, induces prosecutors

conducting investigations and public prosecution to particularly focus on obtaining confessions at the investigation stage, and it is highly probable that, in the actual process, they violate the Constitution's ban against torture, the right to remain silent and the defendant's right to life and bodily freedom.

B. Opinion of the Minister of Justice, the Prosecutor General, the Chief Public Prosecutor of Kwang-ju District Public Prosecutor's Office, Haenam Branch

The instant provision acknowledges the admissibility of the Suspect Interrogation Transcript notwithstanding that it is hearsay evidence. This is justified on the following grounds:

Firstly, its purpose is legitimate because it is for substantive fact-finding and a speedy trial, which the Criminal Procedure Act aims at. Secondly, it is reasonable in that the possibility of human rights infringement such as torture occurring in the suspect interrogation process by a prosecutor is comparatively low, since prosecutors are appointed among the people with the same qualifications as judges and serve as representatives of the public interest. Thirdly, in addition to the prerequisites for admitting into evidence the Suspect Interrogation Transcript stipulated by the instant provision - the authenticity of a transcript and the existence of specially credible circumstances, there is a limit based on the Constitution's principle guaranteeing due process and hence the defendant may adopt various defenses to prevent the Suspect Interrogation Transcript from being admitted into evidence, such as denying its authenticity, contesting the voluntariness of his or her statement, or asserting that notice of the right to remain silent was not given or there was an unlawful restriction on right to communication and consultation with an attorney. Lastly, even if the probative value of evidence is recognized, the question of credibility of that evidence is left to the free discretion of a judge, and the defendant may freely impeach its credibility. Therefore, it cannot be said that the instant provision infringes on the right to equality and the right to a fair trial, or violate due process or the presumption of innocence.

Cruelties during prosecutorial investigations cannot be attributed to the instant provision. They are only an exceptional phenomenon. It cannot be said with certainty that cruelties take place because of the instant provision and will disappear in absence of the same. In short, there is no direct connection between the instant provision and the Constitution's ban against torture, the right to remain silent, the defendant's right to life, and the right to bodily freedom,

and accordingly, the instant provision does not infringe on such rights.

3. Review on Merits

A. The Legislative History and Purpose of Article 312 of the Act

(1) Legislative History

A question concerning probative value of a transcript prepared by the investigative authority was one of the important issues in the enactment process of the Criminal Procedure Act after the Liberation. Originally, Article 312 in the draft of the Criminal Procedure Act stated "A transcript which contains a statement of a suspect..., prepared by a public prosecutor, investigator or judicial police officer... may be introduced into evidence, if the genuineness, thereof, is established by the statement of the defendant at a preparatory hearing or during the public trial." It extensively acknowledged the probative value of a suspect interrogation transcript prepared by the investigative authority and did not distinguish the probative value of a suspect interrogation transcript prepared by a judicial police officer from that of a suspect interrogation transcript prepared by a public prosecutor.

However, when the draft was referred to the Legislation and Judiciary Committee, the wording of the provision was changed, and the following proviso was added: "Provided, that a transcript containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the transcript." The proviso limited the probative value of a suspect interrogation transcript prepared by a judicial police officer. In this manner, Article 312 of the Criminal Procedure Act enacted by Act No. 341 on September 23, 1954 distinguished the probative value of a transcript prepared by a judicial police officer from that of a transcript prepared by a public prosecutor in the form of a main paragraph and a proviso.

Then in the Amendment under Act No. 705 on September 1, 1961, the main paragraph and the proviso were separated as Paragraph 1 and Paragraph 2, and a proviso, "provided, that a transcript containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement

was made under specially credible circumstances, regardless of the statement made at a preparatory hearing or during a public trial by the defendant," was added, which has remained to this day.

(2) Legislative Purpose

Guaranteeing human rights and insuring efficiency of the investigative process are ideals always in conflict, and we have to choose a point of balance between the two. The point our lawmaker chose was to restrict admissibility of the result of investigation as evidence at the public trial later on. In other words, our lawmakers believed that coercive investigation including torture can be prevented by limiting the admissibility of a transcript prepared by the investigative authority, while also considering another ideal for criminal trials so called litigation economy and elimination of unjustifiable expenses and delay by distinguishing the admissibility of a transcript prepared by a public prosecutor from that of a transcript prepared by other investigative authorities. In doing so, our lawmaker tried to reach a point of balance between the guarantee of individual's human rights and litigation economy.

B. The Significance of the Instant Provision in Criminal Evidence

Article 310-2 of the Act states the following under the heading "Hearsay Evidence and Limitation of Probative Value of Evidence": "Except as provided for in Articles 311 through 316, any document which contains a statement in place of the statement made at a preparatory hearing or during public trial, or any statement the import of which is another person's statement made outside preparatory hearing or at the time other than the public trial date, shall not be admissible." The provision denies the probative value of hearsay evidence, in principle, but leaves room for exceptions. For example, Article 311 of the Act admits into evidence a transcript prepared during a proceeding conducted by courts or judges without any particular limitation, and the instant provision admits into evidence the Suspect Interrogation Transcript under more heightened conditions than those of Article 311.

That is, according to the instant provision, an interrogation transcript of a suspect who did not become a defendant prepared by a public prosecutor, non-suspect witness testimony transcript or an inspection transcript is admissible as evidence merely if the genuineness, thereof, is established. In comparison, the Suspect Interrogation Transcript is admissible as evidence regardless of the

statement made in court by the defendant, only when the genuineness, thereof, is established and the statement was made under specially credible circumstances. On the contrary, a suspect interrogation transcript prepared by investigative authorities other than a public prosecutor is admissible as evidence only in case where the genuineness, thereof, is established and the defendant or the defense counsel verifies the contents of the transcript, even if it is of a defendant who has been a suspect (Article 312(2) of the Act).

C. The Constitutionality of the Instant Provision

(1) The Standard of Constitutional Review

(A) The Constitution guarantees the right to request trial as a constitutional basic right, as it provides in Article 27(1) that "All citizens shall have the right to be tried in conformity with law by judges qualified under the Constitution and law" and in Article 27(3) that "All citizens shall have the right to a speedy trial. The accused shall have the right to a speedy public trial in the absence of justifiable reasons to the contrary." Our court has consistently elucidated that the right to request trial under Article 27(1) of the Constitution is a comprehensive right that includes not only access to judicial procedure but also the right to a fair trial, namely all the basic rights involved in the judicial procedure (refer to Constitutional Court, 94Hun-Bal, December 26, 1996, 8-2 KCCR 808, 820; 94Hun-Ma60, November 27, 1997, 9-2 KCCR 675, 693-696; 94Hun-Ba46, December 24, 1998, 10-2 KCCR 842, 850).

Therefore, the standard of constitutional review of the instant provision stipulating evidence rules of criminal procedure should be whether the right to request trial, under Article 27(1) of the Constitution, particularly, the right to a fair trial, is infringed. Besides, other standards of constitutional review, asserted by the requesting court, such as the presumption of innocence, the right not to be tortured, the right to remain silent and the defendant's right to life and bodily freedom should also be reviewed. Although the instant provision itself does not have any intention or contents restricting such constitutional rights. That is because they are in functionally mutual relation with the right to request trial, as they can be taken into consideration in establishing the 'protected realm of the right to request trial.'

(B) Since procedural basic rights such as the right to request trial have the nature of institutional guarantee, the legislative-formative power granted in this area is relatively broad,

compared to the case of other basic rights such as liberty-type basic rights. Therefore, the reasonableness principle or the arbitrariness principle is applied as the standard of constitutional review of related legislation (refer to Constitutional Court, 97Hun-Ba51, September 30, 1998, 10-2 KCCR 541, 550; 94Hun-Ba46, December 24, 1998,10-2 KCCR 842, 850).

In this case, the instant provisions is an exception to the "hearsay rule," that excludes hearsay evidence, and the Constitution does not expressly mandate the hearsay rule to be adopted in criminal procedure. The question of whether to adopt the hearsay rule to materialize the defendant's right to a fair trial and whether to apply the exact same hearsay rule to various kinds of hearsay evidence or to apply different hearsay rules according to the kinds of hearsay evidence is what the lawmaker should decide by comprehensively taking into account the general circumstances such as the legal environment of our society, investigation practices, the level of legal awareness of investigative authorities and the people, the reality of human rights infringement by the investigative authorities, and the structure of our criminal trial.

(2) The Constitutionality of the Instant Provision

The prerequisites for admitting into evidence the Suspect Interrogation Transcript, stipulated by the instant provision, are the "authentication"(the main paragraph) and "existence of specially credible circumstances"(the proviso).

(A) First of all, we review the main paragraph of the instant provision.

1) According to the main paragraph of the instant provision, a Suspect Interrogation Transcript may be introduced into evidence under certain conditions stipulated by the proviso of the same provision if its genuineness is established by the person making the original statement at a preparatory hearing or during the public trial. Authentication here means 'formal authentication' such as inter-page seals, signature, seal affixation, etc., and "substantive authentication" which means that the contents of the Transcript match the testimonies of the witness (Supreme Court, 95Do1761, October 13, 1995).

2) Discovery of substantive truth through due process and a speedy trial are the ideals of the Criminal Procedure Act, and in many cases, the possibility of discovering the substantive truth in the criminal procedure would be lost if a Suspect Interrogation Transcript prepared by a public prosecutor or other investigative

authorities becomes entirely inadmissible as evidence. Since a defendant can easily deny his previous confession if he or she senses that the possibility of a guilty judgment increases in the course of the criminal procedure, the court has to declare a defendant innocent for lack of evidence even if the defendant is in fact guilty, as the court cannot demand a new statement due to the right to remain silent (the latter part of Article 12 (2) of the Constitution).

Public prosecutors, judicial police officers and special judicial police officials take charge of the investigation of crimes (Article 195-197 of the Criminal Procedure Act). Yet, the public prosecution is a state agency with immense power, which directs and instructs judicial police officers and special judicial police officials, decides exclusively whether to bring a prosecution upon the result of the investigation and demands of the court a just application of the law as a party against a defendant in a public trial. The instant provision provides that the Suspect Interrogation Transcript, different from a suspect interrogation transcript prepared by other investigative authorities, is admissible into evidence if it has been made under specially credible circumstances according to the proviso, notwithstanding it being hearsay evidence. The legitimacy of its purpose and reasonableness of its contents are well recognized because it takes into account the status of a public prosecutor and aims at the discovery of the substantive truth through due process and a speedy trial, the ideals of the Criminal Procedure Act.

Moreover, the Supreme Court, which hitherto presumed substantive authenticity if formal authenticity is acknowledged (the Supreme Court, 84Do748, June 26, 1984; 2000Do2617, July 28, 2000 etc.), changed its former standpoint through a recent unanimous decision after en banc review (the Supreme Court 2002Do537, December 16, 2004) that the Suspect Interrogation Transcript can be acknowledged as authentic and used as evidence only when its formal authenticity as well as the substantive authenticity is acknowledged by the person who made the original statement at a preparatory hearing or during the public trial. Under the new opinion of the Supreme Court, if the defendant claims during trial that the Suspect Interrogation Transcript has been recorded differently from his or her statement, in other words, if the defendant denies the substantive authenticity of the transcript, it loses its admissibility as evidence, and thus, cannot be used as evidence of guilt.

3) In short, in addition to the reasonableness of the main paragraph of the instant provision, according to the new opinion of the Supreme Court, this provision does not favor the prosecutor, a

party in a criminal suit, who has the burden of proving guilt, by reducing his responsibility to establish the burden. There are also no more concerns of the prosecutor's excessive investigation to obtain a confession from the suspect or the court's setting priority on the statement made before the prosecutor than the one made at trial.

Therefore, the defendant's right of defense is not unjustly hindered nor is the right to equality violated resulting in the infringement of the right to fair trial by judges due to the main paragraph of the instant provision. Also, there is no possibility of violations of the presumption of innocence, right to be free from torture, right to remain silent, and right to life and bodily freedom as the requesting court had asserted.

(B) Next, we review the proviso of the instant provision, the matter of admitting the Suspect Interrogation Transcript as evidence on the condition that specially credible circumstances exist.

1) According to the proviso of the instant provision, even in a case where the defendant admits the Suspect Interrogation Transcript to be recorded as he or she had stated but denies the veracity of the contents of the transcript, in other words even when the defendant admits the formal authenticity but denies the substantive authenticity, the Suspect Interrogation Transcript is admissible. That is, when the statement was made before the prosecutor under specially credible circumstances.

2) Taking the matter into consideration, if the principles of trial-based adjudication and direct trial are strictly to be carried out without exception, it is logical to, as a rule, deny the admissibility of the Suspect Interrogation Transcript, prepared by the investigation authorities when the defendant denies the contents of the transcript regardless of whether the transcript was prepared by a public prosecutor or a judicial police officer. However, as trial-based adjudication and direct trial are rules of criminal procedure, rather than those of the constitution, they can be limited according to each country's circumstances.

According to each country's legislative examples, Article 322 (Defendant's Written Statement or Statement Transcript) of the Japanese Criminal Procedure Act provides, "Written statement prepared by the defendant or a transcript in which the statement of the defendant is recorded that has the defendant's signature or seal affixation, can be used as evidence only when the statement contains approval of a fact disadvantageous to the defendant or has been made under specially credible circumstances. However, the document that contains approval of a fact disadvantageous to the

defendant cannot be used as evidence, if there is doubt as to its voluntariness, even if it is not a confession, by applying Article 319 (Admissibility as Evidence Probative Value of Confession) mutatis mutandis." Thus, if the suspect interrogation transcript, not only when prepared by the public prosecutor, but also when prepared by the judicial police officer, has the defendant's 'signature or seal affixation,' which corresponds to Korea's formal authenticity, the transcript's admissibility as evidence is acknowledged unless the voluntariness is denied.

On the other hand, in Germany, according to Article 250, Article 254 (1), etc. of the German Criminal Procedure Act, only the suspect interrogation transcript prepared by the judge is admissible as evidence. The transcript prepared by a judicial police officer or a public prosecutor alone cannot be admitted as direct evidence to prove the defendant's guilt. However, in the practices of the criminal trial, although there is no expressed provision, when the defendant makes contradictory statements from the former statements or when the defendant is unable to remember his or her statements that he or she had made in front of the police officer or prosecutor in the investigation procedure, the presiding judge, showing the defendant the suspect interrogation transcript, in which the defendant's statement at the investigation agencies are recorded, asks, "Did you not remark statements of these contents?" In this way, the presiding judge points out the contradiction or helps the defendant to remember. This is a customary practice called 'presentation'(Vorhalt), which is also acknowledged by the Federal Court of Justice (BGH). To such 'presentation' if the defendant acknowledges the former statements, those statements can be used as evidence in trial. If the defendant refuses to answer or dispute the 'presentation' the person who interrogated the suspect (e.g. police officer) can be called as witness, and the veracity of the statement of the witness becomes subject to the judge's discretion.

Meanwhile, in the U.S., as the investigation authorities do not prepare suspect interrogation transcripts and as the inquiry into facts ends at the arraignment procedure, if the suspect confesses to the investigation authorities, the admissibility of evidence of the suspect's confession made to the investigation authorities is rarely a problem. Only when the suspect, who had produced a written confession, denies the confession at trial, the person who heard the confession or interrogated the then suspect (usually a police officer) comes to court as a witness to testify and the testimony is used as evidence.

As can be seen from the above, the question of when and under what circumstances the suspect interrogation transcript, prepared by

the investigation authorities, can be admissible as evidence is a matter of each country's legislation.

3) The purpose of the proviso of the instant provision, the discovery of the substantive truth through due process of law and a speedy trial, is justified. Also, as the proviso grants admissibility as evidence to the transcript only after having the court examine the existence of specially credible circumstances, restricting the application to the limits necessary, the proviso can be said to be reasonable and just in its contents as well.

Moreover, for the Suspect Interrogation Transcript to ultimately acquire admissibility as evidence, due process of law guaranteed by the Constitution should also be observed, along with the formal and substantive authenticities required by the main paragraph of the instant provision.

If we take a more concrete look into this matter, if the defendant's statement such as confession was made against his will and extracted through means such as torture and violence, thus lacking voluntariness (Constitution Article 12 Paragraph 7, Criminal Procedure Act Articles 309 and 317)[1], if the criminal suspect's statement had been made without a prior notification of the right to remain silent (Constitution Article 12, Criminal Procedure Act Articles 309 and 317) founded on the right against self-incrimination (refer to Supreme Court, 92Do682, June 23, 1992), and if the suspect was interrogated under unlawful limitations on his or her right to meet or communicate with an attorney or the attorney's right to participate in the suspect interrogation (Supreme Court, 2003Mo402, November 11, 2003; refer to Constitutional Court, 2000Hun-Ma138, September 23, 2004, 16-2 KCCR 543), the Suspect Interrogation Transcript is denied admissibility in principle.

Therefore, the defendant, apart from the transcript's formal and substantive authenticity, can choose from such various grounds for defense to deny the admissibility of the transcript.

4) Also, under the Korean system, in which professional judges administer trials, the need to exclude hearsay evidence is weaker than under other systems where citizens participate as jurors or judges. As the statement of the defendant made at trial is acknowledged as evidence, even when it differs from the one formerly given to investigation authorities, and as the statement before the public prosecutor is also admitted as evidence when

1) See generally the Supreme Court 97Do3234, April 10, 1998; 98Do3584, January 29, 1999; 99Do4940, January 21, 2000; 2001Do6783, May 10, 2002, etc. for decisions that voluntariness of the confession should be proved by the prosecutor.

verified as stated under specially credible circumstances, the court can compare the two statements, one made before the public prosecutor and the other made at trial and judge which statement is more credible.

Admissibility of evidence only means that evidence is qualified to be used as material for strict verification. It is strictly distinguished from the concept of probative value, which is the substantive value of evidence. Even if evidence is admissible, its probative value, in other words whether it is credible, is left to the discretion of judges (refer to Act Article 308). Therefore, as the defendant is free to use various methods to attack the probative value of evidence, the admissibility as evidence of certain evidence and the verification of a fact that needs support of evidence or the acknowledgement of an existence of crime through that evidence does not have an inevitable link.

Thus, when the defendant, who has the right to deny the admissibility of the Suspect Interrogation Transcript by denying the authenticity of the transcript at trial, does not exercise that right and acknowledges the authenticity of the transcript but denies its contents, the prosecutor can assert the existence of specially credible circumstances along with the basis for such assertion for the transcript to acquire admissibility as evidence. As for the defendant, he or she can assert the nonexistence of specially credible circumstances. This matter is in the realm of the court, and the court decides after considering the overall situation in which the statement was made.

5) To sum up, the defendant's right to defense is not unjustly limited, nor is he placed in an obviously disadvantaged position compared to the other party, the public prosecutor, just because the proviso of the instant provision provides that the admissibility as evidence of the Suspect Interrogation Transcript can be acknowledged regardless of the defendant's statement at the trial when the Suspect Interrogation Transcript, prepared by the public prosecutor, satisfies the formal and substantive authenticity requirements under the instant provision's main paragraph, and when it has been prepared under specially credible circumstances.

Therefore, although the proviso of the instant provision admits the Suspect Interrogation Transcript as evidence even when the defendant, after acknowledging the authenticity of the transcript, denies only its contents on the condition that it had been framed under specially credible circumstances, the legislature cannot be blamed for infringing on the defendant's rights including the right to fair trial by exceeding the limits of legislation.

(3) Sub-conclusion

As can be seen from the above, the defendant's right to a fair trial or other rights such as the presumption of innocence, the right to be free from torture, the right to remain silent, and the right to life and bodily freedom cannot be said to be infringed by the instant provision.

4. Conclusion

The instant provision is not unconstitutional and the court declares so. On this decision, there are concurring opinions of Justices Kim Kyung-il and Jeon Hyo-sook in paragraph 5 and dissenting opinions of Justices Yun Young-chul, Kwon Seong, Kim Hyo-jong, and Lee Sang-kyung in paragraph 6.

5. Concurring Opinion of Two Justices

We agree with the opinions and the points of Justices Song In-jun and Choo Sun-hoe that the instant provision is not unconstitutional. We would like to consider the matter of whether this provision's ambiguity has caused the customary practice of the court, which virtually presumes the existence of specially credible circumstances, as it was asserted in the request for constitutional review.

A reasonable interpretation of the proviso of the instant provision leads to the conclusion that the prosecutor should concretely assert and prove the existence of the specially credible circumstances, as it is a requirement to acknowledging admissibility as evidence. Nevertheless, in a criminal trial the court hitherto presumed substantive authenticity and even the specially credible circumstances when the formal authenticity was acknowledged, thus, placing the burden of proving the nonexistence of the specially credible circumstances on the defendant. The virtual presumption here, an act of the court to confirm ultimate facts from various evidentiary facts by applying common judicial experiences belongs to the realm of the court's judgment. Although the burden of proving the existence of specially credible circumstances actually seems to be reversed, it is not because of the ambiguity of the proviso of the instant provision. If such practice of the court became the customary interpretation of the instant provision's proviso, it would have been necessary to consider its unconstitutionality.

However, since the Supreme Court changed its former opinion by abolishing the customary presumption, not acknowledging the admissibility as evidence of the Suspect Interrogation Transcript if the defendant denies the substantive authenticity of the transcript prepared by the prosecutor (the Supreme Court, 2002Do537, December 12, 2004), the grounds of the former opinion, which acknowledged not only the substantive authenticity but even the specially credible circumstances once the formal authenticity is acknowledged, has become weakly grounded. Also, there is no data that the court still interprets and uses the proviso of the instant provision to presume specially credible circumstances in criminal trial practice even after the Supreme Court's change of opinion. Therefore, it is not proper to discuss the unconstitutionality based on the former practices.

Nonetheless, considering that the dispute on the clarity of the instant provision still continues and that the principle of direct and public trial are emphasized in today's reality, legislation that provides more concrete and clear requirements in acknowledging admissibility as evidence of the Suspect Interrogation Transcript prepared by the prosecutor is needed.

6. Dissenting Opinion of Four Justices

Our opinion differs from the Court's opinion that pronounced the proviso of the Criminal Procedure Act Article 312 (1) constitutional; thus, we iterate our dissenting opinion as follows.

A. Significance of Former Decision of the Constitutional Court and the Ruling of the Supreme Court

As noted in the court's opinion, the Constitutional Court, in its decision of 93Hun-Ba45 on June 29, 1995, judged the proviso of Article 312 (1) of the Criminal Procedure Act constitutional and the Supreme Court changed its former opinion by ruling that the Suspect Interrogation Transcript prepared by the prosecutor can only be used as evidence when the substantive authenticity is acknowledged by the statement of the person who made the original statement at a preparatory hearing or during the public trial (the Supreme Court 2002Do537, December 16, 2004).

However, the Constitutional Court's decision above mainly raised question only on the fact that Article 312 (1) of the Criminal Procedure Act (hereinafter "Article 312 (1)") acknowledges the admissibility as evidence of the Suspect Interrogation Transcript

prepared by the prosecutor more easily than the one prepared by the judicial police officer by acknowledging the admissibility as evidence the transcript prepared by the prosecutor even when the defendant denies the contents. Also, the Supreme Court ruling above does not rule that "the statement was made under specially credible circumstances." (hereinafter "specially credible circumstances"), a condition that the proviso of Article 312 (1) requires among other requirements to grant admissibility as evidence to the Suspect Interrogation Transcript prepared by the prosecutor. Thus, the requirement of specially credible circumstances is still open for constitutional evaluation.

B. Matters in Dispute

The court decision's main basis for judging the proviso of Article 312 (1) constitutional was that the proviso additionally required specially credible circumstances before it acknowledged the admissibility as evidence of the Suspect Interrogation Transcript prepared by the prosecutor (the so-called theory of heightened requirement). However, in the actual practice of a criminal trial, the Court has treated the existence of specially credible circumstances as virtually presumed, leaving to the defendant the burden to assert and prove the exceptional lack of such circumstance, and, as a result, has reduced the burden of proof of the prosecutor. The Supreme Court also virtually presumed the existence of specially credible circumstances, noting "unless there is a reason to believe that the specially credible circumstances do not exist, [the transcript] is admissible as evidence" (refer to Supreme Court 94Do129, November 4, 1994 (Korean Supreme Court Reporter (KSCR) 1994, page 3302); 96Do865, June 14, 1996 (KSCR 1996 Vol. II, page 2286); 97Do2084, November 25, 1997 (KSCR 1998 Vol. I, page 175); 2000Do2617, July 28, 2000 (KSCR 2000 Vol. II, page 1976) etc.)

Such legal reality shows that Article 312 (1) is being interpreted and managed differently from the original intention of the legislature and even from the expectation of the Constitutional Court. Thus, we need to discuss whether Article 312 (1) violates the principle of clarity.

C. Possibility of a Violation of the Principle of Clarity

The principle of clarity, a mandate of the principle of government by the rule of law, requires that the legal norms, including law, should be prescribed with words clear and precise

enough for the individual affected by the norm to be able to understand the requirements of the norm. Thus, the degree of clarity, required by the principle of clarity, is not the same in every law and may differ according to the characteristic of each law or provision, each element's distinctiveness, and the background or the circumstances in which the law was legislated. Generally, the principle of clarity is more strictly required in a case when the provision imposes a duty compared to when that provision provides a benefit. Criminal laws, governed by the principle of nulla poena sine lege, require a heightened degree of clarity with stricter criteria, while general laws do not require such a heightened degree of clarity and are sufficient when a relaxed standard is met (refer to Constitutional Court, 98Hun-Ba37, February 24, 2000, KCCR 12-1, 169, 179). Thus, in case of the criminal law or other laws where the interests of citizens sharply conflict, unclear legal terms are prohibited. When the use of an ambiguous term is unavoidable, various methods, such as defining the term, using a limiting modifier, establishing a clause that limits the application of the law, etc., should be employed to prevent the possibility of the law being interpreted arbitrarily (refer to Constitutional Court 89Hun-Ka104, February 25, 1992, KCCR 4, 64, 78).

Article 312 (1) provides for the requirement of granting the admissibility as evidence to the Suspect Interrogation Transcript in a criminal trial - an exception to the principle of exclusion of hearsay evidence. The provision can be disadvantageous to the defendant; thus, the principle of clarity is required to a higher degree.

The fact that in the practice of criminal trial the specially credible circumstances, required by the proviso of Article 312 (1), are virtually presumed and managed in a way that the defendant bears the burden of proof, after all can only be seen to be attributed to the ambiguity of the meaning of the proviso of Article 312 (1). Of course there can be an opinion that such management, in practice, is only a matter of the court's applying common judicial experiences and judging of evidence in the process of acknowledging facts about the specially credible circumstances and cannot be seen as a matter concerning the unconstitutionality of Article 312 (1). However, such virtual presumption of specially credible circumstances shifts the burden of proof to the defendant based on the one-sided trust for the investigation authorities without the empirical examination or reflective consideration of investigational realities. It is doubtful that such practice can be accepted as the proper management of trials under our constitutional order governed by Constitution Article 27 Paragraph 4 clearly

iterating presumption of innocence of a defendant. In light of the fact that such management of the criminal trial system, while its influence on the structure of the criminal trial and the defendant's right to defense is grave, has been conducted not only in some fact-finding courts but also has been justified by the Supreme Court, such practice can be seen after all as resulting from the ambiguity of the proviso of Article 312 (1) in prescribing the responsibility or burden of proving the prerequisite before the admissibility of the evidence specially credible. For example, if the text of the proviso of Article 312 (1), "only where the statement was made under specially credible circumstances," had been prescribed as "only when the statement was proved to be made under specially credible circumstances," the current practice of criminal trial - presuming the specially credible circumstance and shifting the burden to the defendant - would not have taken root.

Also, the text of Article 312 (1) requiring specially credible circumstances" is also susceptible to two or more equally reasonable interpretations. It is difficult to distinguish the credibility of a statement that the suspect gave in front of the prosecutor from the probative value of that statement. It is also equally difficult to discern from the text the relationship of that requirement to the "voluntariness" requirement, prescribed in Articles 309 and 317. Adding "specially", a vague modifier, does not eliminate that ambiguity. In fact, opinions vary among scholars on how they interpret specially credible circumstances: (i) one opinion requires merely that the defendant sign, seal, and put inter-page seals, all after reading the Suspect Interrogation Transcript and other checking procedures, along with the transcript being recorded as the defendant stated; (ii) another requires not only the authenticity of the transcript, but also that there should be no possibility of falseness with respect to the fact that the suspect stated the recorded words, and further that the term "specially credible circumstances" should be interpreted as having the same or a similar meaning as the existence of concrete and exterior circumstances that can guarantee the credibility or the voluntariness of the statement (there is also a similar opinion that does not require an exterior circumstance guaranteeing 'voluntariness' but one guaranteeing credibility); and (iii) yet another requires, not the existence of a circumstance to guarantee credibility, but one that can guarantee voluntariness; and so forth. Such varying opinions indicate the existence of confusion in interpreting the meaning of specially credible circumstances. As can be seen from the above, it is difficult to think that the legal text, "specially credible circumstances" - prescribed by the proviso of Article 312 (1) as the prerequisite to admissibility of a statement as evidence - possessing

such ambiguity, fulfills the principle of clarity, a constitutional mandate.

Also, as the regulation regarding specially credible circumstances affects the admissibility of the Suspect Interrogation Transcript, the result of the defendant's being interrogated in front of the prosecutor, it is closely related to the attorney's participation in the prosecutor's suspect interrogation. The Constitutional Court in its decision (2000Hun-ma138, September 23, 2004) ruled in the opinion that as the suspect's right to request the participation of an attorney is a crucial element of the right to assistance of counsel, it is basic and self-evident that investigation authorities cannot reject the request for the participation of an attorney and that such a rule can be directly applied even without concrete legislation. Thus, the legislature has the obligation to concretely and clearly legislate procedural regulations and legal effects that can actually ensure the right to request the participation of an attorney, which can be directly deduced from the right to receive the assistance of counsel. Thus, the legislature, in distinguishing the suspect interrogation transcript prepared by the prosecutor from the one prepared by the judicial police officer and giving superior effect to the former through Article 312 (1), through establishing a heightened requirement, it should not have stopped only after prescribing a vague requirement such as "specially credible circumstances" in the proviso of Article 312 (1). The legislature should have required the substantive guarantee of attorney participation through a notice procedure of the suspect's right to request participation of an attorney, etc., as a prerequisite to admissibility, thereby firmly establishing the admissibility requirement. The legislature should also have considered legislative measures emphasizing the procedural transparency of the suspect interrogation conducted by the prosecutor. As noted above, the legislature ambiguously prescribed the requirement for admitting into evidence the Suspect Interrogation Transcript prepared by the prosecutor and therefore was negligent in fulfilling its law-making obligation in deciding the contents of the proviso of Article 312 (1).

Therefore, the proviso of Article 312 (1) is an unconstitutional law violating the principle of clarity, required in forming a legal norm.

D. The Need for a Nonconformity Decision

As seen above, the unconstitutional part is the proviso of Article 312 (1). Thus, if the proviso loses its effect by the court's

decision of simple unconstitutionality, it results in elimination of the heightened requirement for admissibility as evidence, placing the defendant, the requesting petitioner, in a more disadvantageous position. Therefore, it is necessary to choose a nonconformity decision, which maintains the effect of the proviso for the time being and urges the legislature for a legislative reform. Also, accomplishing such legislative tasks such as making clear the requirement of admissibility as evidence requires respect for the legislature's formative discretion as it involves legislative reforms such as ending the unjust shifting of the burden of proof to the defendant and substantively guaranteeing attorney participation. A nonconformity decision is required for the proviso of the Article 312 (1) of the instant statutory provision.

E. Conclusion

For the reasons stated above, although the instant statutory provision is unconstitutional because it violates the principle of clarity, it is proper to pronounce a nonconformity decision that maintains the provision's effect for the time being and urges legislative reform.

Justice Yun Young-chul (Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe (Assigned Justice), Jeon Hyo-sook and Lee Sang-kyung

4. *Request for a Constitutional Review of the Medical Service Act Article 69 etc.*
(17-2 KCCR 189, 2003Hun-Ka3, October 27, 2005)

In this case, the Constitutional Court found unconstitutional the relevant provisions of the Medical Service Act that ban advertising of the skills and the examination and treatment method of a medical person.

Background of the Case

The Medical Services Act bans advertising of "the skills and the examination and treatment method of a specific medical institution or a specific medical person" and imposes a fine of up to 3 million won in event of violation (hereinafter "Instant Provisions").

The petitioner is a doctor operating ○○Ophthalmic Hospital in Seoul. The petitioner was charged with advertising "the skills and the examination and treatment methods of a specific medical person" by posting on the hospital Internet homepage her examination and treatment methods of Laser-assisted In Situ Keratomileusis(LASIK) etc. along with a picture of herself examining and treating a patient. During her trial, she made a petition for a constitutional review asserting that the Instant Provisions were unconstitutional. The Seoul Central District Court accepted this petition and referred to the Constitutional Court for constitutional review.

Summary of the Decision

The Constitutional Court found the Instant Provisions unconstitutional with a decision of 6 to 3 for the following reasons:

1. Majority Opinion of Six Justices

A. The Instant Provisions restrict advertisement that is protected by the freedom of speech and also restrict commercial advertisement and thereby the freedom of occupation (business). These restrictions can be justified only in accordance with the principle of proportionality (the rule against excessive restriction) derived from Article 37(2) of the Constitution. However, commercial advertisement differs from political and civil expressions of idea or knowledge and the effect of commercial advertisement on

development of personality and individuality is not significant. Therefore, in reviewing the restriction of commercial advertisements under the principle of proportionality, it is proper for the standard of "minimum restriction" to be relaxed to reviewing "whether the restriction is in the necessary scope to fulfill the legislative purpose."

B. If an advertisement on the skills or the examination and treatment methods of a medical person deceives the consumers, if it might cause consumers to have unverified medical expectations, or if it hinders fair competition; such medical advertisement cannot be permitted. In such cases, strong restriction is needed to secure the health of the citizens and a sound medical competition order. However, a medical advertisement, if based on objective facts, giving information of the concerned medical person's medical techniques or examination and treatment methods without exaggeration, is about important information of medical service and rather enhances public interest by helping consumers make rational choices and by promoting fair competition among medical persons.

Individuals can perceive their best interests when sufficient information is given. The best method for such a purpose is not to close the means of communication but to open them. The point is to block medical advertisements that may blindfold or deceive medical consumers, and certainly not to block all medical advertisements concerning the skills and the examination and treatment methods.

It is true that medical advertisements deal with professional and technical information and, thus, makes it difficult for the general public to judge their value. However, if the law makes it impossible for the consumer to know which specific medical person has what kind of technique or ability and how he or she examines and treats a patient, this hinders the effective circulation of information by cutting off the consumer from important specific medical information and cannot be said that the restriction of the commercial advertisement, which is the subject of freedom of speech and freedom of business, has been narrowly tailored to the extent necessary for attaining the legislative purpose. Also, besides the Instant Provisions, the Medical Service Act Article 46 (1), the Fair Advertisement Act, the Consumer Protection Act, and the Monopoly Regulation and Fair Trade Act can control false, fraudulent or exaggerated advertisement "concerning skills and examination and treatment methods of a medical person."

Therefore, the Instant Provisions, that prohibit advertisement of the skills and the examination and treatment methods of medical persons and punish its violation with a fine, exceed the necessary

degree to attain the legislative purpose, and thus, violate the rule of minimum restriction. The Instant Provisions infringe on freedom of expression and freedom of occupation in violation of the principle of proportionality set forth in Article 37(2) of the Constitution.

2. Dissenting Opinion of Three Justices

Medicine has been called a benevolent art from the past and being a medical person requires a strong sense of morals and duty. Medical service is different from general commercial acts in that it treats human body and deals with human life. Thus, commercial advertisement of medicine must differ from advertisements of general goods or services. "Medical person's skills and examination and treatment methods" varies greatly according to each medical person and advertisements of them can be expressed with specialized and subjective contents. Information concerning medical techniques or method of medical examination and treatment may be difficult for the consumers to understand, may give erroneous expectations to the consumers, or may be unverified by modern medicine. Therefore, advertisement concerning medical person's skills and examination and treatment methods can easily be potentially deceiving to the patients. Also, if the advertisement on the medical person's skills and examination and treatment methods is allowed without any conditions, there is a high probability of giving rise to excessive competition among medical persons, which may cause the problem of impairing the stability of the medical system and making citizens and the medical insurance union incur unnecessary medical costs.

The majority opinion is that advertisement concerning the medical person's skills and examination and treatment methods should be allowed when they are based on objective facts and are not fraudulent or exaggerated. However, it is difficult to distinguish fraudulent or exaggerated medical advertisements from ones that are not; the excessive competition, which will occur when advertisement on the medical person's skills and examination and treatment methods is allowed, will make it difficult for the patients to select a medical person who can perform more appropriate medical examination and treatment; also, the allowance is sure to hinder fair competition between medical persons who actively promote themselves with exaggeration and those who perform the art of benevolence without advertising. Other provisions suggested by the majority opinion cannot effectively substitute the Instant Provisions.

Even if it were not for the instant provisions, the current law

allows the advertisement of the type of license, specialized subject, subject of medical examination and treatment, matters concerning the emergency medical facilities, medical personnel, and career of the medical person. Evaluation results of a medical institution are also included in the permitted scope of advertisement. Thus, medical consumers can sufficiently obtain the basic information concerning medical persons and facilities.

The Instant Provisions cannot be said to violate the freedom of speech or freedom of occupation.

Parties

Requesting Court

Seoul Central District Court

Petitioner

Choi ○-mi, Attorneys Shin Hyun-ho, et al. 2

Original Case

Seoul Central District Court 2002Go-Dan7576, Violation of Medical Service Act

Holding

The part of Article 46 (3) on prohibition of advertisement of the Medical Service Act (before amended by Act No. 6686 on March 30, 2002) that concerns "the skills and the examination and treatment methods of a specific medical institution or specific medical person" and the part of Article 69 of the same Act, which concerns the violation of the above prohibition of advertisement, are unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

The petitioner is a doctor operating ○○ Ophthalmic Hospital in Seoul. The petitioner was charged with advertising "the skills and the examination and treatment methods of a specific medical person" by posting on the hospital internet homepage her brief personal record (career) of studying abroad and her examination and treatment methods of Laser-assisted In Situ Keratomileusis (LASIK) etc. along with a picture of herself examining and treating [a patient]. During her trial at the Seoul Central District Court, she made a petition for constitutional review (2002Cho-Ki1479) asserting that the Medical Service Act Article 46 (3), which restricted medical advertisement, and Article 69 of the same Act, which prescribed the punishment for the violation thereof, were unconstitutional. The court accepted this petition and referred to the Constitutional Court for constitutional review on February 19, 2003.

B. Subject Matter of Review

The requesting court designated Article 46 (3) and Article 69 of the Medical Service Act as the subject matter of review. However, based on the facts of the indictment in the original case, it is proper to limit the subject matter of this case to the part of Article 46 (3) on prohibition of advertisement concerning "the skills and the examination and treatment methods of a specific medical institution or specific medical person" and the part of Article 69 on the violation of the above prohibition (these parts are hereinafter referred to as "instant provisions") of the Medical Service Act (before amended by Act No. 6686 on March 30, 2002). The contents of the provisions and related provisions are as follows.

Medical Service Act (before amended by Act No. 6686 on March 30, 2002) Article 46 (Prohibition of Exaggerated Advertisement, etc.)

(1) A medical corporation, medical institution or medical person shall not make a fraudulent or exaggerated advertisement concerning the service of medical treatment.

(2) No person other than a medical corporation, medical institution or medical person shall make an advertisement concerning medical treatment.

(3) No person shall advertise the skills and the examination and treatment methods or of assistance in child delivery, career or remedial results of a specific medical institution or specific medical person, by means of mass advertisement, suggestive description, photos, printed matters, broadcasts, or designs, etc.

(4) Scope of advertisement concerning the service of medical treatment and other matters necessary for the advertisement of medical treatment shall be determined by the Ordinance of the Ministry of Health and Welfare.

Article 69 (Penal Provisions)

Any person who violates the provisions of... Article 46... shall be punished by a fine not exceeding three million won.

("Service of medical treatment" of Article 46 (1) has been amended to "service of medical treatment or the career of medical persons" and "career or remedial results" of Paragraph 3 to "remedial results" by Act No. 6686, March 30, 2002.)

2. Opinion of the Requesting Court and the Related Authorities

A. Reasons for Requesting Constitutional Review

The need for public welfare to restrict medical advertisement describing a medical person's skills and examination and treatment methods is to protect medical consumers from fraudulent or exaggerated advertisements, prevent unnecessary medical treatment or medical accidents as a result of advertisement of a medical person's skills and examination and treatment methods unverified by modern medicine on their safety, and prevent confusion in the industrial order of the medical industry and the unnecessary rise in the national medical costs, resulting from excessive competition through imprudent advertisements aimed at attracting patients.

On the other hand, medical advertisements of a specific medical person's skills and examination and treatment methods, etc., facilitate the medical consumer's exercise of their right to select a medical technique or a medical institution by allowing good faith competition among medical institutions. Such advertisements of a medical person's skills or examination and treatment methods, etc., also guarantee the constitutional right of a medical person to maintain and expand his/her business through such advertisement.

In light of such two aspects of medical advertisements, while it is necessary to prohibit fraudulent or exaggerated advertisements of a specific medical person's skills and examination and treatment methods, imprudent advertisements to attract patients indiscriminately, advertisements of a medical person's skills and examination and treatment methods unverified by modern medicine or to selectively prohibit or restrict medical advertisements by way

of limiting the scope of the subject of examination and treatment methods being advertised or the frequency and method of such advertisement, etc., a blanket and uniform prohibition on medical advertisement of a specific medical person's skills and examination and treatment methods such as the instant provisions is an excessive prohibitive provision that exceeds the extent necessary for public welfare noted above. Questions arise on the constitutionality of the instant provisions as they excessively limit the citizen's right to pursue happiness, the right of occupation, and medical consumers' right to know in violation of Articles 10 and 37 of the Constitution.

B. Opinion of the Minister of Health and Welfare

The positive function of medical advertisements of a specific medical person's skills or examination and treatment methods - enhancing the quality of medical technique or service through good faith competition among medical institutions and expanding the medical consumer's right to know and choice of medical institutions - cannot be overlooked. However, even in case of the same disease, skills or examination and treatment methods should be differently applied according to each patient's complex situations - the progress of disease infection, symptoms of the disease, prognosis, and expected risk and side effects. In such circumstances, a uniform advertisement will expose medical consumers to medical accidents by inducing unnecessary medical treatments and will corrupt the order in the medical industry by excessive competition between medical institutions due to imprudent medical advertisements. As a result, such advertisements will not only threaten the health and life of the citizens, but also result in an increase in the national medical costs. The purpose of restricting medical advertisements is to protect medical consumers, patients, and furthermore, competing medical institutions from the flood of imprudent medical advertisements and fraudulent or exaggerated advertisements.

The instant provisions are the least restrictive regulation necessary for protecting the citizens - the medical consumers - and medical institutions. After balancing the competing interests such as limitation on the freedom of occupation prescribed in Articles 10, 15, and 21 of the Constitution, the minimum necessary degree of infringing legal interests for maintenance of order or for public welfare prescribed in Article 37 of the Constitution, and the right to health of citizens, the instant provisions cannot be seen as unconstitutional.

C. Opinion of the Chief of the Seoul District Public Prosecutors' Office

"The skills and examination and treatment methods of specific medical person" are very professional and subjective. It is difficult to obtain similar information from other sources and, therefore, it is also difficult to acquire accurate understanding of the contents of an advertisement. Thus, it is highly probable that medical consumers misunderstand medical advertisements. Such misunderstanding hinders the medical consumer from logically judging the appropriateness of the advertisement of the skills and the examination and treatment methods.

Medicine should not be the subject of competitive profit-seeking. If medical advertisement of specific medical person's skills and examination and treatment methods is allowed, many medical institutions will launch themselves into the competitive pursuit of profit. This may lead to increases in excessive and inappropriate medical examination and treatment and frequent medical accidents. Moreover, increases in the medical consumers' burden of medical examination and treatment payments and the weakening of the finances of the medical insurance are undesirable from the perspective of the national economy. Also, excessive competition among medical institutions can impair fair competition and, thus, will most likely lead hospitals to unnecessary bankruptcy.

Passive regulation of medical advertisements such as establishing certain prohibited types of advertisement concerning "the skills and the examination and treatment methods" is very unlikely to effectively prevent the adverse effects of medical advertisements. This is because "the skills and the examination and treatment methods" themselves are extremely professional and subjective, due to incur tremendous confusion in the course of deciding the permissibility of the advertisement in case the permissibility is decided after judging whether the contents are fraudulent or exaggerated or whether they are verified by modern medicine.

Therefore, it is difficult to say that the instant provisions violate the rule against excessive restriction by uniformly prohibiting [the advertisement of] "the skills and the examination and treatment methods of specific medical person" instead of restricting certain prohibited types of advertisement. The instant provisions [also] do not excessively violate the right to pursue happiness, freedom of occupation, and the citizen's right to know.

3. Review

A. The Legislative History of the Regulation of Medical Advertisement

Former National Medical Service Act (September 25, 1951, Act No. 221) completely prohibited medical advertisement except for the indication of one's specialized field of study. The indication of specialized field of study also required permission from the competent Minister (Articles 41 and 42). Similarly, former Medical Service Act (March 23, 1965, Act No. 1690) also completely prohibited medical advertisement except for the indication of specialized study and subject of medical examination and treatment (Articles 36 and 37).

Later, the revised Medical Service Act (February 16, 1973, Act No. 2533), along with providing prohibitive provisions on fraudulent or exaggerated advertisement of medical service or career of medical persons (referring to doctors, dentists, herb doctors, midwives, and nurses), allowed a certain scope of medical advertisement through the Ordinance of Ministry of Health and Welfare although it maintained the former prohibitive provisions (Articles 46 and 47). The then Ordinance of Ministry of Health and Welfare allowed advertisement of basic information such as the medical person's name, sex, and type of license; name, address, and telephone number of the medical institution; and opening days and hours through all mass media except for television and radio (advertisement in the daily newspaper restricted to once a month) (Article 33).

The Medical Service Act, amended on March 30, 2002, permitted the advertisement of medical person's career (Article 46 (1) and (3)) and the Enforcement Decree of the Medical Service Act (Ordinance of Ministry of Health and Welfare No. 261) amended on October 1, 2003, additionally permitted the advertisement of the internet homepage address, the ratio of available medical persons per patient, number of medical persons, and evaluation results of the medical institution (advertisement in the daily newspaper restricted to twice a month).

The scope of permitted medical advertisement in the current Medical Service Act is the same as the provisions of the above Medical Service Act of 1973, except for the part concerning career history.

B. Whether the Instant Provisions Are Unconstitutional

(1) The Constitution strongly guarantees the freedom of speech and press as basic rights *sine qua non* to the existence and development of modern free democracy by prescribing in Article 21 (1), "All citizens shall enjoy the freedom of speech and press..." Thus, advertisements, which spread ideas, knowledge, and information to a large number of unspecified people, are also under the protection of the freedom of speech and press (the Constitutional Court, 96Hun-Ba2, February 27, 1998, KCCR 10-1, 118, 124-125; 2006Hun-Ma764, December 18, 2002, KCCR 14-2, 856, 867-868). Moreover, as Article 15 of the Constitution guarantees freedom to conduct one's occupation or freedom of business, the legislation limiting commercial advertisement at the same time limits the freedom to conduct's one's occupation (refer to the Constitutional Court, 99Hun-Ma143, March 30, 2000, KCCR 12-1, 404, 414-415).

According to Article 37 (2) of the Constitution, the freedoms and rights of citizens may be restricted by law only when the restriction is necessary for national security, the maintenance of law and order, or public welfare. Legislation limiting the basic rights, therefore, should harbor all the requirements according to the principle of proportionality - legitimacy of the legislative purpose, appropriateness of means to achieve that purpose, minimum restriction, and balance between the public need protected by the legislation and the limited basic rights (the Constitutional Court, 89Hun-Ga95, September 3, 1990, KCCR 2, 245, 260; 93Hun-Ga2, December 23, 1993, KCCR 5-2, 578, 601).

Although commercial advertisement is protected by the freedom of speech, it nonetheless differs from political and civil expressions of idea or knowledge. Also, although it is protected by the freedom to conduct one's occupation, the effect of commercial advertisement on development of personality and individuality is not significant. Therefore, in applying the principle of proportionality to the restriction of commercial advertisements, it is proper for the standard of "minimum restriction" to be relaxed to reviewing "whether the limit is in the necessary scope to fulfill the legislative purpose," rather than reviewing the non-existence of a less restrictive means or whether the limit is the minimum necessary restriction.

(2) The instant provisions prohibit the advertisement of skills or examination and treatment methods of a specific medical institution or a specific medical person and punish the violation by a fine not exceeding three million won.

The reason for restricting medical advertisements is protection of consumers (patients), securing fair trade, and maintenance of the sublime property of medical service. Medical service, which requires a high degree of professionalism and technique, differs from general goods or service and is linked directly to the national health. Therefore, reasonable restriction of medical advertisement is needed in order to protect consumers and prevent unfair and excessive competition between medical persons.

However, the instant provisions exceed the necessary limit in realizing such restriction by uniformly prohibiting advertisement of a medical person's skills, in other words, technical ability, talent, and examination and treatment methods enabling his/her medical service.

If an advertisement of the skills or the examination and treatment methods of a medical person deceives the consumers, if it might cause consumers to have unverified medical expectations, or if it hinders fair competition; such medical advertisement cannot be permitted. In such cases, strong restriction is needed to secure the health of the citizens and maintain a sound medical competitive order. However, a medical advertisement, based on objective facts, giving information of the concerned medical person's medical techniques or examination and treatment methods without exaggeration, is about important information of medical service and rather enhances public interest by helping consumers make rational choices and by promoting fair competition among medical persons.

Generally, a commercial advertisement itself is not harmful unless its contents are illegal, fraudulent, or deceiving. Individuals can perceive their best interests when sufficient information is given. The best method for such a purpose is not to close the means of communication but to open them. If the state, for reasons of protecting the consumers, prevents the circulation of medical information based on facts that are not fraudulent or exaggerated, the consumer is situated in all the worse state of ignorance. In a free market economy, the freedom of speech serves an important goal to help consumers make rational decisions by sufficiently guaranteeing commercial information. The point is to block medical advertisements that may blindfold or deceive medical consumers, and certainly not to block all medical advertisements concerning the skills and the examination and treatment methods.

It is true that medical advertisements deal with professional and technical information and, thus, make it difficult for the general public to judge their value. However, if the law prevents the consumer from knowing which specific medical person has what kind of technique or ability and how he or she examines and treats

a patient, this hinders the effective circulation of information by cutting off the consumer from important specific medical information and cannot be said that the restriction of the commercial advertisement, which is protected by the freedom of speech and freedom of business, has been narrowly tailored to the extent necessary for achieving the legislative purpose.

These days, there has been a rapid leap in the demand for medical information, compared to 1973 when the instant provisions were legislated. Now medical consumers need accurate information on the technique and examination and treatment methods of the providers of medical service - medical persons or medical institutions - to make rational choices. The enhancement of the level of life changed the types and qualities of diseases; in the past, bacterial diseases were the main subject of treatment, but these days, diseases such as cancer, obesity, diabetes are the main subject of treatment. Thus, specialization and technicalization of medical service resulting from qualitative change in the structure of disease calls ever more for smooth circulation of medical information. Also, considering the surge in the number of medical persons, the prohibition of medical advertisement of the instant provisions takes away the opportunity of new medical persons to advertise and publicize his/her skills, technique, examination and treatment methods. This may cause a disadvantageous result for the new medical persons compared to the preexisting medical persons. This does not comply with the market economy order of the Constitution that pursues free and fair competition. Therefore, there is a limit to the state's guardian standpoint of uniformly prohibiting medical advertisements for reasons of protection of consumers and prevention of excessive competition. In reality, these days, a flood of the so-called "advertisement in the form of journalism" and "advertisement in the form of opinions" of medical service - tactics to evade the prohibition of medical advertisement - is damaging the purpose of the instant provisions and disrupting the order of competition in the medical industry. Also, the proliferation of the internet raises doubt of the efficacy and equity of the restriction of advertisement of information about a medical person's skills and examination and treatment methods. Therefore, in reality, it is more effective to restrict the unjust advertisements through autonomous regulation of the medical industry by methods such as having the medical person's trade organization or the association in his/her field of specialization certify his/her internet homepage.

Also, since the legislative purpose of the instant provisions can be sufficiently achieved through other provisions, the instant provisions exceed the necessary scope of restriction.

Medical Service Act Article 46 (1) prohibits fraudulent or exaggerated advertisement concerning medical service. Moreover, Fair Advertisement Act prohibits deceiving or unjustly comparing indications and advertisements and provides that the Fair Trade Commission can request the submission of related data from concerned businessmen when verification of contents of indication and advertisement is needed (Articles 3 and 5). Also, the Consumer Protection Act allows the state to set the criteria concerning the contents and the method of advertisements in cases where there is a need for a restriction in using specific terms or expressions or where there is a need for a restriction in an advertisement's media and period of time in which it appears (Article 9). The Monopoly Regulation and Fair Trade Act prohibits the act of unfairly inducing or coercing customers of competitors to deal with oneself (Article 23 (1) iii.). Also, the Outdoor Advertisements, Etc. Control Act regulates matters concerning locations and methods of displaying outdoor advertisements and the establishment and maintenance of bulletin facilities. Through such provisions, unjust advertisements concerning the skills and method of medical examination and treatment of a medical person, such as fraudulent, deceiving, or exaggerated advertisements that the instant provisions seek to regulate can be restricted.

For the reasons above, the instant provisions, which prohibit advertisement of the skills and the examination and treatment methods of medical persons and punish its violation with a fine, exceed the necessary degree to attain legislative purpose, and thus, violate the "rule of least restrictive means."

(3) Meanwhile, while the attainment of the public good that the instant provisions seek to protect is unclear, the restriction of freedom of speech and freedom of business of medical institutions or medical persons is considerable. To what extent medical consumers will be protected, excessive or improper medical examination and treatment will be prevented, and unfair competition will be prevented through the instant provisions are uncertain. However, the restriction of circulation of important medical information such as medical person's skills and examination and treatment methods limits the freedom of speech of medical persons by extensively depriving their opportunity to advertise and promote their own medical skills and examination and treatment methods. The instant provisions also restrict the freedom to conduct one's occupation by hindering a medical person in effectively executing competition in business with other medical persons. Moreover, the instant provisions limit the consumers' right to know concerning medical information.

As the restricted private good is more important than the public good that the provisions seek to protect, they also violate the principle of balance of interest.

(4) Therefore, the instant provisions infringe the freedom of speech and the freedom to conduct one's occupation by violating the principle of proportionality.

4. Conclusion

The instant provisions are unconstitutional, and the Court declares so by the consensus of all Justices except Justices Yun Young-chul, Kim Hyo-jong, and Choo Sun-hoe who wrote their dissenting opinion in paragraph 5 below.

5. Dissenting Opinion of Three Justices

We do not believe the instant provisions to be unconstitutional and give our dissenting opinion as follows:

A. Medicine has been called a benevolent art from the past and being a medical person requires a strong sense of morals and duty. Medical service is different from general commercial acts in that it treats human body and deals with human life. Thus, commercial advertisement of medicine must differ from advertisements of general goods or service.

Also, as medical service requires complex techniques and expertise, messages of commercial advertisements on medicine may mislead or deceive patients who do not have knowledge and information on medicine. Also, a mistakenly chosen medical service may seriously threaten the patient's health. Thus, from these aspects, it is clear that medical advertisements should be treated differently from general commercial advertisements.

For such reasons, in European nations such as France and Germany, commercial advertisements of medical service are principally prohibited.

B. "Medical person's skills and examination and treatment methods" vary greatly according to each medical person and advertisements of them can be expressed with specialized and subjective contents. Information concerning medical techniques or method of medical examination and treatment may be difficult for the consumers to understand, may give erroneous expectations to the consumers, or may be unverified by modern medicine.

Therefore, advertisement concerning medical person's skills and examination and treatment methods can easily be potentially deceiving to the patients.

Also, if the advertisement of the medical person's skills and examination and treatment methods is allowed without any condition, there is a high probability of giving rise to excessive competition among medical persons, which may cause the problem of impairing the stability of the medical system and making citizens and the medical insurance union incur unnecessary medical costs.

The majority opinion is that advertisement concerning the medical person's skills and examination and treatment methods should be allowed when they are based on objective facts and are not fraudulent or exaggerated. However, it is difficult to distinguish fraudulent or exaggerated medical advertisements from ones that are not; the excessive competition, which will occur when advertisement of the medical person's skills and examination and treatment methods is allowed, will make it difficult for the patients to select a medical person who can perform more appropriate medical examination and treatment; also, the allowance is sure to hinder fair competition between medical persons who actively promote themselves with exaggeration and those who perform the art of benevolence without advertising.

It is a very difficult task to passively regulate the skills and the examination and treatment methods by establishing prohibited advertisement types, concerning the diversity and specialization of the skills and the examination and treatment methods. Also, an ex post facto judgment of an advertisement deciding whether it can be allowed will cause confusion and cannot prevent the damage to the citizens caused by the advertisement before the judgment is made. For such reasons, the legislature chose the form of uniform restriction as in the instant provisions, and such form of uniform restriction is necessary to protect medical consumers, prevent excessive competition between medical persons, and firmly secure sound medical system.

Also, as Medical Service Act Article 46 (1) prohibits "fraudulent or exaggerated" advertisements, it differs in the subject of regulation from the instant provisions. Regulation by other acts that the majority opinion mentioned - Fair Advertisement Act (Articles 3, 5), Consumer Protection Act (Article 9), Monopoly Regulation and Fair Trade Act (Article 23 (1) iii.), and Outdoor Advertisements, Etc. Control Act - not only differ in their legislative purpose, but also in the form and method of regulation compared with the instant provisions. Thus, they cannot be effective means to substitute the instant provisions which protect

customers, safeguard competitive medical institutions from unfair advertisement without reasonable grounds, and seek to establish sound medical system by restricting advertisement concerning "the skills and the examination and treatment methods of a medical person." Therefore, we cannot agree to the majority opinion which ruled that the instant provisions violate the principle of minimum restriction.

Even if it were not for the instant provisions, the current law allows the advertisement of the type of license, specialized subject, subject of medical examination and treatment, matters concerning the emergency medical facilities, medical personnel, and career of the medical person. Evaluation results of a medical institution are also included in the permitted scope of advertisement. Thus, medical consumers can sufficiently obtain the basic information concerning medical persons and facilities.

Medical advertisement concerning the skills and the examination and treatment methods of a medical person is not important to a medical person in conducting his/her business. The medical person's freedom of speech is not extremely limited by the prohibition of such advertising expressions. On the other hand, the protection of medical consumers, [promotion of] fair competition between medical institutions, and establishment of sound medical system that the instant provisions pursue are important public goods. Therefore, the instant provisions cannot be seen to violate the principle of balance of interest.

Moreover, as the instant provisions set forth punishment by a fine not exceeding three million won when any person advertises the prohibited matters and as the degree of punishment concerning the violation of medical advertisement basically belongs to legislative discretion, the statutory sentence above cannot be seen as excessive compared to the contents or the characteristics of the violation.

C. For the reasons above, we cannot accept the majority opinion that the instant provisions infringe on basic rights by violating the principle of proportionality. There are no other reasons to find the instant provisions unconstitutional. Therefore, we judge that the instant provisions are constitutional.

Justices Yun Young-chul (Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il (Assigned Justice), Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun, and Cho Dae-hyen

5. *Constitutional Complaint against the Proviso of Trade Union and Labor Relations Adjustment Act Article 81 ii*

[17-2 KCCR 392, 2002Hun-Ba95 · 96 and 2003Hun-Ba9 (consolidated), November 24, 2005]

In this case, the Constitutional Court found constitutional the relevant provisions of the Trade Union and Labor Relations Adjustment Act that authorize compulsory organization through the means of a collective bargaining agreement (so called "union shop" agreement) for unions representing at least two thirds of workers at the relevant workplaces.

Background of the Case

Complainants are taxi drivers employed by taxi companies A and B. C Labor Union is a labor union that has the workers working in taxi transportation service at D city as its organizational jurisdiction. E Labor Union is a labor union established mainly by the workers of the taxi companies whose workers did not join C Labor Union. According to the statute of the E Labor Union, its organizational jurisdiction is workers of taxi transportation service in D city. Thus, it has the same organizational jurisdiction as that of ○○ District Taxi Labor Union.

As almost all the workers of A and B Taxi Companies joined C Labor Union, it had been concluding collective bargaining agreement on behalf of them. In concluding the collective bargaining agreement for 1998, C Labor Union concluded the so-called union shop agreement, which states "The Company must immediately dismiss the worker who refuses to join or who withdraws from the labor union." Afterwards, complainants withdrew from C Labor Union and at the same time joined E Labor Union. C Labor Union, according to the collective bargaining agreement, requested A and B Taxi Companies to dismiss the complainants. Accordingly, A and B Companies dismissed the complainants. The complainants filed complaints a suit to seek a declaration that their discharges were void, and requested constitutional review of the Instant Provisions. When the request was denied, they filed this constitutional complaint.

Summary of the Decision

The Constitutional Court issued a 7:2 decision of constitutionality for the following reasons:

1. Majority Opinion of Seven Justices

A. The instant provision allows a labor union that represents two-thirds or more of the workers working in the workplace concerned (hereinafter "dominant labor union"), to maintain and strengthen its organization by means of concluding a collective bargaining agreement that sets up the rule of compulsory organization (so called 'union shop' agreement). In this instance, there is a conflict between the workers' right not to organize and the labor union's right to active organization (right to compulsory organization). However, the active right to organization has a more special meaning than the freedom not to organize. The labor union's right to compulsory organization also has a characteristic of a right to livelihood (social right). Therefore, it is guaranteed as having more special value compared to individual worker's liberty right, and the labor union's active right to organization is given more importance than individual worker's freedom not to organize. Therefore, granting a labor union the right to compulsory organization cannot be directly concluded as violating the essential aspect of the workers' right not to organize. The instant provision, although causing a conflict between a worker's right to choose to organize and the union's collective right to organization by compelling entry into a certain union through the means of collective bargaining, limits the scope of the labor union that can lawfully and validly enforce compulsory organization. It also has provisions that protect individual workers from abuse of authority by the labor union in a dominant position. Generally, it achieves rational harmony between two conflicting basic rights. Also, its restriction of rights maintains appropriate proportionality and the essential aspect of the workers' right to choose organization cannot be said to be violated. Therefore, the instant provision does not violate Article 33 (1) of the Constitution, which guarantees the workers' right to organization.

B. The reason for labor unions' compulsory organization is ultimately to contribute to the improvement of overall workers' status by enhancing uniform and organized negotiating power through maintaining and strengthening their organization. The instant provision restrictively allows compulsory organization through collective bargaining only to dominant labor unions. If

such form of compulsory organization is acknowledged even to minority labor unions, it is feared that an employer with an anti-union intention may abuse it as a tool to oppress majority workers' right to organization. Considering such possibility, the instant provision's discriminatory treatment toward minority labor unions and workers, who joined or plan to join them, compared to dominant labor unions and its members has a reasonable basis. Therefore, the instant provision cannot be seen to violate the right to equality.

2. Dissenting Opinion of Two Justices

The purpose of Article 33 (1) of the Constitution is to secure the worker's right to livelihood and improve working conditions. An individual worker's freedom not to organize is also guaranteed in the Constitution. The instant provision allows the discharge of a worker who does not join a particular labor union, by having the entry into a particular labor union as a pre-condition of employment. Therefore, it essentially violates worker's freedom not to organize and right to livelihood. Firing a worker, thus, fundamentally denying his or her status as a worker, for the reason of not joining or withdrawing from a particular labor union runs directly counter to the purpose of Article 33 (1) of the Constitution, which seeks to guarantee worker's right to livelihood and improvement of status. It is also against the principle of coexistence and prosperity and the principle of protection of minorities - principles that free democracy aims at. Therefore, the instant provision infringes on workers' right not to organize in a manner that violates Article 33 (1) of the Constitution.

Parties

Complainants

Bae ○-kyu, et al. 9

Counsel: Busan Law Firm

Attorneys in Charge: Jung Jae-sung, et al. 3

Original Case

1. Supreme Court 2000Da23815, Suit for Declaration of Wrongful Discharge (2002Hun-Ba95)

2. Supreme Court 2000Da23822, Suit for Declaration of Wrongful Discharge (2002Hun-Ba96)
3. Busan High Court 99Na7756, Suit for Declaration of Wrongful Discharge (2003Hun-Ba9)

Holding

The proviso of the Trade Union and Labor Relations Adjustment Act Article 81 ii is not unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) ○○ Transportation Corporation (hereinafter "○○ Transportation") and □□ Transportation Corporation (hereinafter "□□ Transportation") are taxi companies that carry on passenger transportation service. Complainants Bae ○-kyu (March 7, 1996), Son ○-hun (January 20, 1996), Song ○-bok (April 9, 1996), Yun ○-ok (January 29, 1997), Park ○-min (November 21, 1994), Bae ○-yeol (June 1, 1997), Wu ○-hun (June 22, 1989), Son ○-suk (May 9, 1995), and Kim ○-hak (January 8, 1991) joined ○○ Transportation and complainant Kwon ○-ryul (November 25, 1995) joined □□ Transportation as taxi drivers.[2)]

(2) ○○ City District Taxi Labor Union (hereinafter "○○ District Taxi Labor Union") under the National Federation of Taxi Labor Unions is a regional and industry-wide classified unit labor union, which reported establishment on January 21, 1992, having workers working in taxi transportation service at ○○ city as its organizational jurisdiction. ○○ Democratic Taxi Labor Union is a labor union, which reported establishment on May 13, 1997, and received certificate of establishment on the 21st of the same month. In its establishment, the workers of four taxi companies, who did not join ○○ District Taxi Labor Union, played a pivotal role. According to the statute of the ○○ Democratic Taxi Labor Union, its organization jurisdiction is workers of taxi transportation service

2) The dates in the parentheses are the dates each complainant joined ○○ Transportation or □□ Transportation.

in ○○ city. Thus, it is a regional and industry-wide unit labor union, which has the same organization jurisdiction as that of ○○ District Taxi Labor Union.

(3) As almost all the workers of ○○ Transportation and □□ Transportation joined ○○ District Taxi Labor Union, the Union had been concluding collective bargaining agreements with ○○ Transportation and □□ Transportation, or ○○ District Taxi Transportation Association, to which the two companies entrusted the right to collective bargaining. In concluding the collective bargaining agreement for 1998 with ○○ District Taxi Transportation Association during December of 1997, ○○ District Taxi Labor Union concluded the so-called union shop agreement, that states, "The Company must immediately fire any worker who refuses to join or withdraw from a labor union."

(4) Afterwards, complainants Bae ○-kyu, Park ○-min, and Son ○-suk withdrew from ○○ District Taxi Labor Union and at the same time joined ○○ Democratic Taxi Labor Union on June 25, 1998, complainants Song ○-bok, Yun ○-ok, Bae ○-yeol, Wu ○-hun, and Kim ○-hak on the 28th of the same month, and complainant Kwon ○-ryul on August 14th of the same year. ○○ District Taxi Labor Union, according to the collective bargaining agreement, requested ○○ Transportation and □□ Transportation to dismiss the complainants. Accordingly, ○○ Transportation and □□ Transportation dismissed the complainants Bae ○-yeol and Son ○-suk on July 5, 1998, complainants Park ○-min, Wu ○-hun, and Kim ○-hak on the 11th of the same month, complainant Yun ○-ok on the 14th of the same month, complainants Bae ○-kyu, Son ○-hun, Song ○-bok on August 17 of the same year, and complainant Kwon ○-ryul on September 3 of the same year on the basis that they withdrew from ○○ District Taxi Labor Union.

(5) Complainants filed complaints (Busan District Court, 98Ga-Hab15852, 98Ga-Hab19397, and 98Ga-Hab19816) against ○○ Transportation and □□ Transportation asserting that the discharges of the two companies are invalid as they violate the law. The court of first instance sustained the plaintiffs' complaints on July 7, 1999. Therefore, the defendants, ○○ Transportation and □□ Transportation, appealed (Busan High Court, 99Na7756, 99Na7770, and 99Na7794) and the appellate court of 99Na7770 and 99Na7794 reversed the ruling of the court of first instance and rejected the complaints of complainants Bae ○-kyu, et al., and complainant Kwon ○-ryul. Complainants Bae ○-kyu and the three remaining, then, complainants and complainant Kwon ○-ryul appealed to the Supreme Court (Supreme Court 2000Da23815 and 2000Da23822) and requested constitutional review of the proviso of the Trade Union

and Labor Relations Adjustment Act (hereinafter "Trade Union Act") Article 81 ii (Supreme Court, 2000Ka-Gi76 and 2000Ka-Gi183), for the reason that the constitutionality of the proviso, which may be applied to the case, is a precondition to this trial. The Supreme Court, along with the denial of the appeal, denied the request for constitutional review of complainants Bae ○-kyu, et al. 3 on October 25, 2002, and complainant Kwon ○-ryul on November 13, 2002. On the other hand, during the pending case 99Na7756 above, complainants Park ○-min, et al. 4, also requested constitutional review of the proviso of the Trade Union Act Article 81 ii (Busan High Court, 2000Ka-Gi58). The appellate court, along with the reversal of the ruling of the court of first instance and denial of the complaints of complainants, denied the request for constitutional review (this decision was finalized as the complainants did not appeal.). Complainants Bae ○-kyu, et al. 3 requested the Constitutional Court to adjudicate on the instant constitutional complaint on November 16, 2002, complainant Kwon ○-ryul on November 26, 2002, and complainants Park ○-min, et al. 4 on February 7, 2003, according to Article 68 (2) of the Constitutional Court Act.

B. Subject Matter of Review

The subject matter of review of this case is the unconstitutionality of the proviso of the Trade Union and Labor Relations Adjustment Act Article 81 ii (hereinafter "the instant provision") and its contents are as follows.

Article 81 (Unfair Labor Practices)

Employers shall not conduct any act falling under any of the following subparagraphs (hereinafter referred to as an "unfair labor practice"):

(i) Omitted;

(ii) Employment of a worker on the condition that he should not join or should withdraw from, a trade union, or on the condition that he should join a particular trade union: provided that in case where a trade union represents two-thirds or more of the workers working in the workplace concerned, a conclusion of a collective agreement under which a person is employed on condition that he should join the trade union shall be allowed as an exception. In this case, no employer shall act against the status of the worker on the grounds that the worker is excluded from the trade union concerned;

(iii)~(v) Omitted.

2. Opinion of the Complainants, Reason for Denial of the Request for Constitutional Review of the Supreme Court, etc., and the Opinion of Related Parties

A. Opinion of the Complainants (2002Hun-Ba95 · 96 and 2003Hun-Ba9)

(1) Article 33 (1) of the Constitution guarantees the right to organize to workers. Such right to organize includes not only the freedom to choose an organization, but also the positive right to organize. Therefore, compulsory organization, to a certain extent, is necessary. However, unlike the general compulsory organization that forces workers to join "a certain appropriate labor union", specific compulsory organization that forces workers to join a "particular labor union" violates the workers' freedom to choose an organization.

(2) The instant provision, combined with Article 5 (1) of the Addenda of the Trade Union Act that prohibits the establishment of multiple labor unions in a workplace of the same organizational jurisdiction for a limited period of time, violates the workers' freedom to choose an organization through forcing the entry into a particular labor union. Also, the instant provision violates the right to equality by prescribing that only the labor union, which represents two-thirds or more of the workers at a workplace concerned, can conclude a union shop agreement, thus, not only violating the right to organize of other smaller labor unions (minority labor union), but also in practice disfavoring only the minority labor unions.

B. Reason for Denial of the Request for Constitutional Review of the Supreme Court, etc. (2002Hun-Ba95 · 96 and 2003Hun-Ba9)

The main text and the proviso of Trade Union Act Article 81 ii does not characterize as an anti-union contract the conclusion of a union shop agreement with a labor union, which represents two-thirds or more of the workers at a workplace concerned. An anti-union contract is an unfair labor practice requiring non-entry into or withdrawal from a labor union or entry into a particular labor union as a pre-condition of employment. They rather prescribe that the conclusion of a union shop agreement with other smaller labor unions is an unfair labor practice. Although the union shop agreement has an aspect of conflicting with an individual

worker's freedom not to join a labor union or freedom to choose a labor union, the instant provision cannot be said to violate the workers' right to organize. For it acknowledges the validity of the Union Shop Agreement under certain conditions because of its aspect of contributing to strength and maintenance of the organization of the labor union as a part of compulsory organization.

C. Opinion of the Minister of Labor (2002Hun-Ba95 and 2003Hun-Ba9)

The right to organize, guaranteed by the Constitution, includes not only the individual worker's particular right to organize, but also the labor union's collective right to organize. The instant provision is not unconstitutional; although it acknowledges a union shop agreement to substantively guarantee the labor union the right to compulsory organization, it permits the conclusion of the agreement only in the case when a labor union meets the requirements for representation, in order to harmonize with individual worker's right to choose an organization.

Considering the legislative purpose of the instant provision - establishing an order of equal labor - management autonomy and improvement of the working conditions through the maintenance and strengthening of the organization of labor union and the strengthening of the power to organize and to bargain collectively, the instant provision, which admits the conclusion of a union shop agreement only in case when a labor union meets the requirements for representation, does not violate the principle of equality.

D. Opinion of ○○ Transportation and □□ Transportation (2002Hun-Ba95 · 96 and 2003Hun-Ba9)

This opinion mostly concurs with the Supreme Court's reason for denial of the request for constitutional review or the opinion of the Minister of Labor.

3. Review

A. Meaning of the Instant Provision

(1) Exception to the Prohibition of Unfair Labor Practices

Article 81 of the Trade Union Law prescribes the employers'

conduct that violates or interferes with the activity of workers or the labor union that materializes the Three Rights of Labor as "unfair labor practices" and principally prohibits such conduct. Especially, the main text of subparagraph 2 states "anti-union contract," in other words, a practice requiring non-entry into or withdrawal from a labor union or joining a particular labor union as a condition for employment, as an example. Nonetheless, the proviso of subparagraph 2 prescribes that the conclusion of a collective bargaining agreement is allowed, as an exception, in a case where the labor union represents two-thirds or more of the workers working in the workplace concerned.

From the regulation form and the contents of the provision above, while the main text of subparagraph 2 protects the workers by principally prohibiting the anti-union contract, which has the possibility of the employer's violating the right to organize, through prescribing it as an unfair labor practice; the proviso of subparagraph 2 exceptionally allows the restriction on the workers' freedom to choose organization by acknowledging the exception of removing the prohibition on the employer in the prescribed circumstances.

(2) Legal Basis for Compulsory Organization

Generally, a regulation in the collective agreement, which states workers' joining the labor union as a condition for employment, is called a union shop agreement. Such agreement is a system in a collective bargaining agreement in which the labor union forces the gaining and maintenance of membership of a labor union to maintain and strengthen its organization. It is a representative method of compulsory organization of the labor union.

The instant provision confirms that concluding collective bargaining agreements with a representative labor union (hereinafter "dominant labor union"), which represents two-thirds or more of the workers working in the workplace concerned, for the labor union's purpose of extension of organization, establishing an order of more equal labor-management autonomy through strengthening the power of organization and the power of collective bargaining, is not a prohibited unfair labor practice.

Moreover, the instant provision, besides having the passive meaning above, can be seen as granting legal basis to lawfully and effectively conclude a union shop agreement, which is the labor union's means of compulsory organization, or at least to prescribe the scope of the dominant labor union, which can lawfully and effectively conclude a union shop agreement.

(3) The Effect of the Provision of Compulsory Organization

Generally, when a labor union concludes a union shop agreement with the employer, workers who qualify as union members according to the union regulations must, in principle, join the labor union concerned and if a worker does not join the labor union within a certain period of time or withdraws from or is expelled from it, the employer must, as set forth in the agreement, dismiss that worker. The Supreme Court also ruled that "the proviso of the former Labor Union Law (before amended by Act No. 5244 on December 31, 1996) Article 39 ii recognizes the so-called union shop agreement, as one of the compulsory means to strengthen the labor union's power to organize, and therefore requires the worker to become a member of the representative labor union as a condition for employment," and that "the employer has the obligation to dismiss the worker who withdrew from a labor union when there is a union shop regulation that the worker must be a member of the labor union according to a collective bargaining agreement, even absent explicit provisions." (Refer to Supreme Court, 96Nu16070, March 24, 1998)

(4) Restriction of Basic Rights

The instant provision does not expressly violate and deprive the worker's freedom not to organize or right to choose an organization. However, as it acknowledges the effectiveness of the compulsory organization functioning, as the legal basis of the union shop agreement, which is the means of compulsory organization of a labor union, and as its contents assumes compulsory obligation in a particular dominant labor union, it restricts the basic rights such as the right to choose an organization of an individual worker who does not wish to join the labor union concerned. Compulsory organization differs according to its contents. While the general compulsory organization, which requires the entry into an appropriate labor union as the condition for employment, only restricts the worker's freedom not to organize, specific compulsory organization, which requires becoming a member of a particular labor union as the condition for employment, not only limits the worker's freedom not to organize, but also even the right to choose an organization.

B. Whether the Worker's Right to Organize, etc., Is Violated

(1) Matters in Dispute

Generally, compulsory organization of a labor union has an aspect of maintaining and strengthening the organization of a labor union by forcing the worker to join any labor union or a particular one. On the other hand, it also has an aspect of restricting the individual worker's freedom not to organize or the freedom to choose whether to join a labor union. Such problem of restricting the individual worker's right to organize, after all, appears in the form of a conflict with the collective right to organize of the instant provision, which is the legal basis of compulsory organization of a labor union. In other words, as the instant provision acknowledges a certain form of compulsory organization of the dominant labor union, conflict arises between the labor union's collective right to organize and the individual worker's freedom not to organize or right to choose an organization. Therefore, it is important to resolve the conflict between the two basic rights.

(2) Solution to Conflict among Basic Rights

A conflict among basic rights happens when a number of subjects of different basic rights assert before the state the application of opposing basic rights in a same case in order to actualize their own rights and interests. In such conflict, the exercise of one subject's basic right characteristically restricts or inhibits the exercise of the other subject's basic right.

To resolve the conflict between basic rights, we have discussed a hierarchy of basic rights, the principle of balancing competing interests, the principle of substantive harmonization, (i.e. an interpretation favoring harmonization of norms), etc. The Constitutional Court has resolved the problem of conflicts among basic rights by choosing an appropriate solution for each case according to the characteristics and mode of the conflicting basic rights. For example, in a constitutional complaint against Article 7 of the Enforcement Rule of the National Health Promotion Act, the Constitutional Court found that when two basic rights of different ranks such as smoker's rights and non-smoker's rights conflict, the inferior basic right can be limited according to the principle of precedence of a superior basic right. Thus, it ruled that smoker's rights could be acknowledged only so long as it does not violate non-smoker's rights(refer to Constitutional Court, 2003Hun-Ma457, August 26, 2004, 16-2 KCCR 355, 361). Also, in the constitutional complaint on the unconstitutionality of Article 16 (3) of the Registration, etc. of Periodicals Act, the Constitutional Court found that, in resolving the conflict between the right to request a corrective report (right to reply) prescribed by the Act and the

reporting agency's freedom of speech, harmonious method, through which the functions and effects of all conflicting basic rights can be realized to their full extent, should be sought in order to maintain the uniformity of the Constitution. Therefore, it judged from the viewpoint of whether the purpose of the corrective report request system can be justified under the rule against excessive restriction, and whether the extent of restriction on the freedom of speech, caused by the means prepared to achieve that purpose, is also adequately proportionate in relation to the right to personality (refer to Constitutional Court, 89Hun-Ma165, September 16, 1991, 3 KCCR 518, 527-534).

(3) The Conflict between Workers' Freedom Not to Organize and the Labor Union's Positive right to Organize

Labor union's compulsory organization, whether it is a general compulsory organization or a specific one, may restrict workers' freedom not to organize. As can be seen from the above, the instant provision acknowledges a certain form of compulsory organization to the dominant labor union. Therefore, there is a conflict between the workers' right not to organize and the labor union's right to positive organization (right to compulsory organization).

Article 33 (1) of the Constitution guarantees that, "to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action." Our Court's precedents rule that the workers' right to organize guaranteed by the Constitution only indicates the freedom to organize and not the freedom not to organize, the so-called negative right to organize (refer to Constitutional Court, 98Hun-Ma141, November 25, 1999, 11-2 KCCR 614, 623-624).

Therefore, workers' freedom not to form a labor union, freedom not to be forced to enter into a labor union, and freedom to withdraw from a labor union that he or she had entered into, cannot find its basis as a right connoted in the right to organize guaranteed to workers. Rather, they find their basis from the general freedom of action derived from the right to pursue happiness under Article 10 of the Constitution or the freedom of association under Article 21 (1) of the Constitution. Therefore, even though the conflict between workers' right not to organize and the labor union's positive right to organize is not a conflict between rights to organization, the matter of conflict can be posed between basic rights - general freedom of action or freedom of association and the positive right to organize - guaranteed by the Constitution.

From the fact that workers can affect the formation of working conditions through forming an equal power with the employer by opposing the employer as a group through formation of a workers' organization such as a labor union, the right to organize has a characteristic of a "liberty right performing the function of social protection" or a "liberty right with the characteristic of a social right" (refer to Constitutional Court, 94Hun-Ba13 etc., February 27, 1998, 10-1 KCCR 32, 44). It is set up as a right different in quality from general civic liberty rights and is constitutionally acknowledged as a right of special status, on its own, separate from the freedom of association.

Compared to such rights, the general freedom of action, being a concrete expression implied in the right to pursue happiness under Article 10 of the Constitution, is a so-called supplementary liberty right (refer to Constitutional Court, 97Hun-Ma345, October 29, 1998, 10-2 KCCR 621, 633; 99Hun-Ba76, October 31, 2002, 14-2 KCCR 410, 428).

Therefore, even when the freedom not to organize and the positive right to organize conflict, it can be seen that the positive right to organize has a more special meaning than the freedom not to organize. Also, considering the fact that the labor union's right to compulsory organization, as it is also a right to livelihood (social right) modifying liberty right, is guaranteed as a more special value compared to individual worker's liberty right, the labor union's positive right to organize is given more importance than the individual worker's freedom not to organize. Therefore, granting a labor union the positive right to organize (right to compulsory organization) cannot be directly concluded as violating the essential aspect of the workers' right not to organize.

(4) Conflict between Workers' Right to Choose Organization and Labor Union's Collective Right to Organize

(A) Method of Review

The instant provision, as seen above, acknowledges the conclusion of a collective bargaining agreement, which forces entry into a particular labor union. Therefore, worker's individual right to organize (right to choose organization) and labor union's collective right to organize (right to compulsory organization) conflicts in one forum.

In such a case, where the individual right to organize and the collective right to organize conflict, which basic right is superior cannot be concluded according to the ranking of basic rights theory

or the principle of balancing competing interests. This is because, while the individual right to organize is the foundation of the constitutional right to organize and the prerequisite of the collective right to organize, collective right to organize is a sine qua non for workers to actually maintain an equal relationship with the employer through an organization organized and strengthened through the individual right to organize. In short, whether it is an individual right to organize or a collective right to organize, one cannot be prioritized and the other pushed back by ranking of basic rights or balancing competing interests.

Therefore, in such a case, in order to maintain the uniformity of the Constitution, we must seek a harmonious method that allows all conflicting basic rights to exhibit their function and effect (interpretation based on harmonization of norms; refer to Constitutional Court, 89Hun-Ma165, September 16, 1991, 3 KCCR 518, 528). Also, principle of balancing competing interests and selective discretion through legislation should be considered in review.

(B) Legitimacy of the Purpose of Restriction

The purpose of the principle of compulsory organization contemplated by the instant provision is to, as seen above, maintain and strengthen the structure of a labor union, which is an organization of workers, and ultimately to contribute to elevating the standing of the whole body of workers. The principle coincides with the constitutional ideal of guaranteeing the right to organize. Therefore, the legitimacy of its purpose is secured. Workers' substantive freedom and rights can only be effectively secured by organization through a labor union. The instant provision exists to effectively guarantee such labor union's right to compulsory organization. Also, such system cannot be said to directly violate the essential aspect of the workers' right to choose an organization. Our Court already made clear that a certain degree of compulsory organization or compulsory association must accompany a labor union in order to secure its bargaining power (Constitutional Court, 98Hun-Ma141, November 25, 1999, 11-2 KCCR 614, 624).

(C) Maintenance of Appropriate Proportionality between Restricted Basic Rights

A labor union enters into a collective bargaining agreement, which requires workers to join a particular labor union as a pre-condition of employment, for the purpose of maintenance and strengthening of its organization, and such agreement is an effective

and appropriate means to achieve that purpose. Compulsory organization through a collective bargaining agreement is a common and universal phenomenon that appeared in the development process of labor movements in various countries such as the U.S. and Germany despite differences in form and degree. Also, it is not easy to contrive an effective alternative means besides using an organizing provision, such as a union shop agreement, in the collective bargaining agreement. Nonetheless, as the labor union's compulsory organization above is inherently accompanied by restriction on the workers' right to choose an organization, there is a need to seek a balance between competing interests. In other words, a certain limit must be established so as not to excessively violate an individual worker's right to choose an organization and maintain the same in harmony.

In such regard, the instant provision limits the scope of a labor union that can legally and validly enforce compulsory organization through collective bargaining agreement to a certain extent. It requires the labor union to be a sufficiently dominant organization to justify the principle of compulsory organization or its negative consequences in personnel actions, including discharge. That is, to be a labor union representing two-thirds or more of the workers working in the workplace concerned.

Also, to protect individual workers from abuse of authority by the labor union in a dominant position, the Act limits the workers' right to choose an organization to the necessary minimum by prohibiting the employer from imposing disadvantages in worker's status for the reason that he or she has been expelled by the dominant labor union. In other words, the instant provision allows the restriction of the workers' right to choose an organization, by compulsory organization, to only when the worker voluntarily withdraws from or does not join a labor union.

Moreover, ultimately, workers can form and strengthen a labor union and can be guaranteed the substantive right to organize through that labor union's activities. Also, individual workers who do not want entry into the dominant labor union, receives the fruits of such activities of the labor union - the working conditions acquired by the labor union.

Therefore, although the labor union's compulsory organization, contemplated by the instant provision, partly has an aspect of restricting individual workers' right to choose an organization, the instant provision seeks balance between the workers' right to choose organization and the labor union's collective right to organize (right to compulsory organization) through means such as granting the power of compulsory organization only to dominant

labor unions. Thereby, it maintains appropriate proportionality between two mutually conflicting and restricting basic rights.

(D) Selective Discretion through Legislation

The first goal of the right to organize, guaranteed by Article 33 (1) of the Constitution, is to defend the workers' right to organize against the state's governmental power. However, it has a more meaningful purpose of guaranteeing the substantive autonomy of labor and management on working conditions. It does so by making possible the creation of a socially opposing power, the workers' organization, and thereby achieving social balance in forming labor-management relations. To guarantee the social right aspect of the right to organize, the state should actively form and maintain the actual conditions enabling the workers to exercise their rights (refer to Constitutional Court, 94Hun-Ba13 etc., February 27, 1998, 10-1 KCCR 32, 44, 45). However, while the principle of compulsory organization is a sine qua non to actually maintain equal relations between labor and management through forming and strengthening an organization based on worker's individual right to organize, it also has an aspect of restricting worker's right to choose an organization. Therefore, the legislature should establish the most appropriate boundary that guarantees to the utmost the two basic rights that are in complementary and conflicting relations as seen above. Especially, to which labor union and of what form and method will the right to compulsory organization be acknowledged are matters that belong to the choice and discretion of the legislative-formative power bestowed upon the legislature.

The instant provision, in case of a certain dominant labor union, acknowledges the conclusion of a collective bargaining agreement that requires becoming that labor union's member as a pre-condition of employment. Thus, it forces entry indirectly through the medium of a collective bargaining agreement, avoiding use of the direct means of compulsion. The scope of actual restriction of the right to organize is limited only to the workers' right to choose an organization; the right to organize itself is not wholly deprived. Also, it is not easy to assume a more effective and appropriate means that can be chosen to accomplish the labor unions' compulsory organization. Considering such facts, the instant provision cannot be said to go beyond the extent of discretion granted to the legislature in selecting the legislative means.

(E) The instant provision constitutes a statutory means of and thus materializes the principle of compulsory organization through a collective bargaining agreement such as a union shop agreement to

guarantee labor union's collective right to organize. Although it has an aspect of conflicting with the workers' right to choose an organization, generally it achieves rational harmony between two conflicting basic rights. Also, the restriction maintains appropriate proportionality and the essential aspect of the workers' right to choose an organization cannot be said to be violated.

(5) Therefore, the instant provision does not violate Article 33 (1) of the Constitution, which guarantees the workers' right to organize.

C. Whether the Right to Equality Is Violated

(1) The instant provision facilitates a dominant labor union's maintenance and strength through the medium of a collective bargaining agreement, including a union shop agreement. However, the provision does not extend the benefits of compulsory organization through the same means to a non-dominant labor union (minority labor union). Therefore, discrimination in actual maintenance and strength of an organization can be said to exist.

(2) The principle of equality guaranteed by Article 11 (1) of the Constitution does not mean absolute equality, which denies all discriminatory treatment. Rather, it means relative equality, which denies discrimination without a rational basis in legislation and application of law. Therefore, discrimination or inequality with a rational basis does not violate the principle of equality (Constitutional Court, 92Hun-Ba43, February 24, 1994, 6-1 KCCR, 72, 75).

The reason for the existence of labor unions' compulsory organization is ultimately to contribute to the improvement of overall workers' status by enhancing uniform and organized negotiating power through maintaining and strengthening their organization. The instant provision restrictively allows compulsory organization to dominant labor unions. Also, in deciding the scope of the dominant labor union, the provision strictly limits to an organization representing two-thirds or more of the workers working in the workplace concerned. If such form of compulsory organization is acknowledged, even to minority labor unions, it is feared that an employer with an anti-union intention may abuse it as a tool to oppress workers' right to organize. Comprehensively considering such facts, the instant provision's discriminatory treatment of minority labor unions and workers, who joined or plan to join them, compared to a certain dominant labor union and its members, has a reasonable basis. Therefore, the instant provision cannot be seen to violate the right to equality.

4. Conclusion

The instant provision is not unconstitutional, and the Court declares so by the consensus of all Justices except Justices Kwon Seong and Cho Dae-hyen who wrote a dissenting opinion in paragraph 5 below.

5. Dissenting Opinion of Two Justices

We do not agree with the majority that the instant provision is not unconstitutional and, therefore, give our dissenting opinion as follows.

Article 33 (1) of the Constitution prescribes, "To improve working conditions, workers shall have the right to independent association, collective bargaining and collective action." This is to elevate the economic status of workers by securing their right to livelihood and improving their working conditions.

Although Article 33 (1) of the Constitution guarantees worker's right to organize, individual worker's freedom not to exercise the right of organization is also constitutionally guaranteed. Despite the difference in opinions on its constitutional basis, there is no divergence of opinion on the point that a worker has the freedom not to organize.

The main text of Article 81 ii of the Trade Union Act clarifies such legal principle by prohibiting "employment of a worker on the condition that he should not join or should withdraw from, a trade union, or on the condition that he should join a particular trade union" as a unfair labor practice.

However, the proviso of Article 81 ii of the Trade Union Act, the instant provision on review, states, "Provided, that in case where a trade union represents two-thirds or more of the workers working in the workplace concerned, a conclusion of a collective agreement, under which a person is employed on condition that he should join the trade union, shall be allowed as an exception. In this case, no employer shall act against the status of the worker on the grounds that the worker is excluded from the trade union concerned." As such provision allows the discharge of a worker who does not join a particular labor union by requiring the entry into a particular labor union as a pre-condition of employment, it essentially violates the worker's freedom not to organize and right to livelihood.

Free democracy, one of the basic principles of our Constitution,

aims to respect all people and to achieve coexistence and prosperity of all people. The purpose of Article 33 (1) of the Constitution is to secure worker's right to livelihood and improve working conditions. Therefore, worker's right to organize and labor union's right to strengthen organization and right to collective bargaining should be exercised in ways that seek every worker's coexistence and prosperity. They are constitutionally protected only when exercised for such purpose. As labor union's right to strengthen organization and right to collective bargaining are acknowledged for the improvement of all workers' status, it cannot adopt discharge, which fundamentally threatens the worker's right to livelihood, as a means even for the improvement of working conditions. Even if a labor union is a dominant one with more than two-thirds of the workers, that labor union cannot have the authority to request the discharge of a worker for not joining or withdrawing from it. Firing a worker, thus, fundamentally denying his or her status as a worker, for the reason of not joining or withdrawing from a particular labor union runs directly counter to the purpose of Article 33 (1) of the Constitution, which seeks to guarantee worker's right to livelihood and enhancement in status. It is also against the principle of coexistence and prosperity and the principle of protection of minorities - principles that free democracy strives for. Therefore, the instant provision cannot be justified by the worker's right to organize or labor union's right to strengthen organization under Article 33 (1) of the Constitution. Also, although the instant provision prohibits discharge of a worker when the worker was expelled by the dominant labor union, the expulsion of the worker is of the labor union's will and not that of the worker. Therefore, such exceptional provision does not ease or justify the restriction on the freedom not to organize and the threat on the right to livelihood of the worker concerned.

Therefore, the instant provision unjustifiably infringes on the worker's freedom not to organize in a way that violates Article 33 (1) of the Constitution.

Justices Yun Young-chul (Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun (Assigned Justice), Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun, and Cho Dae-hyen

Ⅱ. Summaries of Opinions

1. *Case on the House Head System*

[17-1 KCCR 1, 2001Hun-Ga9 · 10 · 11 · 12 · 13 · 14 · 15 and 2004Hun-Ga5(consolidated), February 3, 2005]

In the instant case, the Court ruled that the relevant provisions of the Civil Code constituting the backbone of the house head system, under which a household, a concept of a collective, is formed around the house head at its core and passes down only through direct male descendants serving as successive house heads, are non-conforming with the Constitution.

Background of the Case

One category of petitioners is people who had married but divorced and established new families. Despite the fact that they held custody and raised their children, to whom they gave birth with their respective ex-husbands, the children were registered under the households in which the ex-husbands respectively are the house heads. These petitioners reported to the family registration office to register their children under their own households, but the family registration office refused.

Another category of petitioners is people who are married and registered under the same households as their husbands or wives. In these households, petitioners who are husbands or the husbands of petitioners are the house heads. Petitioners in this category filed a change of house head so that these families will be registered as households without house heads. However, the family registration office did not accept the filing.

Petitioners in both categories appealed the disposition of the family registration office to court. During the pending suit, the petitioners requested constitutional review asserting that the provisions of the Civil Code regarding the house head system are unconstitutional and the presiding court accepted the request and referred the case to the Constitutional Court.

Summary of the Decision

The Constitutional Court issued a decision of constitutional nonconformity with a six-to-three-vote (one opinion concurring in the dissenting opinion). The summary of the reasoning is as follows.

1. Majority Opinion of Six Justices

A. (1) The Constitution is the supreme norm of the state. Therefore, even though the family system is distinctively an outcome of history and society, it cannot deviate from the superior force of the Constitution. In other words, if a law regulating the family system impairs actualizing the constitutional ideal and only strengthens the gap between a constitutional norm and the reality, such law should be amended.

(2) Our Constitution expressed its constitutional resolution to no longer tolerate the patriarchal and feudal order of marriage, that came from our past society, by declaring equality of men and women in marriage as the basis of the constitutional marital order. In the current Constitution, sexual equality and individual dignity are firmly seated as the supreme value regarding marriage and the family system.

Meanwhile, "traditions" and "cultural heritage," respectively stated in the preamble and Article 9 of the Constitution, are concepts reflecting both their history and the times in which they are used. Thus, these concepts need to be defined according to their contemporary meanings considering the constitutional value order, the common values of mankind, justice, humanity, etc. Perceiving the meaning of the concept in such a manner, we understand that a certain limit - that tradition and cultural heritage of the family system should at least not be contrary to the constitutional ideals of individual dignity and sexual equality - exists. Therefore, if a certain family system, coming from the past, is contrary to the individual dignity and sexual equality required by Article 36(1) of the Constitution, it cannot be justified on the basis of Article 9.

B. (1) The house head system, which forms the basis and framework of the provisions on review - Article 778 ("A person who has succeeded to the family lineage or has set up a branch family, or who has established a new family or has restored a family for any other reason, shall become the head of a family."), latter part of the main paragraph of Article 781(1) ("entered into his

or her father's family register"), and the main paragraph of Article 826(3) ("The wife shall have her name entered in her husband's family register.") of the Civil Code -, is a system whereby "a household, a concept of a collective, is formed around the house head at its core and passes down only through direct male descendants serving as successive house heads." In other words, the house head system is a statutory device to form a family with male lineage at the center and perpetuate it to successive generations. It is not a system that simply identifies the representative of a family called house heads and compiles the family register accordingly.

(2) The house head system is discrimination based on stereotypes concerning sexual roles. This system, without justifiable grounds, discriminates men and women in determining the succession order to house head, forming marital relations, and forming relations with children. Due to this system, many families are suffering inconvenience and pain in many ways since they cannot form a legal family relationship appropriate to family life in reality and the welfare of the family. Traditional ideology or public morals such as ancestor worship, respect for the aged and obedience to parents, and harmony in family can be passed down and developed through cultural and ethical aspects, but cannot justify the blatant sexual discrimination of the house head system.

(3) The house head system one-sidedly prescribes and demands a certain family system deeply rooted in the ideal of maintaining and expanding a family centered on male lineage regardless of the intention or welfare of the people concerned. It does not respect individuals inside a family as individuals with dignity but rather treats them as a means to succeeding a family. Such attitude does not comply with Article 36(1) of the Constitution that demands respect for the right of autonomous decisions of individuals and families in deciding how to manage marriage and family life.

(4) The relationship inside a family, these days, is no longer an authoritarian one, in which a family is divided into a house head and the followers who obey the house head. It is changing into a democratic relationship where all family members are equally respected as individuals with dignity regardless of sex. As the society is becoming specialized the form of families have become very diverse including families with single mothers, remarried couples and their children from the previous marriage, etc. Also, due to the increased economic power of women and the increased number of divorces, the rate of women filling the role of a house head is also on the rise. Even if the house head system is related to the past family system based on the principle of lineage, as can

be seen above, the foundation of the principle's existence has now collapsed and the system no longer can be harmonized with the changed social environment and family relations. Therefore, there is no need for the house head system to be retained.

C. If the provisions on review, the framework of the house head system, are found unconstitutional, the system cannot be retained. As a result, the current Family Register Act, which prescribes that each family in the Family Register be compiled according to each house head, cannot be enforced the way it is. However, if the Family Register Act is not enforced at all, there will be a vacuum in the public records used for notice and verifying the relations among people. Therefore, we pronounce a decision of constitutional nonconformity in order to temporarily enforce the provisions on review until the Family Register Act is amended with a new family register system not premised on the house head system.

2. Dissenting Opinion of Two Justices

The house head system of the current law succeeded our own rational tradition of the principle of paternal lineage that had started from the ancient times traceable to the middle period of the Chosun Dynasty. The system can be said to have rid itself of the vestiges of Japanese imperialism and has returned as truly our own tradition. Family law, regulating marriage and family relations, can have strong traditional, conservative, and ethical features. Therefore, in interpreting the constitutional provision on marriage and family relations, the nature of the family law as a tradition should be considered. Especially, in the realm of family law, we should not imprudently cut up our traditional culture with a mechanistic rule of equality - rejecting and dismantling totally the traditional family culture. The house head system, in the current law, is designed to actualize the constitution of family and succession of family system based on the principle of paternal lineage. The principle that the wife and children are registered as annexed to the husband, and the system of house head succession, have been designed for such purpose, and are based on our society's long tradition. Also, as they cannot be seen as substantial discrimination against women, they do not violate the principle of equality. Even if the house head system has an aspect of one-sidedly forming status relations, this is inevitable in the process of enacting the family system. Moreover, systems alleviating such one-sidedness, such as voluntary branching of family, waiver of the right to succeed the house head, etc., are available. Therefore, as it is also difficult to see that the house head system of the current law does not respect individual dignity, the system does not violate Article 36(1) of the Constitution.

3. Concurring Opinion of One Justice to the Dissenting Opinion (2.) Above

The principle of children's annexed registration, prescribed in the latter part of the main paragraph of Article 781(1), itself is not unconstitutional. However, as the established exceptions to the principle are too narrowly limited, it is, as the majority opinion points out, inappropriate in reality, irrational in limiting the intention of the children, and discriminatory to the mother in substance. Therefore, the latter part of the main paragraph of Article 781(1) cannot be said to be constitutional. As a result, Article 778 and the main paragraph of Article 826(3) are not unconstitutional, but the latter part of the main paragraph of Article 781(1) is unconstitutional.

4. Dissenting Opinion of One Justice

The Civil Code prescribes a household system in order to contribute to the forming and maintenance of the family system, which is one of the institutions guaranteed by Article 36(1) of the Constitution. The reason for having a house head in each family is based on our traditional culture. Therefore, Article 778 of the Civil Code cannot be said to violate the Constitution, including Article 36(1), for acknowledging the concept of a household and introducing the idea of a house head into such concept. The sexually discriminatory element of the house head system can be ameliorated through voiding individual articles such as Article 984 or through legislative amendment. Therefore, such unconstitutional element cannot be said to be a problem essentially innate in Article 778, which is the basic provision constituting the household system. Therefore, I am with the majority that the latter part of the main paragraph of Article 781(1) and the main paragraph of Article 826(3) are unconstitutional, but do not agree on the point that Article 778 is unconstitutional as it is a legislative measure within the realm of legislative discretion to guarantee family system.

Aftermath of the Case

Article 778, the latter part of the main paragraph of Article 781(1) and the main paragraph of Article 826(3), which was declared nonconforming to the constitution have been repealed in the amendment of the Civil Code on March 31, 2005. Amended provisions will be enforced from January 1, 2008.

2. *Period of Medical Treatment and Custody Case*

(17-1 KCCR 70, 2003Hun-Ba1, February 3, 2005)

In this case, the Court found constitutional the relevant provisions of the Social Protection Act, which does not set a numerical limit on the period of medical treatment and custody and which leaves to the Social Protection Committee, not to a judge, the decision of whether and when to terminate medical treatment and custody.

Background of the Case

The complainant, during the pending medical treatment and custody case, requested to the court the constitutional review of Social Protection Act Article 9(2) ("The subject of medical treatment and custody is placed under protection and custody until he or she has recovered to the point of no longer needing custody as the Social Protection Committee declares so through termination decision or preliminary termination decision") regarding the part concerning the medical treatment and custody of a mentally disabled person (hereinafter, "the instant provision"). The request for constitutional review being rejected by the court, the complainant filed a constitutional complaint on the instant provision.

Summary of the Decision

The Court issued a decision that the instant provision is constitutional with a five-to-three vote for the following reasons.

1. Majority Opinion of Five Justices

A. (1) The instant provision sets the time of terminating medical treatment and custody on the basis of when the subject of medical treatment and custody has recovered and, thus, is no longer in need of custody, instead of whether a certain time has elapsed. It is designed to insure attainment of the purpose of medical treatment and custody - rehabilitation of mentally disabled criminals through medical treatment and securing of people's safety. Thus,

the legislative purpose of the instant provision can be justified. Also, fixing the time for terminating medical treatment and custody on the moment of complete recovery coincides with the essence of preventive measures; it is an effective and appropriate means to attain enhancement of the subject of medical treatment and custody and the society's safety, the goals of medical treatment and custody.

(2) When there is hope of recovery, a more effective method, with fewer burdens on the subject of medical treatment and custody, of attaining "betterment and safety," the purpose of the medical treatment, is to treat him or her in custody to a point of recovery until there is no longer a likelihood of recidivism. This system is better than to release the subject of custody just because a certain time has elapsed. Even when the subject of custody is deemed incurable, we may on one hand release the subject and put him or her under strict probation or entrust his treatment and protection to relatives. On the other hand, we may also continue to provide an appropriate level of treatment while the subject remains in custody. Now, which one is a less onerous alternative to the subject of custody is an open question. Therefore, regarding the instant provision which does not set the period of medical treatment and custody and treats the patient while under custody until recovery, it is difficult to find an alternative that has the same effect of medical treatment and security but, nonetheless, fewer restrictions on basic rights.

(3) Leaving the medical treatment and custody period open without a statutory period and, thus, making possible the continual treatment of the mentally disabled helps promote improvement and rehabilitation of the disabled and establish social security. The public interest attained through such measures is considerably great. Moreover, not only can the subject of custody expect recovery from mental illness, he or she can also escape from the negative effects of long-term custody through legal procedures such as preliminary termination decision or treatment entrustment. Therefore, compared to the public interest guaranteed through the instant provision, which does not set the medical treatment and custody period, the violation of the personal interest is not great. Therefore, the instant provision does not violate the rule against excessive restriction and the bodily freedom of the complainant.

B. (1) The instant provision leaves the decision of ending the medical treatment and custody, the commencement decision which has been made by the court, to the Social Protection Committee. The subject of custody, nonetheless, can request the committee to review and decide the termination of treatment and custody. Even

if the committee rejects the termination request, he or she can file an administrative action on that decision - thus, can be tried by judges. The right to trial of the subject of custody, therefore, is not violated.

(2) The instant provision in granting the Social Protection Committee the power to decide whether to terminate the medical treatment and custody does not violate due process of law for the following reasons: Considering its constitution or review, resolution, and decision-making procedure, the Social Protection Committee is a special committee endowed with independence, professionalism, and quasi-judicial characteristics; it is a rational measure to leave to the Social Protection Committee the decision on whether the likelihood of recidivism exists, when there is an indispensable connection between psychiatric evaluation, and legal evaluation and the committee is composed of judges, prosecutors, or lawyers and doctors; the right to request termination of medical treatment and custody and, to a certain degree, the right to participate in the procedure are guaranteed to the subject of custody and, in the case of a rejection, he or she can file an administrative action to the court.

C. Recovery to the point of no longer needing custody means that the subject of custody is no longer likely to commit another crime. The concept of likelihood of recidivism is abstract. However, the scope of its meaning can be narrowed down to a single meaning by citizens under the regulation of law who have sound common sense and through the interpretation of the court - reflecting the concept on the overall system and contents of Criminal Code, Criminal Procedure Act, and Social Protection Act. Therefore, the part of the instant provision that prescribes "until [the subject of treatment and custody] has recovered to the point of no longer needing custody" does not violate the principle of clarity.

2. Dissenting Opinion of Three Justices

A. (1) The instant provision, which does not provide a limit for the period of treatment and custody, neglects the requirements derived from the principle against excessive restriction - appropriateness of means and balance of interests. Therefore, by violating the principle, the instant provision infringes on bodily freedom. Continually keeping in custody the subject of treatment and custody who cannot be expected to or cannot recover, is an ineffective or inappropriate means of attaining the purpose of custody - rehabilitation of the mentally disabled and protection of social safety. Moreover, such continued custody, as a result,

acknowledges "treatment and custody without treatment" or "treatment and custody with the possibility of treatment excluded" and, therefore, does not coincide with the essence of treatment and custody. Also, the instant provision, making possible the deprivation of freedom until death when there is likelihood of recidivism to the subject of custody - in other words, when he or she is not recovered to the point of no longer needing custody - does not consider any allocation of risks; it one-sidedly deprives the freedom of the subject of custody. Therefore, the basic right infringed and the social interests protected through the instant provision cannot be seen to be in balance.

(2) The absolutely indefinite term of medical treatment and custody, prescribed by the instant provision, one-sidedly deprives the subject of custody of his or her freedom without spreading the risks among the society and people involved. It, therefore, violates the principle of proportionality - principle that limits the punitive power of a government by the rule of law - and infringes human dignity by degrading human beings to a means for the protection of the society. Thus, as it does not satisfy the mandate to ban absolutely indefinite imprisonment and, as a result, is unable to fulfill the request of clarity in criminal punishments, the instant provision violates the principle of statutory probation.

B. (1) Medical treatment and custody, one of the criminal judicial measures, is a preventive measure that deprives bodily freedom. Therefore, due process of law in the narrow sense - in other words, due process of law in criminal punishment - should be strictly applied and the rights guaranteeing perfect judicial review such as the right to receive trial by a judge should be guaranteed to the same degree as in the case of a punitive measure. This is because, in the realm of criminal punishment, guarantee of the right to receive trial by a judge is the most essential procedural request deduced from the principle of due process of law. The instant provision, by leaving the termination decision of medical treatment and custody to the Social Protection Committee - an institution under the administrative branch - violates the right to receive a trial by a judge. "Recovery to the point of no longer needing custody," the termination requirement provided by the instant provision, means that the likelihood of recidivism no longer exists. The "likelihood of recidivism" used as a standard in terminating medical treatment and custody is essentially the same one used in commencing it, and calls for normative and legal review, and therefore falls into the authority of a judge. Moreover, it may be more rational to have the judge who commenced the medical treatment and custody to again review the likelihood of recidivism

after a certain period. Through such procedure, the right to testimony during trial or the right to request examination is naturally guaranteed; therefore, it is better in substantiating the principle of due process of law.

(2) The Social Protection Committee, in essence, is an institution under the administrative branch. Therefore, it is an inappropriate institution to decide the termination of medical treatment and custody, considering the meaning of the right to receive trial by a judge, the punitive characteristic of medical treatment and custody, the essence of reviewing the likelihood of recidivism, and the possibility of basic right infringement. Even though the subject of custody can request to the Social Protection Committee to review and decide the termination of treatment and custody and can file an administrative action in case the committee rejects the termination request, such is only an *ex post facto* review by the judge; it cannot be deemed the same as when the right to fair trial by a judge is sufficiently guaranteed from the beginning according to the strict criminal judicial procedure.

3. *Ban on Writing during the Period of Prohibitory Confinement Case*
(17-1 KCCR 261, 2003Hun-Ma289, February 24, 2005)

In this case, the Court found unconstitutional the relevant provision of the Enforcement Decree of the Penal Administration Act, which completely prohibits prisoners from writing during the period of prohibitory confinement, a disciplinary measure taken against prisoners.

Background of the Case

The Enforcement Decree of the Penal Administration Act prohibits writing by prisoners who are under the punitive measure of prohibitory confinement. The complainant, while imprisoned, received the disciplinary measure of prohibitory confinement for one month for assaulting a fellow prisoner. The complainant requested writing permission in order to draft a petition and file an administrative lawsuit protesting against the punitive measure, but the request was rejected. After the rejection, the complainant filed a constitutional complaint asserting that the instant provision

violates the right to trial, right to equality, and right to petition and, thus, is unconstitutional.

Summary of the Decisions

The Court issued a decision that the instant provision is unconstitutional with a six-to-three vote for the following reasons.

1. Majority Opinion of Six Justices

A. The instant provision, by completely prohibiting writing by a prisoner who received a punitive measure of prohibitory confinement, restricts basic rights such as the freedom of expression. Therefore, it needs a statutory basis and needs to be delegated.

From the term "prohibitory confinement" that the Penal Administration Act prescribes, we can only infer a particular type of confinement at the punishment ward; the Act does not provide any explicit provisions for or delegations to inferior laws and regulations the concrete effects or execution methods of "prohibitory confinement." Therefore, it is not clearly established whether such complete ban on writing is included in the terms of "prohibitory confinement."

Also, Article 33-3(1) of the Penal Administration Act prescribes, "A prisoner may either prepare documents or drawings or write... with permission of the warden," provided that the content written is not likely to endanger the security and order of the correctional institution or improper for edification of prisoners. However, the instant provision enforcing the aforesaid statutory provision makes the restriction provided by the Act more severe by completely prohibiting writing by a person under a punitive measure of prohibitory confinement. Also, it prohibits writing for a very different reason from the Act, which prohibits according to the content of the writing. Moreover, Paragraph 2 of the same article prescribes, "Matters necessary for management of writing instruments, time and place for writing, storage of written documents, etc. and transmitting them to the outside shall be prescribed by Presidential Decree." It delegates to inferior laws and rules the matters actually necessary for writing, on the premise that the writing is allowed. Therefore, this provision cannot be used as the statutory basis of prohibiting writing during the period of prohibitory confinement.

Therefore, the instant provision violates the principle of

statutory reservation by limiting, without a statutory basis or delegation, a prisoner's right concerning writing when that prisoner is under prohibitory confinement.

B. Writing is a personal action, which is unlikely to risk jeopardizing the maintenance of security and order in a correctional institution. Also, it is rarely relevant to the violation of a regulation, which was the reason for the prohibitory confinement. The legislative purpose can be sufficiently attained through measures such as, while allowing writing, reducing the length of time or the frequency of writing or restricting writing by listing exceptional circumstances in which writing is allowed.

Nevertheless, the instant provision, during the period of prohibitory confinement, unconditionally prohibits writing without inquiring into the purpose or contents of writing. Moreover, it prohibits writing without any exception even when it is necessary for edification of or due treatment of the prisoner. Therefore, the instant prohibition violates the rule against excessive restriction by deviating from the minimal extent of restriction necessary to attain the legislative purpose.

2. Dissenting Opinion of Three Justices

A. Article 33-3(1) of the Penal Administration Act prescribes writing to be a matter requiring approval. Thus, it can be adequately expected that writing can be prohibited in certain circumstances. Also, Paragraph 2 of the same article, delegates to the Presidential Decree the "time" and "place" for writing and "management of writing instruments," and thus can be the statutory basis of the instant provision. The instant provision, therefore, does not violate the principle of statutory reservation.

B. Prisoners are already restricted from writing to a certain degree. In case a prisoner is given the most severe disciplinary measure of prohibitory confinement for violating the rules, it is hardly unreasonable to narrow or deprive a freedom formerly enjoyed by the prisoner to a limited extent. Also, as most writing instruments have the risk of being used as instruments to inflict harm on others or oneself, prohibition on writing is related to the maintenance of security and order in a correctional institution. The period of prohibitory confinement, during which writing is prohibited, cannot be said to be a long time - being two months at its maximum and in reality being limited to 30 days. Therefore, compared to the disadvantage caused by prohibiting writing during the period of prohibitory confinement, the protected public interests - maintenance of order and security of a correctional institution and

correction and edification of prisoners - are greater.

Moreover, the instant provision is interpreted as already allowing writing to prepare documents to directly contest the legality of the prohibitory confinement, etc.

Therefore, the instant provision of the enforcement decree does not violate the rule against excessive restriction.

4. *The Requirement of 25 Years of Age or Above to be Elected as Assembly person Case*

(17-1 KCCR 547, 2004Hun-Ma219, April 28, 2005)

In this case, the Court found constitutional the relevant provision of the Public Official Election Act, which limits the right to be elected as an assembly person to nationals 25 years of age or above.

Background of the Case

The Public Official Election Act grants the right to be elected as assembly person to only nationals 25 years of age or above as of election day. Therefore, the complainants who are under 25 years of age were unable to register as candidates in the election of assembly persons. The complainants filed the instant constitutional complaint, asserting that the provision violates the right to equality and the right to hold public office by granting the right to be elected as an assembly person only to nationals 25 years of age or above.

Summary of the Decision

The Court issued a decision to reject the complaint finding the instant provision constitutional with the unanimous opinion of all Justices for the following reasons.

A. The right to be elected as an assembly person is a right to become a candidate in the election for assembly person and to be elected. To whom and with what qualifications this right will be granted should be decided as a matter of policy by the legislature,

which should comprehensively consider various elements such as the status and authority of an assembly person, political awareness and education level of the people, political culture, public economic conditions, public legal sentiment, and the relevant legislative precedents of other major countries in the world.

When the requisite age to exercise the right to be elected is set at too high an age, even nationals who have sufficient intellectual and political ability and quality are unable to participate in the election and become elected as assembly persons. Therefore, there is a constitutional limit in setting the qualified age to exercise the right to be elected, in that there should be balance and harmony between the public interest to be attained and the restriction on basic rights. Nevertheless, if the actual age criterion set by the legislature is not too high or irrational-fitting into the realm and limit of legislative discretion, it cannot be easily concluded as unconstitutional.

B. Under the government order of representative democracy, the power to create agencies and the power to make policies are divided, and the latter is freely delegated to the representative agency. Therefore, the following matters should be considered in setting the age criterion: the need to secure professionalism at representative agencies due to the enlargement and complexity of national functions; the demand for enhanced representative ability and political cognitive ability due to an assembly person's change in status and expansion of authority; and, the minimum time required to finish formal or informal educational courses and to obtain direct or indirect experience needed to acquire such ability and quality. Considering such matters, we reach a conclusion that the provision on review, which sets 25 years of age or above as the qualified age to exercise the right to be elected as an assembly person, is within the realm and limit of legislative discretion. Therefore, the provision on review cannot be seen as excessive to the degree of violating the essential aspect of the complainants' basic rights such as the right to hold public offices.

5. *Collecting and Computerizing Fingerprints and Using them for Investigation Purposes Case*

[17-1 KCCR 668, 99Hun-Ma513 and 2004Hun-Ma190 (consolidated), May 26, 2005]

In this case, the Court found that the governmental power does not excessively violate the right to control personal information by collecting and keeping prints of all ten fingers of all citizens 17 years of age or above and using them for investigation purposes.

Background of the Case

To receive a resident registration card, citizens seventeen years of age or above must submit the prints of all ten fingers. The fingerprint information collected through the procedure is sent to the Commissioner General of the National Police Agency (NPA); the Commissioner General keeps and computerizes the fingerprint information and uses it for criminal investigation purposes. The complainants argued that such exercise of governmental power is unconstitutional as it violates the right to control one's own personal information.

Summary of the Decision

The Court issued a decision to reject the complaint with a six-to-three vote finding collection and computerization of fingerprint information and using it for investigation purposes and their statutory basis constitutional for the following reasons.

1. Majority Opinion of Six Justices

A. The right to control one's own personal information is a right of the subject of the information to personally decide when, to whom or by whom, and to what extent his or her information will be disclosed or used. It is a basic right, although not specified in the Constitution, existing to protect the personal freedom of decision from the risk caused by the enlargement of state functions and info-communication technology.

Fingerprints, which reveal the uniqueness and identity of an individual, are personal information that makes possible distinguishing an information subject from others. Therefore, collection of personal fingerprint information by mayors, county heads, or chiefs of wards, and storage and computerization, and use of fingerprints for investigation purposes by the Commissioner General of the National Police Agency all restrict the right to control one's own personal information.

B. The Resident Registration Act prescribes fingerprints as one of the matters to be recorded on the resident registration card. The

Act on the Protection of Personal Information Maintained by Public Agencies can be interpreted as allowing the Commissioner General of the NPA to be provided with, computerize, and use for investigation purposes - matters under the jurisdiction of the NPA - not only personal information already processed by the computer of public agencies but also the original information data not yet processed by the computer. In such original information data, fingerprint information is included. Therefore, collection, storage, computerization, and use of fingerprints all have statutory bases.

C. The purpose of collecting and maintaining the prints of all ten fingers of nationals 17 years of age or above - to enhance the accuracy and perfection in identification process - is legitimate. Also, the fingerprinting system does not violate the principle of minimum restriction considering the following: 1) Storing only the fingerprints of specific persons such as criminals weakens the identification function; 2) Collecting only the fingerprint information of one hand risks making identification impossible due to damage, etc., and lessens accuracy; and 3) Among the methods for identification, fingerprint information is the most accurate, simple, and efficient method.

Even if one is provided with fingerprint information, it is impossible to evaluate the personal whereabouts of the subject of the information; identify the subject of the information without professional ability; and distort the information. The public good attained by using fingerprints stored and computerized by the NPA Commissioner General for identification purposes such as in criminal investigation activities, in identifying the bodies at the sites of massive crimes or accidents or the bodies of unexplained death, and in preventing surreptitious use of others' personal information is greater than the substantive disadvantage suffered by the information subject due to the fingerprinting system.

Therefore, the fingerprinting system cannot be seen to infringe on the complainants' right to control one's own personal information in violation of the rule against excessive restriction.

2. Dissenting Opinion of Three Justices

A. The Resident Registration Act is only the basis for recording fingerprint information on the resident registration card. It does not provide a statutory basis for the NPA Commissioner General to collect and store the original fingerprints. Also, the Act on the Protection of Personal Information Maintained by Public Agencies is a law established to protect basic human rights of individuals from infringements on their personal information already lawfully retained

by the public agencies, when the information is used and processed by computers. It does not regulate matters such as the legitimacy of original information data before being processed by computer.

Therefore, collection, storage, computerization, and use of fingerprints by the NPA Commissioner General all lack statutory bases and are against the principle of statutory reservation in restricting basic rights, the constitutional principles of free democracy, and the rule of law.

B. It is difficult to acknowledge the need to collect the prints of all ten fingers instead of one in order to keep record of movement of population and to promote proper management of administrative affairs.

Considering the investigation purpose, the NPA can collect and store fingerprint information of only those who have criminal records or propensities and use it for criminal investigation. However, it is currently using ordinary citizens' request for issuance of resident registration cards as an opportunity to store and computerize the prints of all ten fingers of the citizens. Fingerprint information stored in such a way is used for criminal investigation purposes without any restriction on its scope, subject, and term of use. This cannot be seen as a minimum restriction on the right to control one's own personal information. Moreover, the current fingerprinting system can be abused to monitor a specific person's action under the cover of criminal intelligence-gathering or crime prevention.

Therefore, the fingerprinting system infringes on the complainants' right to control one's own personal information in violation of the rule against excessive restriction.

6. *Use of Restraints on Inmates*
(17-1 KCCR 754, 2004Hun-Ma49, May 26, 2005)

In this case, the Court found unconstitutional Article 298 (i) and (ii) of Restraint and Protection Work Rules (hereinafter, "Provisions") which in principle require use of restraints on inmates in prosecutorial interrogation rooms and continue such use even when prosecutors require release from the restraints. The Court also found that the use of restraints according to the Provisions infringed on the bodily freedom of the petitioners.

Background of the Case

Petitioner, a sociologist residing in Germany, entered the country when a detention warrant had been issued for violation of the National Security Act, etc. After investigation, he was arrested and committed to the Seoul Jail on October 22, 2003, and was interrogated as a suspect several times between October 24, 2003, and November 6 of the same year at the prosecutorial interrogation room of the Seoul District Prosecutors' Office. Almost the entire time during the interrogations, he was interrogated with his body restrained by handcuffs and ropes. Petitioner argued that such use of restraints infringes on his basic rights to bodily freedom, human dignity and worth, etc., and filed a constitutional complaint seeking a declaration that the above use of restraints and the Provisions authorizing such use are unconstitutional.

Summary of the Decision

The Court issued a decision of unconstitutionality with a 7 to 2 decision on both the Provisions and the actual use of the restraints for the following reasons:

1. Majority Opinion of Seven Justices

A. Handcuffs, ropes, and other restraints may be used for the purpose of restraining and protecting those inmates serving prison terms or those inmates whose judgment has not been finalized. They may not be used, as a matter of course, merely because he or she is detained. Additional restriction on bodily freedom arising out of use of restraints should not violate the principle against excessive restriction. Therefore, use of restraints against arrested suspects may be used only when a clear and concrete risk of flight, violence, disturbance, self-injury, or suicide is present. In principle, when prosecutors interrogate suspects in their interrogation rooms, suspects should be allowed to exercise their right of defense without feeling pressured physically or emotionally, and the use of restraints should be allowed only in exceptional situations when a clear and concrete risk of flight, violence, disturbance, self-injury, or suicide is present. The Provisions not only make it a rule to use restraints in prosecutorial interrogation rooms but also compel such use notwithstanding the interrogating prosecutors' request to release the suspects from the restraints. Such provisions put an exception before the rule, infringe upon bodily freedom and thereby violate the

Constitution.

B. On the part of the petitioner, there was little risk of flight, disturbance, violence or self-injury. Use of restraints against such petitioner for lengthy interrogations lasting several days is excessive in view of the mere abstract risk of flight or self-injury, and therefore does not satisfy the requirement of minimum restriction which should be abided by in restricting bodily freedom. Psychological pressures must have forced the petitioner into a substantively unequal position in responding to interrogation and thereby interfered with his exercise of the right to defense, disrupting the requisite balance among competing legal interests. Therefore, the use of the restraints against the petitioner infringes on the petitioner's bodily freedom and is therefore unconstitutional.

2. Dissenting Opinion of Two Justices

In this case, handcuffs and ropes were used on a petitioner who was being interrogated on charges of National Security Act violations, the allegations of which were being hotly disputed. There was a dire need for the use of the restraints in order to prevent unpredicted events such as flight or self-injury, protect the petitioner's and other's lives and limbs, and maintain order within the facilities. In light of the inadequacy in personnel and equipment available in prosecutorial interrogation rooms, the respondent had to supervise, restrain and protect the petitioner using ropes and handcuffs. Such method of restraint and protection is not clearly unjust or excessive in view of its purpose. Use of restraints in prosecutorial interrogation rooms, in this case, can be seen as a minimum measure necessary for the legitimate purpose of restraint and protection based on Article 14(1) of the Penal Administration Act and Article 46(1) of the Enforcement Decree. Therefore, even if the petitioner's basic rights have been restricted, such restriction does not constitute exercise of public authority in violation of the rule against excessive restriction.

7. *Case on Designation of National Basic News Agency*
(17-1 KCCR 996, 2003Hun-Ma841, June 30, 2005)

In this case, the Constitutional Court found constitutional the relevant provisions of the Law Regarding Promotion of News

Communications that designates Yonhap News Agency as the national basic news agency and grants financial assistance and other benefits (hereinafter, "Instant Provisions").

Background of the Case

Petitioner and Yonhap News Agency were registered as news agencies when the Law Regarding Promotion of News Communications was enacted and became effective. This Law designates Yonhap News Agency the national basic news agency and provides various assistances including financial assistance but does not provide to the petitioner any special assistance other than governmental assistance generally available to all news agencies. Petitioner, arguing that the unjust one-sided assistance to a news agency, competing with it, violates unlawfully its right to equality, freedom of speech and press, freedom to choose one's occupations, and right to property, filed this constitutional complaint seeking a decision of unconstitutionality on the Instant Provisions providing for such assistances.

Summary of the Decision

The Constitutional Court found the Instant Provisions constitutional, with a unanimous decision of all Justices, for the following reason:

A. In order to protect informational sovereignty and eliminate informational inequality among people and thereby protect national interests and strengthen the nation's capacities for good publicity, there is a need for minimum governmental intervention in the news agency market and appropriate assistance for news agencies. To that end, the Instant Provisions designate a national basic news agency and impose certain public duties while shouldering the expenses incurred by that agency in the course of performing those duties. We find this grant of privileges rational. Therefore, when the Yonhap News Agency differs incomparably with other news agencies in its function, role and scope of work and noticeably distinguishes itself in its physical aspect such as the number of news professionals employed and other personnel structure and revenue, designating it a national basic news agency and providing various benefits including financial assistance has a rational basis and therefore does not constitute irrational discrimination in violation of the principle of equality.

B. Grant of the benefits to Yonhap News Agency does restrict other news agencies' ability to compete with Yonhap News Agency in the news agency market. However, the Instant Provisions designate Yonhap News Agency a national basic news agency only by way of declaration, and such designation does not automatically entitle Yonghap News Agency to a benefit. Only when the government actually enters into a news and information subscription agreement or grants Yonhap News Agency certain public projects, these benefits are given according to the Instant Provisions. Grant of these benefits is effective only for "six years" from the effective date of this law: the effect of limiting the competition is not permanent. Therefore, the effects of restricting basic rights, caused by the Instant Provisions, are relatively insignificant while the effects of accomplishing the public interest - enhancing the nation's ability to compete in the international news and information market - are great. Therefore, the Instant Provisions do not violate the principle against excessive restriction.

8. *Case on Retention of Graduates' Information*

[17-2 KCCR 81, 2003Hun-Ma282 · 425 (consolidated), July 21, 2005]

In this case, the Constitutional Court found constitutional the acts by the Minister of Education and Human Resources and the Supervisor of the Seoul Metropolitan Office of Education (hereinafter, "Respondents") of retaining in the National Education Information System (hereinafter, "NEIS") the name, birth date, and graduation date of the students who had graduated from the schools within the jurisdiction of the Education Office.

Background of the Case

The Minister of Education and Human Resources established a nation-wide computer network system called NEIS, and after testing between September 2000 and October 2002, began operating it starting in the first semester of the 2003 academic year. This system is the education component of the project designed to realize an electronic government, and replaces the school databases built for each school containing information on students and teachers. Now, a database has been established for the Education Office of each Province (Do) and Metropolitan City, and about ten thousand

primary and secondary schools, sixteen Provincial and Metropolitan Education Offices, and the Ministry of Education and Human Resources are connected through the Internet. Through this comprehensive educational information system, school administration, academic affairs, personnel, budget, accounting, and all work related to education are electronically integrated so that they can be performed likewise. Petitioners, students who had graduated from schools within the jurisdiction of the Seoul Metropolitan Office of Education, filed this constitutional complaint on the ground that Respondents' retention of the information on the petitioners, in the aforesaid system, violates the petitioners' basic rights such as the right to the pursuit of happiness, privacy and freedom in private life.

Summary of the Decision

The Constitutional Court ruled with a seven to one decision that retention of the graduates' name, birth date, and graduation date is not unconstitutional on the following grounds:

1. Majority Opinion of Seven Justices

A. In restricting the right to control one's personal information, it is sound to specify concretely in law the subject, purpose, object, and scope of collection, storage, and use of the personal information, and thereby provide a clear legal basis for such restriction. Depending on the type and nature of the personal information, and the method and nature of processing the information, the degree of clarity required of the law authorizing such restriction varies. Respondents wish to perform customer services required of them - issuance of all certificates related to school graduates - efficiently and for that reason retain in the educational information system (NEIS) the information not deemed sensitive or closely related to one's personality right such as the graduate's name, birth date, and graduation date. In light of the nature and quantity of the information retained, and the non-invasive nature of the retaining purpose, we do not find that the degree of clarity required of the authorizing law is especially high. Therefore, the respondents' acts of retention, even if based on a general authorizing provision such as Article 5 of the Act Regarding Protection of Personal Information by Public Agencies, which states that "public agencies may retain personal information files to the extent necessary for performing the duties required of them," does not violate the principle of statutory reservation.

B. Restriction on the right to control one's personal information affects or infringes on the personality right or freedom of private life to a varying extent that depends upon the type, nature of the personal information at issue, and the purpose of collecting, the method of using and processing the information. In judging the legitimacy of the restriction on the right to control one's personal information, we need to weigh the aforesaid factors and the importance of the public interest sought. In trying to accommodate the convenience of those applying for issuance of graduation certificates and promote administrative efficiency, the respondents retain in NEIS only the name, birth date, and graduation date - the information can hardly be deemed as sensitive information that can significantly influence one's dignity and personality right. Such retention affects the minimum information necessary for accomplishment of the purpose. Also, such retention is subject to the regulation of those provisions relevant to protection of personal information set forth in the Act Regarding Protection of Personal Information By Public Agencies. Nothing in the record suggests that the respondents used the personal information outside the scope of their retaining purposes. The mere fact that the information is retained in the automated electronic system called NEIS does not destroy the legitimacy of the respondents' lawful retaining act.

2. Dissenting Opinion of One Justice

The information retained by the respondents constitutes information concerning academic records, which have tremendous influence in extracting the image of the information's subject in our country where academic records are important. The information therefore can be sensitive information that its subject person would wish not to disclose to others without his or her own consent. It is questionable whether holding this type of information in a highly centralized information system such as NEIS that uses computer and the internet can be based on the general provision of Article 5 of the Act Regarding Protection of Personal Information By Public Agencies, which does not specify for which purpose the information can be collected and processed. I question whether provision of the public services such as issuance of graduation certificates really necessitates accumulating in an electronic system and managing the aforesaid personal information at the level of the Heads of the Provincial and Metropolitan Offices of Education and the Ministry of Education and Human Resources. I question what true public interest is attained through such measures. Under the circumstances that the laws concerning protection of personal information are not fully enacted and that the legitimacy of the

purpose of, and the appropriateness of the means, of retaining the information, are not recognized, the respondents' act of retaining important personal information in NEIS infringes upon the information subject's right to control one's own personal information.

9. *Ban on Civil Servants' Labor Movement*
[17-2 KCCR 238, 2003Hun-Ba50 and 2004Hun-Ba96 (consolidated) October 27, 2005]

In this case, the Court upheld a provision of the Local Public Officials Act that bans civil servants' labor movement activities.

Background of the Case

The relevant provisions of the Local Public Officials Act ban all civil servants from labor movement activities and any other non-work-related concerted activities, except those civil servants performing manual labor, and impose criminal punishment for any violation of the ban. Petitioners were indicted for participating in non-work-related concerted activities and other labor movement activities, and filed this constitutional complaint arguing that the relevant provision of the Local Public Officials Act is unconstitutional.

Summary of the Decision

The Court found the instant provision constitutional with a decision of five to four for the following reasons:

1. Majority Opinion of Seven Justices

A. The instant provisions limit the scope of civil servants entitled to the three basic rights of labor to only those civil servants performing manual labor. Such limitation is based on Article 33 (2) of the Constitution that allows the legislature to determine the scope of the beneficiaries of the three basic rights of labor and therefore does not depart from the formative discretion granted to the legislature. Also, the instant provisions ban non-work-related concerted activities, among civil servants, because the concerted activities of civil servants may advocate the collective

interests of civil servants and thereby become an obstacle to the pursuit of the national interest as a whole. Therefore civil servants are under a duty arising out of their special status as civil servants. The limitation itself is clearly interpreted narrowly to apply only to 'concerted activities interfering with public interest and causing dereliction of the duty to devote themselves to their work duties.' Therefore, the instant provisions do not excessively infringe upon the essential content of the freedom of speech and press and the freedom of assembly and association.

B. The instant provisions guarantee the three basic rights of labor only to those civil servants performing manual labor and restrict those rights with respect to other civil servants. Such differential treatment is based on Article 33 (2) of the Constitution and has a rational basis, and therefore does not violate the principle of equality. On the other hand, the legislature can choose to pursue progressive improvement of the system in a way that fulfills the relevant legal values within the extent permitted by its capacities according to a rational standard. Therefore, restriction of the three basic rights of labor does not violate the Constitution and the failure, at this point, to guarantee civil servants the right of association and the collective bargaining rights granted to teachers specified under the Act Regarding Formation and Management of Teachers' Labor Union does not constitute unfair discrimination.

C. International human rights covenants allow restriction of basic labor rights by statute as long as the restriction does not infringe upon the essence of the right and takes place in accordance with each country's representative democratic procedure. Therefore, such treaties do not contradict the instant provisions. Other declarations, conventions, and recommendations under international law concerning basic labor rights have not been ratified by our country or have only advisory effects, and therefore cannot lend itself to a standard of reviewing the constitutionality of the instant provision.

2. Dissenting Opinion of Two Justices

The instant provisions grant or deny basic labor rights depending solely on whether the civil servants perform manual labor, and do not take into account other factors, and therefore fail to accomplish sufficient balancing of interests. The public nature of civil servants' work varies depending on the type, level, and nature of the work. Not granting the basic labor right for the mere reason of their status as civil servants infringes upon the essential content of the basic labor right or violates the principle of minimum

restriction. On the other hand, the Universal Declaration of Human Rights, international human rights covenants, the treaties related to the International Labor Organization concerning civil servants' basic labor rights, and recommendations of international bodies, although they have not been ratified by our country or, if they have, were put under reservation and therefore are of merely advisory force and lack direct binding force, can become important guidelines in interpreting the meaning, content, and scope of application of highly abstract provisions of the Constitution. If we interpret Constitutional provisions relevant to basic labor rights in light of these guidelines, the instant provisions' extreme restriction on civil servants' basic labor right contradicts the Constitution. Furthermore, some of the work performed by the civil servants is of equally or similarly public nature to the work performed by teachers protected under the Act Regarding Formation and Management of Teachers' Labor Union. The instant provisions do not recognize the basic labor right solely because of the status as civil servants working in local self-government bodies, and therefore such discrimination does not have a rational basis.

3. Dissenting Opinion of Two Justices

The right to organize forms the precondition of the right to collective bargaining and the right to collective action. It is the most fundamental right in formation of a labor union. The right to collective bargaining is also the purpose of the right to organize and the right to collective action, both of which operate as a means in realizing equality in the bargaining position between labor and management and thereby inducing collective bargaining into a more advantageous position. The right to collective bargaining therefore forms the essential content of the basic labor right. Therefore, denying civil servants entirely the right to organize and the right to collective bargaining violates the principle of minimum restriction and the principle of balancing of legal interests, and also departs from the legislative-formative discretion. However, granting civil servants the right to collective action without any limitation can disturb the public interest, fairness, fidelity, and political neutrality of the civil servants' work. Therefore, we are not convinced that, like in private companies, even the right to raise a labor dispute as a means of collective bargaining is guaranteed as a matter of course under the Constitution. However, determining the scope of civil servants granted the right to collective action is not a duty of the Constitutional Court, and falls under the domain of legislature's discretion, which holds broad legislative-formative power, and should be left to legislative policy. Therefore, we should not

declare a decision of simple unconstitutionality but a decision of constitutional nonconformity so that the legislature can enact an improved provision that conforms to the Constitution.

10. *Ban on Outdoor Assembly and Demonstration Near Courthouses*
(17-2 KCCR 360, 2004Hun-Ga17, November 24, 2005)

In this case, the Court upheld the relevant provisions of the Act Regarding Assembly and Demonstration, which absolutely ban outdoor assemblies and demonstrations within 100 meters of the border surrounding courthouses.

Background of the Case

The Act Regarding Assembly and Demonstration absolutely bans outdoor assemblies and demonstrations within 100 meters of the border surrounding courthouses (hereinafter, Instant Provisions). Petitioners had been ordered, through a summary proceeding, to pay a fine of three hundred thousand won each for having participated in an unregistered assembly in a no-assembly zone near a courthouse. Petitioners requested a full trial, and during the full trial, they requested constitutional review of the Instant Provisions and the presiding Jinju Branch of the Changwon District Court referred the case to this Court for review.

Summary of the Decision

The Constitutional Court issued a decision upholding the Instant Provisions with a five to four decision for the following reasons:

1. Majority Opinion of Five Justices

A. The legislative purpose of the Instant Provisions is protection of the proper functioning and peace of courts although peace in the courthouse can be recognized as a legislative purpose to the extent that it contributes to the proper functioning of the courts. The function of a court can be properly maintained only when the fairness and independence of judicial functions is secured.

The fairness and independence of judicial functions is a constitutional mandate. The core legislative purpose of the Instant Provisions, protection of the proper functioning of courts, is strongly mandated by the Constitution, and is therefore found legitimate. Also, protection of such functioning of courts is special in that it is required by the Constitution, and therefore, an absolute ban, without exception, on all assemblies and demonstrations near courts is an indispensable means to prevent materialization of abstract risks, and therefore satisfies the rule of minimum restriction.

B. Restriction caused by the Instant Provisions only reduces the effects of assemblies and demonstrations and does not materially limit the freedom thereof. Courts of our country usually have independent buildings at a distance from their neighboring buildings, and therefore due to their general structure, the scope of limitation on assemblies and demonstrations is relatively narrow. On the other hand, the public interest pursued by the Instant Provisions - protection of judicial functions - is great, and therefore the Instant Provisions satisfy the requirement of balance between legal interests.

2. Concurring Opinion of One Justice

The Instant Provisions' creation of a no-assembly zone near courthouses does not depart significantly from the level necessary for satisfying the three principles of assembly: the principle of peaceful assembly, the principle of assemblies at a distance, and the principle of mutual respect. The no-assembly rule does not intend to ban all assemblies without exception. It is intended to allow assemblies not affecting the proper functioning of courts, which its legislative purpose attempts to protect. Therefore, courts through reasonable interpretation taking into account the legislative purpose and the three principles of assembly can set its detailed scope constitutionally.

3. Dissenting Opinion of Four Justices

The Instant Provisions' creation of no-assembly zone near courthouses itself is rational in that it is based on an assumption that assemblies and demonstrations taking place near courthouses can threaten a legal interest ordinarily requiring protection. However, such generalized assumption may not apply to an actual assembly or demonstration, in which case there is no danger against the protected legal interest, and therefore there is no need to ban that assembly or demonstration. The Instant Provisions do not

make an exception for such situation and ban such assembly and demonstration as well. Such ban, even considering the uniqueness of a courthouse, is a restriction exceeding the extent necessary for accomplishing the legislative purpose, and thereby fails to satisfy the requirement of minimum restriction. The Instant Provisions restrict the freedom of assembly and demonstration excessively in view of the public interest sought, and therefore lack the requisite balance among legal interests. The Instant Provisions violate the principle of proportionality and therefore violate the Constitution.

11. *Revocation of Driver Licenses for Using Cars in Commission of Crime*
(17-2 KCCR 378, 2004Hun-Ga28, November 24, 2005)

In this case, the Court struck down the relevant provisions of the Road Safety Act that mandatorily revokes the driver license of a person who has committed a crime using an automobile.

Background of the Case

The relevant provisions of the Road Safety Act mandatorily revoke the driver license of a person who has committed a crime using an automobile. Petitioner had his license revoked for forcefully confining and driving another person in his car. Petitioner filed an administrative action seeking cancellation of the revocation. The presiding court referred for constitutional review the question of the constitutionality of the provisions.

Summary of the Decision

The Constitutional Court found the instant provisions unconstitutional with a decision of eight to 1 for the following reasons:

1. Majority Opinion of Eight Justices

A. Ordinarily, a 'crime' is an anti-social act infringing upon legal interests and is therefore subject to criminal punishment pursuant to criminal law. According to the instant provision, a

license is revoked not only when a car is used directly as a tool of or place for a grave crime but also when the car is used in before- or after-the-fact crimes such as preparing or conspiring for or fleeing from an underlying crime, or when the car is used in a criminal negligent offense. These days, cars have established themselves as necessities in people's daily lives since cars are the popular means of transportation or the means of making a living. Traffic laws are punctuated with special provisions concerning driving an automobile. We do not believe that the scope of the crimes covered by the instant provision includes minor negligent offenses. The instant provision, however, does not take into account the gravity or intent of the crime and revokes a driver license on account of the use of an automobile in any crime. Its coverage is too broad and violates the principle of clarity.

B. The instant provision indiscriminately revokes a driver license without taking into account the extent the automobile contributed to the commission of the crime and how grave the crime was, as long as a car was used in the commission of a crime. It thereby eliminates any room to consider the individuality and uniqueness of each specific case. It requires revocation of the driver license even in cases of very low illegality and culpability, and therefore violates the principle of minimum restriction. Once a driving license is revoked, under the instant provision, the driver cannot obtain a license for two years. Such consequences constitute excessive restriction on basic rights, and violate the principle of balance among legal interests. Therefore, the instant provision violates the freedom of occupation and the general freedom of action and therefore the Constitution.

2. Dissenting Opinion of One Justice

The clause "when a crime was committed using an automobile" can be interpreted to mean when the automobile was directly used as the means of committing a crime, and therefore its meaning cannot be said to be unclear. Even if one cannot obtain a driver license for two years after his or her license is revoked, under the instant provision, it does not constitute excessive restriction on basic rights because the fact of using a car as the direct tool of committing a crime indicates a very high degree of danger and culpability: mandatory revocation of the driver's license under those circumstances is not excessive for a person who used the car as the direct means in committing the crime.

Aftermath of the Case

Before this decision was announced, the aforesaid provision was revised to require revocation only in instances of using an automobile for crime, rape, and other grave offenses. On the day of the announcement, the Supreme Court finalized a judgment in a case where the instant provision was applied, giving rise to a controversy on the effect of that Supreme Court judgment (Law Times, December 12, 2005).

12. *Administrative Center Multi-City Case*

[17-2 KCCR 481, 2005Hun-Ma579 · 763(consolidated) November 24, 2005]

In this case, after the Special Measures Act for Building the New Administrative Capital was entirely struck down as unconstitutional and therefore a new Special Act was legislated for the purpose of building an Administrative Center Multi-City in Yeongi and Gongju areas, the Court dismissed a constitutional complaint against the new Special Act, stating that building the Administrative Center Multi-City does not constitute relocation of the capital and therefore does not infringe on the people's basic rights including the right to vote.

Background of the Case

The Constitutional Court struck down the entirety of the Special Measures Act for Building the New Administrative Capital (hereinafter, "New Administrative Capital Act") on October 21, 2004 (2004 Hun-Ma554, et al.) (hereinafter, "New Administrative Capital Case"). The Administration and the National Assembly had discussions on follow-up measures, from which building a new city in Yeongi and Gongju areas, the prospective site of the former New Administrative Capital, came up as a promising alternative. Therefore, a new special law was enacted and became effective so that major administrative agencies would be relocated to those areas and would become part of the Administrative Center Multi-City to be newly constructed.

Vice Mayor of Political Affairs of the City of Seoul, the members of Seoul City Council, Gyunggi-do Assembly, Gwachon

City Council, the employees of various public entities, and people residing in various parts of the country including Yeongi-gun and Gongju City of Choongnam Province, as petitioners, filed this constitutional complaint on the ground that the aforementioned statute violates the customary constitutional norm that the capital of our country is Seoul, and infringes upon the petitioners' right to vote, right as taxpayers, right to be heard, and other basic rights.

Summary of the Decision

The Constitutional Court dismissed the claim with the majority opinion of seven Justices (three Justices writing concurringly, and two Justices dissenting) for the following reasons:

1. Majority Opinion of Four Justices

A. All forty-nine agencies including the Prime Minister's Office is to be relocated to the Administrative Center Multi-City. The work scope of the relocating agencies is mostly limited to economic, welfare, and cultural areas. The agencies making financial policies important to the nation's economy are not included. Important government policies are still decided through deliberation at the State Council and finally by the President. Then, the Prime Minister has a constitutional duty to assist the President, and executes its mandate of supervising the administrative agencies, the heads of which merely carry out these policies concretely. Especially, in the contemporary society of advanced information and communications technologies, the President and the administrative agencies, even if located remotely from one another, can secure efficient means of communication through which the President can maintain control over the decision-making. Therefore, we do not find that the agencies located in the Administrative Center Multi-City perform central political and administrative functions that amount to control over national policies.

Therefore, the Administrative Center Multi-City is, internally, not where the nation's important policies are finally decided, and externally, not where foreign diplomats of various countries reside and major international relations are formed. A role as the nation's symbol can arise only through long periods of interplay with historical and cultural elements, and cannot be artificially created in the short time. We do not find that the Administrative Center Multi-City brought into existence by the instant statute gains the status of a capital. Neither do we find that the instant statute relocates the capital to the Administrative Center Multi-City or that

the capital is divided into Seoul and the Administrative Center Multi-City.

B. Under the instant statute, when the Administrative Center Multi-City is constructed, the National Assembly and the President remain in Seoul. The National Assembly performs legislative functions as the body representing the will of the people, and all state functions are subject to the statutes thus legislated, under the principle of national governance by law. The President, as the chief executive of the government performing executive functions, is the officer of highest responsibility in organizing and supervising the government. The President makes the final decisions on the administration and execution of law, and orders and supervises all members of the government. Therefore, Seoul continues to perform central political and administrative functions. Also, formation and development of international relations takes place in Seoul, which will still be a very large city and will still maintain its status as the largest city and the economic and cultural center of the nation. The Supreme Court and the Constitutional Court will remain in Seoul and therefore the core of judicial functions will take place here. Therefore, despite the construction of the Administrative Center Multi-City pursuant to the instant statute, Seoul remains where central political and administrative functions and national-symbolic functions are carried out, and we do not find that the statute dismantles her role as the capital.

C. Article 27 of the Constitution explicitly grants the President discretion in deciding which important matters will be submitted to a national referendum. The Constitutional Court has confirmed that the Constitution exclusively granted the President discretionary power to conduct a national referendum - the power to decide whether and when to conduct a national referendum, what exactly to refer to the referendum, and the contents of the queries submitted to the referendum. Therefore, even if a majority of the people wishes to submit certain national policies to a national referendum, the President does not violate the Constitution by failing to heed such wish. People are not entitled to the right to submit national policies to a national referendum.

2. Concurring Opinion of Three Justices

We concur that the instant statute does not make the Administrative Center Multi-City obtain the status of a capital. However, we do not recognize the customary constitution that Seoul is the capital, and we do not believe that it is necessary to amend the written constitution to change the customary constitution.

3. Unconstitutionality Opinion of Two Justices

73% of administrative agencies will be located in the Administrative City, and cover all areas except national defense and foreign affairs. All agencies handling administrative affairs in economic areas, and the Ministry of Planning and Budget, charged with the overall planning and management of the economic activities of the government, are relocated in the Administrative City. The Prime Minister will be relocated to the Administrative City, taking with it a very important part of the control and supervision of government functions. A substantial portion of the operation of the Cabinet, which is presided over by the Prime Minister, will be carried out in the Administrative City. About 70% of the government budget will be controlled from within the Administrative City on its execution. Administrative functions carried out in the Administrative City are at the highest administrative level, and therefore constitute central administrative functions. Therefore, relocation of national administrative agencies pursuant to the instant statute constitutes division of the capital into Seoul and the Administrative City. The instant statute attempts to prescribe division of the capital by statute when such division can be resolved only through a national referendum amending the Constitution. It therefore infringes upon the people's basic political right to participate in a national referendum on constitutional amendment.

13. *Use of Paternal Family Name Case*

[17-2 KCCR 544, 2003Hun-Ga5 · 6(consolidated), December 22, 2005]

In this case, the Court found unconstitutional the Civil Code provision requiring one to follow the paternal family name, for the reason that it infringes on individual dignity and sexual equality, and issued a decision of constitutional nonconformity allowing the provision to remain valid pending its revision.

Background of the Case

Petitioners' father died and thereafter the mother remarried. The husband in the remarriage adopted the petitioners and, wishing to give them his family name, filed an application for change in the

family registration system at the Seoul District Court. The petitioners then applied for constitutional review of the main text of Article 781 (1) of the Civil Code, and the presiding court referred for constitutional review the phrase "a child shall follow the family name of the father" in the main text of Article 781 (1).

Summary of the Decision

The Court issued a decision of constitutional nonconformity with the majority opinion of seven Justices (two Justices with a concurring opinion and one Justice with an opinion of simple unconstitutionality) for the following reasons:

1. Majority Opinion of Five Justices

Requiring one to follow his or her father's family name in selecting his or her family name does not exceed the scope of legislative formation. However, when the child was born after the father's death or the parents' divorce and is therefore expected to be raised solely by the mother, or when the mother alone is rearing a child born of extramarital origins, such unilateral requirement to follow the father's family name and disallow use of the mother's name violates individual dignity and sexual equality.

In adoption, remarriage, and other changes in or new creation of family relations, depending on concrete circumstances, changing one's family name to his or her adopting father's or step-father's becomes closely related to his or her personality-interests. Forcing one to use only his original father's family name and not allowing a name change infringes on the individual's right to personality.

The unconstitutionality of the instant provision does not arise out of the fact that it selects the father's family name in the first place, but that it does not allow exceptions where use of the father's family name may be unfair. Therefore, we issue a decision of constitutional nonconformity and allow the provision to remain valid temporarily pending the effective date of the new law that has revised the provision.

2. Concurring Opinion of Two Justices

The instant provision requires all individuals to follow the fathers' family names and not allow use of the mothers' family names, and thereby treats men and women discriminately. There is no legitimate legislative purpose for such discrimination. The

provision violates Article 36 (1) of the Constitution prescribing sexual equality in marriage and family life.

Especially, the instant provision completely disregards one's and his or her family's concrete circumstances and wishes concerning how to determine his or her family name and unilaterally imposes the State's requirement to use the father's family name, and we cannot find any concrete interest justifying the compulsory use of the paternal family name. The provision also violates individual dignity in marriage and family life guaranteed by Article 36 (1) of the Constitution.

3. Dissenting Opinion of One Justice

Paternal family names are used because, while one's blood relation to the mother can be visually ascertained through the facts of delivery and breast-feeding, his or her blood relation to the father is by nature unascertainable. Paternal family names give public notice of the blood relationship to the father, and thereby strengthen the unity and solidarity between the father and children and protect the sustenance and integrity of the family. Family names are merely systems of signs, which do not affect women's substantive legal statuses or relations. One may suffer inconvenience from use of the paternal family name in cases of remarriage or adoption. However, such inconvenience is caused by society's prejudice and bigotry, not by the rule requiring use of the paternal family name. We should not follow abstract standards of liberty and equality to deny what is the way of life and the cultural phenomenon that has remained effective and the value of which has been recognized in this society. It is too early to deny the constitutionality of the paternal family name rule.

14. *Admission of Hearsay Statements of Foreign Residents Case*
(17-2 KCCR 712, 2004Hun-Ba45, December 22, 2005)

In this case, the Court found constitutional the relevant provisions of the Criminal Procedure Code that exceptionally admitted into evidence hearsay statements of a person whose testimony is needed but cannot be given because he or she resides overseas, reasoning that the provisions do not violate the principle of clarity.

Background of the Case

Petitioner was indicted for violation of the Act on the Aggravated Punishment, etc of Specific Crimes(bribery) and during the appellate proceeding requested to the court constitutional review of Article 314 of the Criminal Procedure Code which states "if a person who is to give a statement at a preparatory hearing or during a public trial cannot appear to testify because of residing abroad, then his previous statement or any other documents shall be admitted as evidence." The presiding court denied the request and the petitioner filed a constitutional complaint.

Summary of the Decision

The Constitutional Court rejected the claim with a majority opinion of six Justices (three Justices dissenting) for the following reasons:

1. Majority Opinion of Six Justices

A. The Criminal Procedure Act does not provide for a definition of "residing abroad" in the instant provision. However, "residing abroad," in the instant provision, is commonly and often used and even ordinary people understand it to mean only the situation where the person's overseas stay has been prolonged so that he or she is not expected to return during the pending trial. The Supreme Court has also decided in the same manner. The meaning of the instant provision can be understood by ordinary people of common knowledge, and can be ascertained through a judge's supplementary value judgment, and such interpretation is unlikely to be affected by who the interpreter is. Therefore, it does not violate the principle of clarity.

B. The instant provision recognizes an exception to the hearsay rule because, if the principle of direct examination and the hearsay rule are applied to all situations without any exception, they can interfere with expeditious trial and discovery of substantive facts, and thereby undermines fair trial and judicial justice, the most important goal of trials. The jurisdiction of the Republic of Korea does not reach foreign countries. Summoning a witness, service, and other powers in conducting a trial cannot or cannot be easily exercised. Even if judicial assistance is possible, it is possible that the person who made the original statement cannot or cannot be easily summoned to a court in our country for obtaining testimony. In these instances, waiting indefinitely for testimony can undermine

an expeditious trial and discovery of substantive facts, and these consequences constitute a rational basis for admitting into evidence hearsay evidence, as in the instances of death or disease. Furthermore, even in event of recognizing the exception to the hearsay rule, the proviso in the instant provision reasonably minimizes the scope of its application to a situation only when the interrogation report or the document was prepared under "particularly credible circumstances." Therefore, the instant provision does not infringe on the right to receive a fair trial.

2. Dissenting Opinion of Three Justices

Today's advanced transportation and communication has expanded exchanges with foreign countries and has facilitated exit from and entry into the country. The fact of residing abroad itself is not sufficient to convince us that a trial will not be conducted expeditiously. Even if the person, who made the original statement, resides abroad, his or her in-court statement can be obtained through the international criminal judicial assistance system and thereby the right to receive a fair trial can be exercised. Expansion of criminal judicial assistance is the responsibility of the state. We cannot accept the logic that, if the state does not make sufficient efforts or is not diligent in expanding criminal judicial assistance, it becomes more advantageous for the state in the criminal proceeding. The difficulty of appearing in court due to overseas residence should be born by the state, not by the defendant, in order to uphold the basic tenet of criminal procedure dominated by the principle of the presumption of innocence.

Furthermore, the credibility of a testimony by a witness who has difficulty appearing in court due to residency overseas can be doubtful. It is questionable whether the legislative measure of trying to limit the scope of the exception to the hearsay rule using the condition of the circumstances of special credibility is practical.

Furthermore, the fair trial and substantive fact-finding aimed at by the instant provision is only one of the means of realizing the right to receive a trial under Article 27 of the Constitution. The instant provision restricts the petitioner's right of defense, which constitutes the essential component of the right to receive a fair trial, which is the most important part of the Constitution's Article 27 right to receive a trial. Therefore, the instant provision does not satisfy the mandate of balance between legal interests.

Therefore, the instant provision infringes the Constitution's Article 27 right to receive a fair trial and is therefore unconstitutional.