CONSTITUTIONAL COURT DECISIONS

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2013 to December 31, 2013 by the Constitutional Court of Korea.

This volume contains 32 cases, 3 full opinions and 29 summaries.

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

December 24, 2014

Kim Yong-Hun
Secretary General
Constitutional Court 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 Section 2 of the Constitutional Court Act
  - Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68 Section 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.)
  - Hun-A : various special cases (re-adjudication, 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. Punishment of Insult as a Criminal Offense

[25-1 KCCR 506, 2012Hun-Ba37, June 27, 2013]

Questions Presented

1. Whether the part "insult" in Article 311 of the Criminal Act which penalizes the act of insult (amended by Act No. 5057, Dec. 29, 1995) (hereinafter referred to as the "Provision") is against the rule of clarity (negative)

2. Whether the Provision infringes on the freedom of expression (negative)

Summary of the Decision

1. "Insult" as an element of crime is an abstract judgment or an expression of derogatory emotion unaccompanied by factual statements that can undermine one's social reputation. Given the legal interest, legislative purpose, etc. of penalizing the crime of insult, it does not appear to be significantly difficult for an ordinary citizen with common sense and conventional legal mind to foresee what kind of acts are banned, and there is no concern for arbitrary interpretation by law enforcement agencies. Thus, "insult" stated in the Provision is not against the rule of clarity.

2. If an expression insulting someone's character is made publicly, the victim's social value will be degraded and the potential of his/her life and development as a member of society will inevitably be affected. Therefore, the act of defamation using insulting words definitely needs to be prohibited. Additionally, considering that insult is, among others, punishable only upon the victim's complaint and has relatively low statutory maximum, and that courts generally seek adequate balance

between the freedom of expression and the protection of reputation by appropriately applying Article 20 of the Criminal Act on “justifiable act”, the Provision does not infringe on the freedom of expression.

Dissenting Opinion of Justice Park Han-Chul, Justice Kim Yi-Su, and Justice Kang Il-Won

The scope of “insult” in the Provision as an element of crime is excessively broad, and all negative or derogatory expressions regarding someone may amount to insult as they are likely to undermine one's social reputation. In the same vein, not just hateful cursing of someone humiliating enough to tear down his/her character, but satirical, humorous literary expressions that use ridicule to expose and criticize the world, or twisting of negative intentions into the form of polite expressions, or newly coined words on the Internet that are somewhat coarse, etc. are also punishable as a crime of insult. Consequently, even expressions that warrant the protection of the Constitution can be regulated.

Criminal punishment of insult limits the possibility of raising issues in social communities and addressing them constructively through free exchange of different views and criticism. If certain negative languages or critical expressions on sensitive political, social issues used in political, academic debates or communications are branded as insult and regulated accordingly, this will threaten political and academic statements and restrain the possibility of open debates. This may lead to weakening the essential function of the freedom of expression.

In addition, the exercise of the state's authority to punish crime prescribed by criminal law should be confined to the minimum. Merely an abstract judgment or a derogatory expression can be regulated through self-correcting mechanism of the civil society or imposition of civil liability. Penalizing the act of insulting do not meet international human

rights standards either. Taking these into consideration, the Provision fails to observe the rule against excessive restriction and thus violates the freedom of expression.

Provision at Issue

Article 311 of the Criminal Act (amended as Act No. 5057, Dec. 29, 1995)

Related Provisions

Article 21, Article 37(2) of the Constitution

Cases for Reference

1. 17-1 KCCR 812, 821-822, 2002Hun-Ba83, June 30, 2005
   21-1(B) KCCR 545, 560-561, 2006Hun-Ba109, etc. May 28, 2009
   22-2(B) KCCR 368, 377-378, 2009Hun-Ba27, November 25, 2010
2. 17-2 KCCR 311, 319, 2002Hun-Ma425, October 27, 2005

Parties

Complainant
Jin O-Kwon
Representative: Yi-Gong Lawyers
Attorney in Charge: Huh Jin-Min

Underlying Case
2010Do10130, Supreme Court, on insult and violation of the Act on Promotion of Information and Communications Network Utilization and information Protection, etc. (defamation)

Holding

Article 311 of the Criminal Act (amended as Act No. 5057, Dec. 29, 1995) is not in violation of the Constitution.

Reasoning

I. Case Introduction and Subject Matter of Review

A. Case Introduction

1. The complainant was prosecuted on charges of insult and violation of the Act on Promotion of Information and Communications Network Utilization and information Protection, etc. (defamation) for making posts insulting a person on his OO blog as well as the members' page of the OO Party website, and also for defaming a person by publicly disclosing false information for purpose of libel on the OO Party website. The complainant was consequently sentenced to 3 million Korean won in fines by the trial court (2009KoDan6302, Seoul Central District Court). He filed an appeal with the court of appeals but it was denied (2010No615, Seoul High Court), and his appeal to the Supreme Court was denied again on December 22, 2011 (2010Do10130, Supreme Court).

2. The complainant, with his appeal pending before the Supreme Court, filed a motion to request constitutional review of Article 311 of the Criminal Act that penalizes insult, arguing that it is against the rule of clarity required by nulla crimen sine lege and that it infringes on the freedom of expression (2011ChoKi245, Supreme Court). However, the motion was denied on December 22, 2011 and upon being served the decision on December 26, the complainant filed this complaint on January 25, 2012.

B. Subject Matter of Review

The matter subject to review in this case is whether Article 311 of the Criminal Act (amended as Act No. 5057, Dec. 29, 1995) is constitutional, and the provision at issue is stated as follows:

[Provision at Issue]
Criminal Act (Amended as Act No. 5057, Dec. 29, 1995)
Article 311 (Insult)
A person who publicly insults another shall be punished by imprisonment or imprisonment without prison labor for not more than one year or by a fine not exceeding two million won.

II. Argument of the Complainant

A. The Provision regulates expressions by employing an overly abstract and broad concept of “insult” as an element of crime, which is contrary to the principle of clarity required for restrictive legislation on freedom of expression and the rule of clarity required by nulla crimen sine lege.

B. The purpose of punishing insult is to protect the subjective, inner feelings of one’s reputation that tend to resist insult. Yet, this subjective perception of one's reputation is difficult to measure in an objective manner and therefore not appropriate to warrant protection by law, so there is no conceivable legitimate purpose. Additionally, enforcing criminal punishment of insult, when there are other options such as social norms or dispute resolution measures, is neither an appropriate means nor satisfies the principle of proportionality. And it is not a possibility that a mere opinion, emotion or abstract judgement unaccompanied by factual statements would pose a clear and present danger to national security, maintenance of law and order, or public welfare.

In conclusion, the Provision violates the rule against excessive restriction that serves as a limit for all legislation restricting fundamental rights as provided for in Article 37(2) of the Constitution, and thus infringes on the complainant's freedom of expression.

III. Review on Merits

A. Fundamental Rights Infringed

Article 21(4) of the Constitution provides that “Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.” This should be considered as a provision that places emphasis on the responsibility and obligation accompanied with the freedom of speech and press. At the same time, it lays down the conditions for restriction on the freedom of speech and press, but not one that imposes a limit on the boundary of the freedom of expression to be protected under the Constitution (21-1(B) KCCR 545, 560, 2006Hun-Ba109, etc, May 28, 2009).

In other words, an expression cannot be excluded from the boundary of protection of the freedom of expression at the outset just because it contains certain content. Instead, it should be interpreted that “insulting expressions” that may infringe on others' reputation or rights are to be protected as the freedom of speech and press stated in Article 21 of the Constitution, provided that such expressions can be restricted for the purpose of national security, maintenance of law and order, or public welfare pursuant to Article 37(2) of the Constitution (24-2(B) KCCR 141, 152, 2011Hun-Ba137, Nov. 29, 2012).

In conclusion, the Provision restricts the freedom of expression guaranteed by the Constitution by prohibiting insulting statements of certain content through punishment.

B. Whether the Provision Violates the Rule of Clarity

1. Meaning of the rule of clarity

a. The rule of clarity is particularly relevant when it comes to legislation restricting the freedom of expression. Given that the freedom of expression is indispensable for realizing the ideas of popular sovereignty in modern democratic society, regulation of freedom of expression through vague norms may intimidate the expressions protected under the Constitution and thereby neutralize the essential function of the freedom of expression that allows for diverse opinions, views, and ideologies and thus the cross-check among them. For this reason, it is required by the Constitution that the law regulating the freedom of expression specify the concept of the restricted expression clearly and in detail.

Meanwhile, the rule of clarity is also required by nulla crimen sine lege. That is, the principle of punishment by statute guaranteed under Article 12 and 13 of the Constitution implies that crime and punishment should be defined by law. The rule of clarity derived by the principle of punishment by statute require that elements of crime are clearly stated so that anyone can predict what kind of acts are punishable by law and what the punishments are, and as a result be able to decide his/her actions accordingly.

Yet, it is impossible, from the technical perspective, to compose all texts of legal norms with purely technical concepts. Somewhat broad concepts requiring, to a certain extent, supplementary interpretation of judges is not necessarily against the rule of clarity insofar as any person equipped with sound common sense and conventional legal awareness may understand with general method of interpretation the interest protected by the penal provision, the actions prohibited, as well as the type and degree of punishment (21-1(B) KCCR 545, 560-561,

2006Hun-Ba109, etc, May 28, 2009).

And whether a legal norm is clear or not is determined by whether it provides predictability through fair statement of its definition and whether it prevents arbitrary interpretation or enforcement of law by the competent institution through detailed clarification of its meaning in law. The implication of a legal norm takes concrete shape when its texts are interpreted with its legislative purpose, history, systematic structure, etc. Thus whether a norm is against the rule of clarity will depend on whether such interpretation method can provide a standard for reasonable interpretation of its meaning (17-1 KCCR 812, 821-822, 2002Hun-Ba83, June 30, 2005; 22-2(B) KCCR 368, 377-378, 2009Hun-Ba27, November 25, 2010).

b. The Provision provides for punishment of those who publicly insult others, as well as restricting the freedom of expression. Therefore, it should comply with not only the rule of clarity required by nulla crimen sine lege but also from the clarity principle required for legislation restricting the freedom of expression. Clarity required herein should be understood in the strict sense.

2. Judgment

a. The protected interest in the Provision is social evaluation of one's value, or external reputation. The dictionary definition of the word “insult” in the Provision is “to affront or demean.” Criminal law academics also perceive “insult” as an expression of contemptuous intention of someone without factual grounds that include all forms of actions made either in writing or physical movements, not confined to linguistic expressions. Also the Supreme Court has held that “insult” as a crime implies an expression of abstract judgment or derogatory emotion not backed by facts which merely undermines a person's social reputation (2003Do3972, decided Nov. 28, 2003, Supreme Court, etc.).

The courts thus present a standard for objective interpretation on the basis of the aforementioned textual meaning of the term.

b. Whether an expression amounts to abstract judgment or derogatory emotion likely to undermine one's social reputation cannot be determined by an abstract, general standard; it can only be decided specifically and individually by conventional wisdom and sound common knowledge.

c. As stated above, penalizing insult is aimed at protecting the interest of external reputation as the social evaluation of one's value. Also considering the legislative purpose or intent of the Provision which, unlike in the crime of defamation, does not require factual statements as criminal element, it is hard to suspect that an ordinary citizen with healthy common sense and conventional legal awareness would find it significantly difficult to predict what kind of acts are banned. In addition, the Supreme Court offers an objective standard for interpreting the meaning of insult, so there is no cause for concern for a law enforcement agency to interpret it arbitrarily.

d. Furthermore, specifically what kind of expression satisfies the criminal element of the Provision is a matter of the court's general interpretation and application of law that should be considered along with multiple factors. This includes the overall content and context of the expression instead of the literal text of the language, whether it had a contemptuous intent or was merely accidental, whether it is a kind of exaggeration or not, the background and nature of the dialogue or forum that took place, relationship between the offender and the person affected, etc. As it is inevitable that doubts may exist as to which actions meet the legal elements of crime in specific cases given the general and abstract nature of criminal norms, this alone is not sufficient to conclude that the Provision is against the rule of clarity.

C. Whether the Provision Infringes on the Freedom of Expression

1. Standard of review in this case

The general personality right derived from Article 10 of the Constitution also includes the right to personal reputation (17-2 KCCR 311, 319, 2002Hun-Ma425, Oct. 27, 2005). Penalizing public insult of others by the Provision is aimed at protecting the external reputation guaranteed by Article 10 of the Constitution. However, the Provision limits the freedom of expression, which results in the conflict of two fundamental rights, namely the right to reputation and the freedom of expression.

In cases as this where two fundamental rights are at odds, all conflicting fundamental rights have to be balanced for the sake of constitutional integrity and coherence so that the function and power of each right may be exercised to its fullest possible extent. Therefore, the focus of review will be whether the Provision serves legitimate purpose consistent with the rule against excessive restriction and whether the means to achieve the purpose ensures appropriate proportionality between the restriction of the freedom of expression and the protection of reputation (3 KCCR 518, 528-529, 89Hun-Ma165, Sept. 16, 1991).

2. Legitimate purpose and appropriate means

Although insulting expressions may be part of the right to freedom of expression, a public statement implying contemptuous judgment of a person's character will inevitably undermine his/her social value and the potential to live and develop in society. Particularly in recent days where media and communication technology is advanced, an insulting behavior can be easily communicated, and the resulting damage can be much more severe and irrecoverable compared to the past.

Therefore, there is a need to prohibit behaviors that damage a person's external reputation, which is a social evaluation of one's value, by publicly expressing abstract judgments or derogatory emotions likely to erode one's social evaluation. In this sense, the Provision serves a legitimate purpose, and penalizing insult made in public is an appropriate means to help achieve the legislative purpose.

3. Proportionality of restricting fundamental rights

The Provision does not ban all insulting words or actions regardless of the target individual, place of action, etc. The prohibition is limited to insulting expressions that are made in public, that is, under recognition of an unspecified number or a majority of people.

In addition, the penalty prescribed in the Provision limits the freedom of expression within the necessary minimum in light of the following: the legislative intent and protected interest in the Provision is important, particularly so when dissemination of insult using the Internet or other information and communication media can have considerable ramifications; insult is punishable under criminal law only upon the victim's complaint; the ceiling of statutory punishment is relatively low as the Provision provides for “imprisonment or imprisonment without prison labor for not more than one year or by a fine not exceeding two million won”; a judge can achieve proportionality between unlawful acts and liability through discretionary sentencing for relatively minor crimes under special circumstances, such as through suspended sentence or suspended execution of sentence.

Furthermore, the Supreme Court held that, even when an article contains an insulting judgment or an opinion, it qualifies as a justifiable act under Article 20 of the Criminal Act and is thus exempt from prohibition if it is not considered inconsistent with the established norms of society when viewed from the perspective of conventional wisdom of

the times (2010Do6462, decided Feb. 23, 2012; 2010Do9511, decided Oct. 28, 2010; 2003Do3972, decided Nov. 28, 2003, etc.). The Court thereby applies the Provision in a way that appropriately balances the interest and values gained from the freedom of expression and those from the protection of reputation. This way, the Provision adequately employs the portion concerning "justifiable act" in Article 20 of the Criminal Act in punishing public insult and thus allows for adequate guarantee of the freedom of expression. Therefore, it should not be considered that the Provision lacks proportionality in restricting the fundamental rights.

Meanwhile, as mentioned above, insulting expressions on the Internet or other information and communication outlets can have quite a number of ramifications when disseminated, and, consequently, the concern for damage to personal reputation is growing more than ever. At the same time, even if the Provision permits some restriction on the freedom of expression through punishment of insult, there can be exceptions to the punishment under the Criminal Act when the expression in question is not in conflict with the established norms of society. Therefore, it is hard to conclude that the extent of restriction on the freedom of expression is significantly greater than that of the protection of personal reputation, or that the Provision has failed to balance the conflicting interests between the protection of personal reputation and the freedom of expression.

4. Review of the complainant's argument

The complainant claims that the scope of insulting expressions prohibited under the Provision is too broad and extensive, and therefore even an abstract judgment or a critical statement made in the course of dialogue or exchange of opinions in everyday lives can be penalized on grounds that all such expressions amount to insult. And all this may be decided upon the insulted person's ambiguous, subjective feelings about

his/her own reputation. The complainant, in this context, argues that the Provision breaches the rule against excessive restriction.

Yet, the Provision is intended to protect external reputation, which is social evaluation of one's character and value, not a subjective feeling one has for his/her own reputation (87Do739, decided May 12, 1987, Supreme Court). For insult to constitute a crime, the least requirement is *mens rea,* or the consciousness that one made an insult, if not the purpose or intention of offence. Moreover, whether a certain expression or action is derogatory of one's reputation or not should not be decided by one's subjective feelings for his/her own reputation. It has to be decided in an objective, reasonable manner with due consideration given to the circumstances, subject of insult, relevance of the statement or action in question, etc. Therefore, whether an expression fulfills the criminal element set forth in the Provision is merely a matter of conventional interpretation and application of law to be determined by the competent court in consideration of the precise circumstances involved in individual cases. The fact that an expression challenged by the complainant has the possibility of constituting an element of crime alone does not mean that the Provision violates the rule against excessive restriction.

IV. Conclusion

For reasons stated above, the Provision does not violate the Constitution. And the holding of the Court, to which Justices Park Han-Chul, Kim Yi-Su, and Kang Il-Won filed a dissent below, is so decided.

V. Dissenting Opinion of Justices Park Han-Chul, Kim Yi-Su, and Kang Il-Won

We believe that the Provision violates the rule against excessive

restriction and thus infringes on the freedom of expression, and submit the following dissenting opinion:

A. Broadness of the Expression Regulated

The scope of criminal element of “insult” as provided in the Provision is too broad. The Supreme Court interprets that “insult” is “an expression of abstract judgment or derogatory emotion not backed by facts which is likely to undermine one's social reputation (2003Do3972, etc., decided Nov. 28, 2003, Supreme Court). According to this standard, an expression containing negative or derogatory contents may constitute an insult because any such expression can possibly erode one's social reputation. The majority opinion states that the Provision only regulates insulting expressions made in public or under recognition of an unspecified number or a majority of people. Yet this only confines the circumstances under which the insult takes place, such as the subject of insult and place of action. It does not limit the precise content of the “insult” subject to penalty. As the criminal element of insult is very extensively applied, “criticism” of others also becomes an insult and may be subject to criminal punishment.

In this vein, even satirical, humorous literary expressions that use ridicule to expose and criticize the world, or twisting of negative intentions into the form of polite expressions, or newly coined words on the Internet that are somewhat coarse, etc. are also punishable as a crime of insult. The “unheard of nobody (*dutbojab*)” at issue in this case is a shortened form of “unheard of and unseen nobody,” which is a new online word that refers to a person or thing that is not well known. These kinds of newly coined online terms are one of the interesting cultural phenomena widespread among netizens, and a slight degree of coarseness and awkwardness in expression does not necessarily constitute an insult.

The restriction on free expression should be confined to actions likely to cause specific harm to society or seriously damage an individual's feeling about his/her own reputation. Specifically, punishment should be limited only to abstract judgments and emotional expressions that will evidently inflict clear and great damages. One of the examples requiring punishment could be hateful expressions associated with sex, religion, disability, country of origin, etc. (US Code Title 18 Part 1 Section 245(b)(2) and French Press Law Article 33 Section 3, 4) and those inciting hatred and violation against certain groups (German Criminal Code Section 130). This could be extended to lewd and obscene words involving character assassination and disparagement solely intended to humiliate others that, by their very utterance, tend to incite immediate violence (refer to the US fighting words law). Since the Provision not only regulates insult that causes concrete harm to society or seriously undermine one's feelings for his/her reputation, but also may regulate even simply negative, critical judgments or emotional expressions that merit constitutional protection, the area subject to regulation is too extensive.

B. Intimidation of Free Expression

The scope and definition of insult subject to punishment under the Provision is too broad, and this intimidates acts of expression. Punishment of insult as a criminal offense restrains the possibility to raise and constructively resolve issues in social communities through free exchange of views and criticism. If certain negative languages or critical statements on sensitive political, social issues used in political, academic seminars or debates constitute insults and are thus regulated, political, scientific acts of expression will be restrained and opportunities of open debate will decline. This may lead to damaging the essential function of the freedom of expression. Particularly in a modern democratic society founded on ideologies of plurality and relativism of values, the state making judgment on whether to permit an expression or not based on a

too broad definition of insult may distort or politically abuse the free market of press and ideas.

Although the majority opinion states that the freedom of expression can be appropriately protected under Article 20 of the Criminal Act concerning "justifiable act," allowing for ex post facto exception to prohibition alone cannot prevent the intimidation of free expression. The criminal procedure regarding insult from criminal charge, prosecution, and then trial intimidates not only the offender but also ordinary citizens who watch the process in real time. In an environment where Internet websites, blogs, social media, etc. have become part of our everyday lives, criminal punishment of insult has an enormous restraining effect on the free expression of society as a whole.

C. Appropriateness of Criminal Punishment

The state's authority to punish crime is the most powerful authority enjoyed by the state and, for those subject to penalty, a severe form of enforcement. Therefore, the exercise of such authority prescribed in criminal law should be limited to the minimum. Issues that can be resolved in moral or social domains should be left up to morals or members of society. Merely an abstract judgment or expression of scornful emotion could be regulated through self correcting-mechanism of civil society or by imposition of civil liabilities.

In recent days, dissemination of insulting expressions in cyberspace have huge repercussions, and it is understandable that regulation is required. However, a large number of malicious acts of expression in cyberspace are mostly committed by juveniles by accident or on impulse; regulating all such acts as criminal offense may unnecessarily turn many people including juveniles into criminals. In fact, minor cases of insult in cyberspace can be prevented to a great extent through alternatives, such as deleting or removing the expression in question or blocking the

offender's access to Internet bulletin boards. As such, there are cases where sanctions through criminal punishment are not required.

According to the 2012 Annual Report of the Prosecutor's Office, in 2000 the number of cases filed involving insult amounted to 1,858 and 532 individuals were indicted, and in 2011 a total of 11,839 cases were filed and 6,260 were prosecuted. There could be many reasons for the 10 fold-increase in the number of prosecuted individuals within 11 years. But, above all, increased acts of expression on the Internet have resulted in easier, more frequent insults without facing each other in person, which probably has led to more charges of insult. This change indicates that people overall are less inclined or cannot afford to accept critical, negative opinions or emotional expressions directed against themselves.

As “insult” may also include minor insulting behaviors, abstract judgments, or derogatory expressions, penalizing all these expressions as criminal offence excessively limits the freedom of expression.

D. International Human Rights Standards

Criminal punishment of insult, in some respect, does not meet the international human rights standards either. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), an international human rights treaty to which Korea is a party and thus has the same effect as domestic law pursuant to Article 6(1) of the Korean Constitution, provides for the freedom of expression. General Comment No. 34 on Article 19 (freedoms of opinion and expression) adopted by the Human Rights Committee established under the ICCPR states that the mere expression of opinions, not factual arguments, is not sufficient to justify the imposition of legal responsibility. The General Comment also calls on the State parties to consider decriminalization of defamation and states that, in any case, the application of criminal law should only be countenanced in the most serious of cases and imprisonment is never an

appropriate penalty. The Special Rapporteur for Freedom of Opinion and Expression also said that penalization of defamation represents a limitation on the freedom of expression and suggested decriminalizing defamation. It also points out that criminal punishment cannot be justified as long as people can sue for damages from defamation through the civil code.

E. Legislation and Cases

The origin of insult crime goes back to contempt of God in the Roman Empire and *lèse-majesté* in Europe, the crime of violating majesty. Many countries around the world currently have provisions classifying insult as criminal offence. However, it has been abolished in part or has become practically insignificant in a great number of countries for reasons that such prohibition prevents free criticism and overly restricts freedom of expression in a democratic society.

The U.S. Supreme Court held in a case that it is unconstitutional to criminalize defamation even when statements are not “false” nor made with “actual malice” as it limits criticism and free debate and discussions. Under the U.S. jurisprudence, “fighting words” are not one of the expressions protected by the Constitution, but they fall under a narrowly limited category of speech. The Supreme Court struck down a law that prevented “insulting or fighting words which by their very utterance tend to incite an immediate breach of peace.” The Court also ruled unconstitutional another legal provision that prohibits “swearing others by using intimidating, defamatory, and insulting languages,” stating that the provisions involve excessively broad range of speech and thus may conflict with the freedom of speech protected under the Constitution.

Looking into the civil law countries, Article 231 of the Penal Code of Japan provides for punishment of insults, but the offenders only get a

slap on the wrist－misdemeanor imprisonment without work or a petty fine. And insult is the only crime penalized by misdemeanor imprisonment without work or a petty fine under the Penal Code. Section 185 of the German Criminal Code penalizes insult, but it is known to be rarely punished in practice. The punishment of insult in Germany is initiated by *Privatklage*, or private prosecution led by the victim, instead of the prosecutors, and the extreme complexity and trouble involved in the procedure tends to prevent its abuse. Since 2000, France has been imposing only fines for insulting a person except for certain cases specified otherwise, and in 2004 abolished the offence of insulting a foreign head of state. Latin American penal codes used to prohibit insults, threats, and violence aimed at public officials in duty, but a large number of countries including Chile and Costa Rica have repealed the ban. Also the Supreme Court of Honduras and the Constitutional Court of Guatemala have held such penalty for insult unconstitutional.

F. Sub Conclusion

The Provision overly restricts free expression and thus limits free debate and constructive criticism. Therefore, the Provision fails to comply with the rule against excessive restriction and infringes on the freedom of expression, which is in violation of the Constitution.

Justice Park Han-Chul (presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog, Cho Yong-Ho

2. Aggravated Punishment on Parricide

[25-2(A) KCCR 82, 2011Hun-Ba267, July 25, 2013]

Questions Presented

Whether the part ‘a person who kills one's own lineal ascendant’ of Article 250 Section 2 of the Criminal Act (hereinafter, the “Provision”) which prescribes aggravated punishment for a person who kills one's (legal) lineal ascendant compared to punishment for general murder violates the principle of equality (negative)

Summary of the Decision

From the Joseon Dynasty to the present, parricide (killing one's own lineal ascendant) has been punished in an aggravated way under which lies Confucian values and traditional ideas that emphasize filial duty. The depravity of parricide also justifies intensive social condemnation, compared to general murder. Furthermore, the Provision corrected the issue of disproportion between crime and responsibility in sentencing by revising its statutory punishment from ‘death or life imprisonment’ to ‘death, life imprisonment or imprisonment for seven years or more.’ Therefore, the Provision does not violate the principle of equality that requires balance in criminal punishments.

Dissenting Opinion of Justice Lee Jin-Sung and Justice Seo Ki-Seog

The Provision imposes aggravated punishment on parricide (killing one's own lineal ascendant) only based on legal relationship, without considering any circumstance such as custody, caring or attachment. In contrast, a person is punished by general murder (Article 250 Section 1 of the Criminal Act) if he/she kills a spouse, lineal descendant, or a special benefactor not legally related. The punishment would be even mitigated if a lineal ascendant kills his/her infant for disgrace or

concealment (Article 251 of the Criminal Act). As such the Provision is not in consonance to democratic family relationship protected by the Constitution. The flat increase of minimum punishment by rule, without considering the intent of crime, makes reasonable determination of sentencing difficult. Such regulation is hard to find reference from the perspective of comparative law. Therefore, discrimination by the Provision cannot be reasonably justified, thus violating the principle of equality.

Provision at Issue

The part ‘a person who kills one's own lineal ascendant’ of Article 250 Section 2 of the Criminal Act (revised by Act No. 5057 on December 29, 1995)

Party

Petitioner
Son O-Wook
Attorney in Charge: Chung Ihn-Bong

Underlying Case
2011Do9250, Supreme Court (Parricide)

Holding

The part ‘a person who kills one's own lineal ascendant’ of Article 250 Section 2 of the Criminal Act (revised by Act No. 5057 on December 29, 1995) does not violate the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) Complainant, the defendant in the underlying case, was charged with murdering his father. According to the indictment, the defendant had harbored grievance toward his father who under the influence of alcohol frequently assaulted his mother. On January 24, 2011, the defendant was involved in a tussle when he tried to keep his father from assaulting his mother. Shortly after the complainant attempted reconciliation with his father, his father (victim) assaulted the complainant and during the tussle that ensued he killed his father. The complainant was sentenced to 10 years in imprisonment by the trial court (Seoul Central District Court 2011GoHab91) and sentenced to 7 years in imprisonment by the appeal court (Seoul High Court 2011No1052).

(2) The complainant appealed the case to the Supreme Court (Supreme Court 2011Do9250). While the appeal was pending, the complainant filed a motion to request constitutional review on Article 250 Section 2 of the Criminal Act. When the motion was denied on October 5, 2011, the petitioner filed this constitutional complaint on October 18, 2011.

B. Subject Matter of Review

The complainant requested constitutional review on the entire Article 250 Section 2 of the Criminal Act, but the subject matter of review of this case should be limited to the constitutionality of the part ‘a person who kills one's own lineal ascendant’ of Article 250 Section 2 of the Criminal Act (revised as Act No. 5057 on December 29, 1995) (hereinafter, the “Provision”) that is applicable in the underlying case.

The Provision and relevant provisions are stated as follows:

Provision at Issue

Criminal Act (revised as Act No. 5057 on December 29, 1995)

Article 250 (Murder, Killing Ascendant)

(2) A person who kills one's own or any lineal ascendant of one's spouse shall be punished by death, imprisonment for life or for not less seven years.

Related Provisions

Criminal Act (enacted as Act No. 293 on September 18, 1953)

Article 250 (Murder, Killing Ascendant)

(1) A person who kills another shall be punished by death, or imprisonment for life or for at least five years

Criminal Act (enacted as Act No. 293 on September 18, 1953 but before revised as Act No. 5057 on December 29, 1995)

Article 250 (Murder, Killing Ascendant)

(2) A person who kills one's own or any lineal ascendant of one's spouse shall be punished by death or imprisonment for life.

II. Arguments of the Complainant

(intentionally omitted)

III. Judgment

A. Legislative History and Purpose of the Provision

(1) In the Joseon Dynasty when traditional Confucian values emphasizing filial duty were dominant, parricide was classified into one of the ten worst crimes punished by decapitation or dismemberment. The Criminal Code of the Korean Empire, promulgated on April 29, 1905, also

punished the murder of lineal ascendants with death by hanging.

Article 200 of the former Criminal Act of Japan applied during the period of Japanese colonial rule stipulated that murder of one's own or any lineal ascendant of one's spouse be punished by death or life imprisonment.

Article 250 Section 2 of the Criminal Act of Korea (parricide provision), which was enacted in 1953, succeeded the above provision of the former Criminal Act of Japan and was maintained for more than 40 years. During the third revision of the Criminal Act in 1995, it was argued whether to delete the parricide provision or not. The parricide provision was not repealed under the considerations that aggravated condemnation of immoral crimes against a lineal ascendant is part of our traditional legal culture. Also considered was the fact that abolishing the parricide provision only for the reason of its excessive punishment, while maintaining other aggravated punishment on crimes against a lineal ascendant is against the principle of criminal justice. Nonetheless, its statutory punishment was altered from ‘death or imprisonment for life’ to ‘death, imprisonment for life, or imprisonment for not less 7 years’ by adding ‘imprisonment for not less 7 years’, accepting criticism that pointed out its excessive punishment.

(2) From the Joseon Dynasty to the present, parricide (killing one's own lineal ascendant) has been punished in an aggravated way under which lies Confucian values and traditional ideas that emphasize filial duty. Besides, the Criminal Act has other provisions that impose additional punishment on crimes against ascendants, including assault against ascendants, battery against ascendants, and abandonment of ascendants. These aggravated punishment provisions are justified by the intensive social condemnation of the immorality of the perpetrator when the victims of crimes are legally related as lineal ascendants (see 14-1 KCCR 159, 2000Hun-Ba53, March 28, 2002).

B. Principle of Equality

(1) Complainant argues that the Provision violates Article 11 Section 2 of the Constitution by creating a special social class. Nevertheless, it is obvious that the Provision does not create a social position class such as slavery, aristocracy, and nobles and commoners, implied by 'special social class' of Article 11 Section 2 of the Constitution (23-1(A) KCCR 276, 312-313, 2008Hun-Ba141 etc., March 31, 2011). Therefore, this argument should be construed as to whether the Provision discriminates against lineal descendants in favor of lineal ascendants, thus violating the principle of equality under Article 11 Section 1 of the Constitution.

(2) The principle of equality under Article 11 Section 1 of the Constitution represents relative equality (equality before law) that prohibits any unreasonable discrimination in enacting legislation and applying laws. This means that discrimination based on reasonable ground is not against the principle of equality (*see* 13-2 KCCR 678, 690, 2001Hun-Ba4, November 29, 2001). Thus the Provision would not violate the principle of equality if the discrimination against lineal descendants is deemed reasonable.

(3) The legislature is invested with broad discretion on the punishment of crimes. The legislature determines the types and degree of criminal punishment under comprehensive consideration of not only the nature of the crime and benefit of the law, but other various elements such as the culture and history of our society, circumstances surrounding the enactment, values and legal consciousness of the citizens, and criminal policy issues, etc. Therefore, statutory punishment of a crime should not be deemed to violate the Constitution unless it clearly violates the principle of equality or the principle of proportionality of the Constitution. This may be determined by whether it loses the balance in the criminal punishment system for its excessive cruelty compared to the nature of the crime and ensuing responsibility or by exceeding the

constitutional limit in achieving its own purpose and function (4 KCCR 225, 229, 90Hun-Ba24, April 28, 1992; 63 KCCG 1162, 2001Hun-Ba4, November 29, 2001).

(4) Parricide has been perceived as an immoral crime that is against general social order, moral principles, as well as humanity. Its immorality justifies the intensive social condemnation of parricide compared to general murder. Even if severe punishment on parricide aimed at restraining crimes of depravity and immorality ends up providing strong protection for lineal ascendants, this is merely reflective benefit and not necessarily unreasonable. Rather, it may be reasonable under the current moral values.

Descendants' respect and love for ascendants are core values constituting essential elements of our social morals, rather than a cultural heritage of the feudal family system. It is especially emphasized in our nation that has succeeded and developed traditional cultures based on Confucian ideas. The Provision does not violate the principle of equality of Article 11 Section 1 of the Constitution as the discrimination has reasonable grounds, considering the legitimacy of its legislative purpose and appropriateness of means, which are reasons of aggravated punishment and the appropriateness of its degree (*see* 14-1 KCCR 159, 164, 2000Hun-Ba53, March 28, 2002).

(5) While aggravated punishment for depravity of the crime in itself has reasonable grounds, if the statutory punishment is too severe for reasonable determination of sentencing in exceptional cases where immorality is denied or relatively minor, such reasonable grounds are lost.

Nonetheless, the statutory punishment of the Provision has been altered from 'death or imprisonment for life' to 'death, imprisonment for life or not less 7 years' by the revision of 1995. Considering that differences between the minimum statutory punishment of the Provision and that of general murder which is 'imprisonment for more than 5 years' have been

minimized, the issue previously raised of disproportion in sentencing has been resolved. Also, the revision has enabled appropriate punishment according to responsibility by the judge's mitigation of sentencing in cases where liability is relatively minor considering criminal intention or aspect of action.

(6) Accordingly, the Provision provides aggravated punishment for immoral action that should be intensively condemned among several types of murder. The statutory punishment is neither excessively severe compared to the nature of crime and ensuing responsibility nor arbitrary legislation losing the balance of criminal punishment. Therefore, the Provision is not against the principle of equality.

IV. Conclusion

Therefore, we hold the Provision not in violation of the Constitution in a unanimous opinion of participating Justices, except the dissenting opinion of Justice Lee Jin-Sung and Justice Seo Ki-Seog in chapter V.

V. Dissenting Opinion of Justice Lee Jin-Sung and Justice Seo Ki-Seog

We are of opinion that the Provision violates the principle of equality, and thereby unconstitutional for the following reasons:

A. The Provision provides aggravated punishment for killing his/her own or spouse' lineal ascendants which is discriminatory treatment compared to killing other legal relations, including lineal descendants or spouse, or killing a person who is not legally related.

The legislative history of the Provision implies that it is inherited from ancient times when law and morals were not separated and the worst ten crimes of Confucian ideas were punished most severely. Confucianism developed through Joseon Dynasty to be the ruling principles maintaining

feudal orders based on the caste system. It also confirms the authority and control of sovereign over subject, father over children, husband over wife, and men over women.

On reviewing the regulations, the act of killing one's spouse who should be supported and cooperated with, or lineal descendants who should be cared for and reared, or special benefactors not legally related but should be respected are all punished by general murder (Article 250 Section 1 of the Criminal Act). The punishment would be even mitigated if a lineal ascendant kills his/her infant for disgrace or concealment. In contrast, the Provision imposes aggravated punishment on parricide (killing one's own lineal ascendant) only based on legal relationship, without considering any circumstance such as custody, caring or attachment.

Accordingly, the Provision is based on the feudal ethics code, implying the intent of discrimination is to maintain authoritarian and paternalistic family orders that assume controlling relationship between lineal ascendants and descendants.

Article 36 Section 1 of the Constitution states that “Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.” Human dignity and free expression of personality constitute the core values of the Constitution and democratic orders constitute the basis of constitutional order. This affects family life relationship which is a foundation as well as an element of social relationship or national relationship. If constitutional values and orders are not attained in the family life relationship it would be difficult to realize it altogether. The family system protected by the Constitution is based on a democratic family relationship that respects and treats every family member equally as an individual with dignity. Therefore, the discrimination is not in consonance to democratic family system

protected by the Constitution.

Therefore, the purpose of discrimination against a person who killed his/her lineal ascendants under the Provision is not legitimate in protecting the basic morals of society to maintain free and peaceful community life as expressed in the majority opinion. Besides, it is hardly the appropriate benefit of the law protected by criminal punishment, which is the most powerful and last resort.

B. The majority opinion also states that the revision of 1995 that inserted the imprisonment for more than 7 years for statutory punishment resolved the issue of reasonable determination of sentencing in individual cases.

But recent research on parricide reveals that crimes of parricide motivated by greed that is obviously immoral account for only 7.1% of entire cases, whereas cases motivated by mental disorder of perpetrator account for 36.9% and cases arising from abuse of the perpetrator by victim or other family members account for 26.2%. This implies that the representative types of parricide are either cases by reason of mental disorder or cases by reason of accumulated anger by habitual abuse of the perpetrator by victim or other family members. Illegality or responsibility of the latter case would not overweigh that of general murder cases. The perpetrator might be the true victim, in a sense, if the perpetrator had been abused physically or psychologically by constant domestic violence or sexual harassment for a long time or has been receiving substantial death threats. In such case, aggravated punishment against lineal descendants would be excessively severe as lineal descendants cannot choose their ascendants, while ascendants can determine whether to have descendants or not and also have opportunities to educate their descendants.

While it is true that there are cases where the illegality and

responsibility of parricide are heavier than ones of general murder, there is also the possibility of the opposite. However, the Provision increases minimum statutory punishment without considering the criminal intent, etc. Because it increases punishment against parricide as well as eliminating the possibility of suspension of sentence when there are no additional statutory reduction reasons except general reduction reasons, it crosses over the boundary of reasonableness.

The Criminal Act states that several circumstances, including the relationship between perpetrator and victim, should be considered in examining a case (Article 51). Through the process of fact finding, the relationship between perpetrator and victim would be considered in aggravating or mitigating the punishment when the specific 'sentence' and 'responsibility of assessment of a case' is determined. Therefore, it would be reasonable to aggravate punishment against murder if the victim is an ascendant and the action is found to be immoral, instead of providing a separate statutory punishment from general murder.

C. Aggravated punishment of parricide of the Provision has hardly any reference from the perspective of comparative law.

Not only common law countries, including the United Kingdom and the United States, but also Switzerland, Denmark, Norway, Russia, and China do not provide aggravated punishment for parricide. Germany and Austria abolished the aggravated punishment for parricide, in 1941 and 1974, respectively. Countries that provide aggravated punishment for parricide, including France, Italy, Argentina, and Taiwan, also provide aggravated punishment for murder of descendants or spouses, as well as murder of ascendants.

Even the aggravated punishment provision of the Criminal Act of Japan, which was succeeded by the Provision, was repealed together with other aggravated punishments over crimes against ascendants in

1995, after the Supreme Court of Japan declared it unconstitutional in 1973.

D. Therefore, discrimination by the Provision cannot be reasonably justified, thus violating the principle of equality of the Constitution.

Justice Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog, Cho Yong-Ho

3. Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers

[25-2(B) KCCR 248, 2010Hun-Ma219 · 265(consolidated), October 24, 2013]

Question Presented

Whether Article 4 Section 1 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers, which prohibits employers from hiring a fixed term worker for a period exceeding two years(hereinafter the 'Provision'), infringes upon the complainants' right to contract (negative)

Summary of the Decision

If a fixed term employment contract is allowed to run without limit, general workers may not be able to refuse the one-sided offer of short term employment contract even against their will, which could result in increasing temporary, insecure employment and widening the gap between permanent and temporary workers. Therefore, in order to prevent such problems, it is necessary to encourage transfer the employment contract to open ended ones by curbing the use of fixed term employment contracts.

The Provision which prohibits employers from hiring a fixed term worker for a period exceeding two years may, in some cases, cause workers to be temporarily unemployed. However, such limitation is inevitable to induce employers to transfer fixed term workers' status into open ended term basis. And it cannot be denied that the Provision generally has a positive influence on reducing job insecurity or improving working conditions. Therefore, the Provision does not infringe on the complainants' freedom of contract.

Dissenting Opinion of Justice Lee Jung-Mi and Justice Cho Yong-Ho

As it is impossible to transfer all fixed term contracts to open ended ones after the expiration of initial fixed term of two years in the current situation where employability is low, employers may well deny the renewal of employment contracts with the fixed term employees. As a result of the Provision, fixed term employees, who expect to continue their work at the current workplaces after the expiration of the employment contracts even though on a fixed term basis, may end up being dismissed and unemployed against their will. As such, the Provision fails to stabilize job insecurity or improve working conditions. Rather, it deprives the employees engaged on fixed term contracts of the right to hold fixed term contracts exceeding two years, thereby excessively infringing on the fixed term workers' freedom of contract.

Provision at Issue

The main text of Article 4 Section 1 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers

Related Provisions

Intentionally omitted

Parties

Complainants

1. Woo O-Tae(2010Hun-Ma219)
2. Choi O-Soon(2010Hun-Ma265)
3. Sohn O-Soon(2010Hun-Ma265)

Representative of the Complainants: Eun Chang-Yong and three others

3. Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers

Holding

The constitutional complaint is rejected.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) 2010Hun-Ma219

Complainant had worked for OO Tech. since March 1, 2008 as a factory worker based on short term employment contract. Upon the denial to renew his employment contract by the company on February 28, 2010, he filed this constitutional complaint on April 8, 2010, arguing that Article 4 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers infringes on his fundamental rights.

(2) 2010Hun-Ma265

Complainant Choi O-Soon had worked for OO Trade Co. Ltd for seven years and two months from December 3, 2002 to January 31, 2010 and complainant Sohn O-Soon had worked for the company for nine years and two months from December 20, 2000 to January 31, 2010 as contract based workers. Upon the denial to renew their employment contracts by the company on April 27, 2010, they filed this constitutional complaint on April 8, 2010, arguing that Article 4 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers infringes on their fundamental rights.

B. Subject matter of Review

The complainants filed the constitutional complaint on Article 4 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers as a

whole. But the employer's refusal to renew employment contract in this case is based on the main part of Article 4 Section 1 of the aforementioned Act that prohibits employers from hiring fixed term workers for a period of exceeding two years. Therefore, the subject matter of review in this case should be confined to the main text of Article 4 Section 1 of the aforementioned Act.

The subject matter of review in this case is whether the main text of Article 4 Section 1 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers (revised as Act No. 8074 on December 21, 2006; hereinafter the 'Fixed Term Act') (hereinafter the 'Provision') infringes on the complainants' fundamental rights. The provision at issue in this case is as follows:

Provision at Issue

Act on the Protection, etc. of Fixed Term and Part-Time Workers (revised as Act No. 8074 on December 21, 2006)

Article 4 (Employment of Fixed Term Employee) (1) Any employer may hire a fixed-term contract worker for a period not exceeding two years (where his/her fixed-term employment contract is repetitively renewed, the total period of his/her continuous employment shall not exceed two years).

Related Provisions

Intentionally Omitted

II. Arguments of complainants and opinion of related bodies

(Intentionally Omitted)

III. Review on Justiciability

Article 68 Article 1 of the Constitutional Court Act stipulates that any

person who claims that his/her fundamental right has been infringed by the exercise or non exercise of governmental power may file a constitutional complaint, and 'governmental power' in this provision includes legislation. As for constitutional complaints against a statute, however, the alleged violation must be caused directly and presently by the statute itself of which he/she complains, not by any specific executive action taken to implement it (4 KCCR 813, 823, 91Hun-Ma192, November 12, 1992; 12-2 KCCR 361, 367, 2000Hun-Ma79, November 30, 2000).

In this case, the complainants who had been working as fixed term employers became unable to renew their employment contracts with current employers due to the enactment of the Provision. Therefore, the complaint against the Provision satisfies the requirement of directness as it directly restricts the complainants' fundamental right. Also, we find that the complaint satisfies other elements of justiciability, too.

Therefore, the constitutional complaint is justiciable.

IV. Legislation of the Fixed Term Act and limit on the term of employment

A. Legislation of the Act

Before enactment of the Fixed Term Act, Article 23 of the former Labor Standard Act regulated the term of employment contract. It limited the term of contract for fixed term to one year in principle by stipulating that "the term of a labor contract shall not exceed one year, except in case where there is no fixed term or where a fixed term is necessary for the completion of a certain project." The reason for the limitation was that an employment contract should be open ended in principle, and even when a fixed term contract is made as an exception, the provision, by stipulating one year for the fixed term contract, prevented employees from being forced to work for a long time. But since there was no

provision that prohibited the repeated renewal of contract, of course, the total term of contract was not limited.

In spite of the above provision of the former Labor Standard Act, however, in reality, the term for fixed term employment contract often exceeded one year. The courts affirmatively recognized the effect of fixed term contract. The courts ruled that the term of contract did not fall under the conditions of employment stipulated in Article 21 of the Labor Standard Act but simply showed the duration of contract, and therefore, could be determined by the parties to the contract. So, even though the term of employment contract exceeded one year, the term or duration of contract itself was considered to be effective. Employers could not argue that the contract had expired for passing one year within the duration of contract (employees could cancel the contract at any time after the lapse of one year), and when the term expired, the contract was also considered to be terminated unless there was special circumstance to be considered (Supreme Court Decision 95Da5783 Decided August 29, 1996). Due to the court decision, Article 23 of the former Labor Standard Act practically lost its effect and any labor contract exceeding one year could not be considered invalid.

Meanwhile, employers could evade the prohibition of dismissal under the Labor Standard Act by repeatedly renewing limited term employment contract less than one year. After the Asian financial crisis of 1997, fixed term employment contracts rapidly increased throughout all sectors of economy. As length of service of fixed term workers increased they were even misused by being assigned to regular work duties. Thereby the problem of irregular workers including fixed term employment became serious problem of our society. In this situation, the need to reorganize the system to correct unreasonable discrimination against irregular workers and to protect their working conditions became urgent. The Fixed Term Act was legislated on December 21, 2006 as Act No. 8074 and came into effect on July 1, 2007.

3. Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers

The main purpose of the Fixed Term Act, a bill submitted by the government, is to reduce unreasonable discrimination against irregular workers and curb abuse of such workforce while at the same time promoting flexibility and harmony in the labor market. The Act was expected to remedy the evil of repeated renewal of one year contracts brought on by the former Labor Standard Act which set the term of fixed term employment contract at one year. Also it was expected to prevent abuses by employers who evaded application of provisions in the former Labor Standard Act protecting workers such as salary or severance pay, by signing a less than one year contract. While the former Labor Standard Act was unable to restrict repeated renewal of fixed term employment contracts, the Act, by extending the term of fixed term employment contract to two years, showed the possibility to settle the abuse problem.

B. Limitation of Employment Period of Fixed Term Employees

Article 4 Section 1 of the Fixed Term Act which stipulates that “any employer may hire a fixed-term contract worker for a period not exceeding two years” allows an employer to hire a fixed term employee without proving a legitimate reason for up to two years. Therefore, employers can hire fixed term employees up to two years without limit. At the same time, the problem related to the legal effect of employment contract exceeding one year was naturally resolved.

However, under the proviso of Article 4 Section 1 of the Fixed Term Act which enumerates exceptions to the two year rule, an employer may hire a fixed term employee for a period in excess of two years where: (1) the task itself is temporary such as when the period needed to complete a project or a particular task has been set; when there is a vacancy arising from a worker’s leave of absence or dispatch and it is necessary to fill in until the worker returns to work; when the period needed for a worker to complete schoolwork or vocational training has

been set; (2) there is no possibility for deteriorating the worker's status even without limitation on the period of service such as when labor contract is made with the aged or when the job requires professional knowledge and skills; and (3) limitation of employment period is not reasonable such as when the job is offered as part of the government's welfare or unemployment measures as prescribed by the Presidential Decree and there is a rational reason prescribed by the Presidential Decree.

Meanwhile, Article 4 Section 2 of the Fixed Term Act prohibits repeated renewal of fixed term employment contract exceeding two years by stipulating that "where any employer hires a fixed term worker for more than two years although those grounds under the proviso to Section 1 do not exist or cease to exist, such fixed term worker shall be deemed as a worker subject to open ended employment contract." Therefore, if an employer hires a fixed term employee for more than two years, the fixed term employee shall be considered as a worker who has made a labor contract with no fixed term. Moreover, if an employer who hires an employee for a period exceeding two years wants to terminate the employment for the reason that the term of labor contract has expired, it is considered as a dismissal which requires legitimate reasons under Article 23 of the Labor Standard Act.

V. Whether the Provision Infringes on the Fundamental Right

A. Issue of the Case

The complainants argue that the Provision violates their freedom to choose occupation and the right to work, as it makes it impossible for fixed term employees to continue their current jobs for more than two years unless being converted into regular employees. The complainants are trying to argue that even a fixed term worker should be guaranteed to enjoy the freedom to continuously work in the same workplace

(continuation of employment relation). The freedom of occupation under Article 15 of the Constitution and the right to work under Article 32, however, simply impose the duty of the state to provide minimum protection for the loss of job due to the disposition of employer, and cannot be the basis of a right on which an employee may claim protection from the loss of job (14-2 KCCR 668, 678, 2001Hun-Ba50, November 28, 2002). Therefore, this case has no issues on infringement on the freedom of occupation or the right to work.

Rather the complainants' argument rests on the fact that due the Provision, as long as they have worked for more than two years, they are not able to enter into a labor contract exceeding two years with the same employer in the same company. As labor relations between employer and employee are formed by a bilateral labor contract, we conclude that the Provision restricts the freedom to make a fixed term employment contract exceeding two years, or in other words, the freedom of contract derived from Article 10 of the Constitution.

B. Whether the complainants' freedom of contract is infringed

(1) Standard of Review

The right to pursue happiness guaranteed under Article 10 of the Constitution includes the general freedom of action from which the freedom of contract to decide whether, with whom and how a contract should be entered is derived. But as freedom of contract is not absolute, it can be limited by law for the purposes of such as protecting the minority and vulnerable populations, preventing monopoly, realizing substantive equality or promoting economic justice, but only in compliance with the principle of proportionality under Article 37 Section 2 of the Constitution (20-2(A) KCCR 462, 475, 2005Hun-Ba81, September 25, 2008; 175 KCCG 690, 694, 2009Hun-Ba37, April 28, 2001, etc.).

Meanwhile, the ban on a fixed term employment contract exceeding

two years under the Provision is to mediate conflicting private interests between employers and employees. This is more related to regulating economic activities in social relationship, rather than to the domain of intrinsic and fundamental freedom. Therefore, the Provision should be scrutinized under a less stringent standard of review.

(2) Whether the Freedom of Contract is Infringed

(A) The purpose of the Provision, prohibiting any employer from hiring an employee on fixed term contract for a period exceeding two years, is to relieve the fixed term workers' job insecurity and improve their working conditions through curbing the misuse arising from the successive use of fixed term contract workers exceeding a maximum of two years. Therefore, the legislative purpose of the Provision is legitimate. When the term of service is limited to two years, it compels employers to convert fixed term employees into regular employees in order to continue employment contract with them. This is a proper means to achieve the legislative purpose of relieving the fixed term workers' job insecurity and improving their working conditions.

(B) If a fixed term employment contract is allowed to run without limit, general workers may not be able to refuse the one-sided offer of short term employment contract even against their will, which could result in increasing temporary, insecure employment and widening the gap between permanent and temporary workers. Therefore, in order to prevent such problems, it is necessary to encourage transferring the employment contract to open ended ones by curbing the use of fixed term employment contract. This could lead to job candidates having difficulties in finding a position. But as long as the limitation on the employment period of fixed term workers results in the overall conversion of fixed term employees into regular employees, exerting a positive effect on the improvement of job insecurity and working conditions, such a legislative decision should be respected.

Despite worries in the labor market that the enactment of the Fixed

Term Act would bring massive layoffs due to the impossibility to renew an employment contract, conversion into regular position or non-fixed term contract has gradually expanded, especially in public institutions, public sector or financial institutions, thereby successfully stabilizing employment in some parts. And meaningful evidence that the system causes instability in the employment of fixed term employees has yet to be detected. Rather, according to the analysis on the trend of irregular employment from 2003 to 2012 conducted by the Statistics Korea, the percentage of fixed term employees among salaried workers has gradually decreased from 17% before the enactment of the Fixed Term Act to 14% after the enactment. Also, the data of the Ministry of Labor collected by the nine panel surveys targeted to fixed term employees from April 2010 to December 2012 shows that most fixed term employees who work for more than two years tend to be guaranteed stable and continuous employment (approximately 87.7%. Among them, those who are considered to be non-fixed term employees is 392,000, accounting for 79.3% and the number of employees who are converted into regular positions is 42,000 or 8.5%). Based on these statistics, we can conclude that the Provision substantially contributes to employment stability by inducing conversion into non fixed employment contract.

However, it is undeniable that after the enactment of the Provision, employers might be burdened by converting fixed term employees into non fixed term workers, so that in reality, there are cases where employers replace existing fixed term employees with new ones rather than continuously hiring them or even further, try to outsource. But since the court's decision that the term of service decided by both employer and employee is effective under the Former Labor Standard Act, job insecurity had worsened and disparity in working conditions had widened. Temporary and myopic measures to solve the immediate unemployment problem at hand such as allowing repeated renewal of fixed term employment contract may not able to provide fundamental solution to stability in employment in the long term. Some people argue

that for the job security of fixed term employees, it would be more effective to lead employers to convert fixed term employees into non fixed term staffs through imposing heavier cost on the use of fixed term employees. But imposing a burden solely on employers in the labor relationship which requires mutual understanding and modification is inherently not a fundamental solution.

In the employer-employee relationship which is basically a private one, legislative measures aiming to maintain fixed term worker's job security can only be limited. In such a situation, limitation imposed by the Provision on the term of fixed term employment could result in some undesirable situation such as temporary unemployment. However, such limitation is inevitable in order to reduce job insecurity and improve working conditions by inducing employers to transfer fixed term workers' status into open ended term basis. Therefore, it is difficult to conclude that the Provision imposes excessive restriction on the fixed term employees' freedom of contract.

(3) Further, while the public interests pursued by the Provision such as job security and improvement in working conditions through inducing employers to transfer fixed term workers' status into open ended term position are undeniably important, restriction on the freedom of contract by the Provision cannot be considered to be unacceptably serious. Therefore, we conclude that the restriction is not excessive.

(4) For the above reasons, the Provision does not excessively infringe on the complainants' freedom of contract in violation of the principle against excessive restriction.

VI. Conclusion

For the stated reasons, it is so ordered that the constitutional complaint is rejected as set forth in the holding. This decision is based on the

unanimous opinion of the participating Justices, with the exception of the dissenting opinion of Justice Lee Jung-Mi and Justice Cho Yong-Ho as stated in paragraph 7 below.

VII. Dissenting Opinion by Justice Lee Jung-Mi, Justice Cho Yong-Ho

Unlike the majority opinion, we think the Provision imposes serious restriction on the complainants' freedom of contract. Accordingly, we set forth below our dissenting opinion.

A. We basically agree with the majority opinion on the rationale of legislative purpose. As the proverb goes "the road to hell is paved with good intentions." However, despite good intentions(legislative purpose) of the Provision, we have to point out the unconstitutionality of the Provision in that it failed to provide better status to the fixed term employees regarding employment contracts: rather it paved way for the inferior status (like "hell" in the proverb).

As the Provision prevents employers from entering fixed term employment contract exceeding two years, fixed term employees would be left unemployed if they fail to be converted into open ended contract or find another job. It seems impossible, however, to convert all the workers employed under fixed term contracts into open ended positions after the expiration of their initial fixed term contracts of two years in the current situation where employability is low. Therefore, employers may well deny renewal of employment contracts with the fixed term employees and replace existing fixed term employees with new ones rather than continuously hiring them or renewing contract, or even further, try to outsource in order to escape from the burden(*see* 'Guideline to the Irregular Employment Act' published by the Ministry of Labor in August 2009). Therefore, in spite of the good intention of the legislative purpose (job security and improvement of working conditions), the Provision drives fixed term employees into far worse

positions by worsening job security as it makes them lose their jobs if they fail to be converted into regular positions.

B. As fixed term employees are always threatened by unemployment and in many cases and work under inferior working conditions, effective system and measures to improve their status are required: for example, 1) in a situation where overall conversion of fixed term contract into open ended contract is impossible, it is possible to give employers who convert fixed term employees into regular positions tax or social insurance incentives while maintaining two year contract term without restriction on the number of renewal, thereby gradually inducing conversion into open ended contract. In this case, the negative effect would be the routinization of contract renewal. But if employees choose to work for fixed term instead of being unemployed, at least the legislative purpose of stabilization of employment may be achieved; 2) it is also possible to increase the shares of unemployment benefits borne by employers as the resignation of fixed term employee is one cause of payment of unemployment benefits and employers who terminate fixed term contract are providers of the cause. There could be other measures to indirectly compel employers to convert fixed term contracts into open ended appointments through setting a fixed mandatory conversion rate into open ended contract. Or it is possible to impose burden on employers to pay considerable discharge allowance when employers fail to convert fixed term employees into open ended term employees after two years, thereby making the expense of using fixed term employees including discharge cost higher than that of using regular employees; 3) further, reflecting the current situation, while maintaining the existing restriction on the use of fixed term employees, it is possible to extend the maximum period of contract term so that fixed term employees get enough time to achieve more skills for the same duty (the government has submitted a bill to prolong the maximum period of fixed term employment contract by four years to the 18th National Assembly). In this case, employees can accumulate work experience and skills which

can be assets for finding a stable job and employers can be expected to convert skilled fixed term employees into open ended term employees while maintaining employment flexibility; 4) meanwhile, hiring fixed term employees for a regular and permanent duty can be prohibited from the outset. In order to effective realize this option, fixed term employment contract for a regular and permanent duty should be deemed to be open ended term employment contract. This may achieve the two purposes of stabilization of employment and improvement of working conditions.

As reviewed above, even though there are many options and systems to guarantee fixed term employees' job security and improve their working conditions, the Provision fails to consider these options and corners fixed term employees who has been working for two years into fear of dismissal and unemployment. Therefore the Provision excessively infringes on fixed term employees' right to contract.

C. Before the enactment of the Provision, fixed term employees used to have at least three options at the expiration of fixed term employment contract. These were being converted into regular positions; continuously working at the current company as fixed term employees; or leaving the company to find another job. Due to the Provision, however, the second option has disappeared contrary to the intention of both employees and employers. The Provision only provides two alternatives without considering specific situations or private autonomy of labor management, which is taking the unilateral offer of employer of converting into open ended employment or leaving the job. As a result, many employees who want to maintain their employment contract even on a fixed term basis[according to data presented during the oral proceedings, 64%(based on the survey of the Federation of Korea Trade Union) or 46%(based on the survey of the Korean Confederation of Trade Union) of fixed term employees want to continue to work even as irregular employees] are compelled to quit their jobs, leaving them unemployed and their

livelihood threatened. The government's intervention into the labor market through enacting the Provision has brought about rigidity of employment and the undesirable result of most fixed term employees losing their jobs with the exception of a few cases where fixed term contracts are transferred to open ended appointments.

D. The Provision thoroughly deprives fixed term employees of the right to enter into a labor contract exceeding two years and the effect of restriction on their fundamental rights is grave. In contrast, in terms of achieving the legislative purpose of eliminating job insecurity and improving working conditions, the Provision is hardly considered effective. We also think that the examples of stabilization of employment in some parts or the statistics related to the trend of irregular employment mentioned in the Court Opinion fail to reflect the reality or simply pose as a statistical illusion.

We learned from the oral proceedings that conversion into open ended term positions is mostly found only in limited institutions such as public companies, public sectors or financial institutions. But for most small and medium sized companies including the companies where the complainants worked, it is a totally different story (according to the Ministry of Employment and Labor, the data published on July 2009 showed that 36% of fixed term employees were converted into open ended term positions and 37% of them became unemployed due to the expiration of fixed term contract but the data on January 2011 showed that 32% of fixed term employees were converted into open ended term positions and 48% of them became unemployed due to the expiration of fixed term contract). As such, the Provision excessively and unacceptably restricts the fixed term employee's freedom of contract while the public interest achieved through it cannot be deemed significant.

E. Therefore, the Provision infringes on the complainants' freedom of employment contract. It is also meaningful to mention that the Ministry

of Employment and Labor initially presented an opinion that the Provision can be considered unconstitutional on the basis of the rationale we have pointed out.

Justice Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog, Cho Yong-Ho(unable to sign and seal due to business trip)

II. Summaries of Opinions

1. Case on Presidential Emergency Decree No. 1, 2 and 9

[25-1 KCCR 180, 2010Hun-Ba70 · 132 · 170(consolidated), March 21, 2013]

In this case, the Constitutional Court decided that the Presidential Emergency Decree Nos. 1, 2 and 9 of the 1970s, invoking Article 53 of the *Yushin* Constitution (Constitution of the Fourth Republic of Korea) is unconstitutional. The above Decrees prohibited any act of denial, opposition, distortion or slander of the *Yushin* Constitution, any act of speech, suggestion, petition for revising or repealing the *Yushin* Constitution, and any act of fabrication and distribution of groundless rumors, and tried any person who violated the Decrees by court-martial.

Background of the Case

1. Article 53 of the former Constitution (revised by Constitution No. 8 on December 27, 1972 but before being revised by Constitution No. 9 on October 27, 1980, hereinafter the "*Yushin* Constitution") authorized the president to enforce Emergency Decrees as a part of national emergency right and excluded it from subject of judicial review.

The president at the time proclaimed Presidential Emergency Decree Nos. 1, 2 and 9 that included prohibiting and punishing claims to revise the Constitution.

2. Complainant Oh O-Sang was charged of violating Presidential Emergency Decree No. 1(enacted by Presidential Emergency Decree No. 1 on Jan. 8, 1974 and repealed by Presidential Emergency Decree No. 5 on August 23, 1974, hereinafter "Decree No. 1") at the Emergency Common Court-Martial established by Presidential Emergency Decree No. 2(enacted by Presidential Emergency Decree No. 2 on January 8, 1974, hereinafter, "Decree No. 2") under the *Yushin* Constitution of 1970s and was sentenced to imprisonment.

1. Case on Presidential Emergency Decree No. 1, 2 and 9

The petitioner filed for a retrial and a motion to request for constitutional review of Decree Nos. 1 and 2 at Seoul High Court. After his motion dismissed, he filed this constitutional complaint with the Constitutional Court on February 3, 2010.

The underlying court began retrial of the above judgment and the Supreme Court declared judgment of acquittal for the charge of the violation of Decree No. 1 on December 16, 2010(Supreme Court 2010Do5986).

3. The rest of the complainants were sentenced to imprisonment for violating the 'Presidential Emergency Decree for National Security and Public Orders(enacted by Presidential Emergency Decree No. 9 on May 13, 1975 and repealed by Presidential Announcement No. 67 on December 7, 1979, hereinafter "Decree No. 9") under the *Yushin* Constitution of the 1970s.

The complainants filed for a retrial and a motion to request for constitutional review of Article 53 of the *Yushin* Constitution and Decree No. 9 at Seoul High Court and Seoul Central District Court. After their motions were dismissed, they filed these constitutional complaints on February 16, 2010 and April 14, 2010.

Provisions at Issue

The subject matter of review in this case is the constitutionality of Presidential Emergency Decree Nos. 1, 2 and 9 (hereinafter collectively referred to as the "Decrees") and the substances are as follows:

Presidential Emergency Decree No. 1 (enacted by Presidential Emergency Decree No. 1 on Jan. 8, 1974 and repealed by Presidential Emergency Decree No. 5 'Emergency Decree on the repeal of the Presidential Emergency Decree Nos. 1 and 4' on August 23, 1974)

1. Any act of denying, opposing, distorting or criticizing the Constitution of the Republic of Korea shall be prohibited.

2. Any act of asserting, moving for, proposing or petitioning the

amendment or repeal of the Constitution of the Republic of Korea shall be prohibited.

3. Any act of fabricating and distributing groundless rumors shall be prohibited.

4. Any act of recommending, instigating, or promoting prohibited acts under paragraph (1), (2), and (3) or any speech or act to communicate about the instant prohibited acts with others by means of broadcasting, reporting, publishing and other methods shall be prohibited.

5. A person who violates or criticizes this decree shall be subject to arrest, detainment, seizure, search, and up to 15 years of imprisonment without the warrant issued by judge

6. A person who violates or criticizes this decree shall be adjudicated and punished at the Emergency Court-Martial.

Supplementary Provision

7. This decree shall take effect from January 8, 17:00, 1974.

Presidential Emergency Decree No. 2 (enacted by Presidential Emergency Decree No. 2 on Jan. 8, 1974)

1. The Emergency Court-Martial shall be established to adjudicate violators of the Presidential Emergency Decree as below:

Name	Location	Jurisdiction
Emergency High Court-Martial	Headquarter of Ministry of National defense	The Nation
Emergency Common Court-Martial	Headquarter of Ministry of National defense	The Nation

2. The Emergency Court-Martial shall have the jurisdiction over any crime of violating the Presidential Emergency Decrees.

3. The right to judge shall belong to the Judgment Division.

4. A Judgment Division shall be established at the Emergency High Court-Martial. The Judgment Division will consist of 7 judges as below:

a. Presiding Judge: one minister-grade officer on service of the

national armed forces

b. Judicial Scrivener: one military judicial officer

c. Adjudicator: two minister-grade officer on service of the national armed forces and three people who are qualified as judges, prosecutors, or lawyers

5. Three Judgment Divisions shall be established at the Emergency Common Court-Martial. The Judgment Division will consist of 5 judges as below:

a. Presiding Judge: one minister-grade officer on service of the national armed forces

b. Judicial Scrivener: one military judicial officer

c. Adjudicator: one minister-grade officer on service of the national armed forces and two people who are qualified as judges, prosecutors, or lawyers

6. The Prosecutor's Office shall be established at the Emergency High Court-Martial and Emergency Common Court-Martial. The jurisdiction of the Prosecutor's Office shall depend on the jurisdiction of the affiliated Emergency Court-Martial.

7. The Prosecutor's Office at the Emergency High Court-Martial will consist of less than three prosecutors and the Prosecutor's Office at the Emergency High Court-Martial will consist of less than twelve prosecutors.

8. The prosecutor of the Emergency Court-Martial shall have the authorities and duties as below:

a. authorities and duties belonging to public prosecutors and military prosecutors of the Public Prosecutor Act, the Criminal Procedure Act and the Court-Martial Act.

b. direction and supervision of investigation of general or special judicial police officers

c. request to cooperation with public prosecutors or military prosecutors for investigation

9. The Judge and Prosecutor of the Emergency Court-Martial shall be appointed among minister-grade officers on service of the national armed forces or military judicial officers with suggestion of the Minister of National Defense and among judges, or public prosecutors or lawyers with suggestion of the Minister of Justice by the President. The Prosecutor of the Emergency Court-Martial shall be appointed among judicial military officers or public prosecutors.

10. The Director of the Central Intelligence Agency shall supervise information, investigation or security operation under the jurisdiction of the Emergency Court-Martial.

11. The Court-Martial Act shall apply mutatis mutandis a matter that is not stipulated by this Decree. In this case, the Emergency High Court-Martial shall be regarded as the High Court-Martial at the Headquarter of the Ministry of National Defense and the Emergency Common Court-Martial shall be regarded as the Common Court-Martial at the Headquarter of the Ministry of National Defense. Provided, Article 132, 238, 239 and 241 of the Court-Martial Act shall not apply in this case and the detention period shall not be restricted.

12. In case of necessity of warrant issued by the Competent Officer for arrest, detention or seizure with regard to a case under the jurisdiction of the Emergency Court-Martial, the Prosecutor shall issue the warrant.

13. In the need of judgment or investigation, the Presiding Judge or the Prosecutor may restrict the residence of the defendant or suspect to reside in a hospital, house, or other places with proper conditions or custody. Any person who violates the order of restriction of residence shall be imprisoned within five years.

14. The Competent Officer of the Emergency High Court-Martial may establish rules and regulations of affairs of the Emergency Court-Martial with consultation of the Minister of Justice.

15. Appellate Courts or District Courts shall transfer cases arising out of the violation of the Presidential Emergency Decrees to a corresponding Emergency Court-Martial.

Supplementary Provision

16. This decree shall take effect from January 8, 17:00, 1974.

Presidential Emergency Decree for National Security and Public Orders(enacted by Presidential Decree No. 9 on May 13, 1975 and repealed by Presidential Announcement on December 7, 1979)

1. The following acts are prohibited:
   a. any act of fabricating and distributing rumors;
   b. any act of denying, objecting, distorting or criticizing the Constitution of Korea or alleging, petitioning, or inciting for the revision or repeal of the Constitution of Korea through assembly, demonstration, the press, media, documents, printed materials, record or any other expression;
   c. any act of assembly, demonstration or political activities of students, except for class or research supervised by school authorities or non-political activities permitted by school principal in prior; or
   d. any act of slandering this Decree to no purpose.

2. Any act of distributing contents violating Provision 1 by means of broadcasting, reporting, or other methods or any act of distributing, circulating, selling, possessing expressions violating Provision 1 shall be prohibited.

3. Any act of transferring properties of the Republic of Korea or the People of the Republic of Korea to abroad or concealing or disposing of properties that should be carried into the Republic of Korea for the purpose of the flight of properties shall be prohibited.

4. Any act of receiving permission of emigration by improper methods including false entry of related documents or flying abroad shall be prohibited.

5. The relevant Minister may take the following measures against the violators of this Decree and the school, organization or business entity to which the violators were affiliated at that time and the representative or principal of such school, organization or business entity.

a. to instruct the representative or principal to dismiss or expel the member employees or student;
b. to dismiss or expel the representative, principal, member employees or students;
c. to forbid the broadcasting, news reporting, production, sale or distribution;
d. to close temporarily or permanently the school, organization or business entity; or
e. to cancel the permission, registration, certification or license.

6. The member of the National Assembly shall not be punished under this Decree if he or she expressed his or her official opinion. Provided, any act of broadcasting, reporting or spreading the speech in public shall be punished.

7. A person who violates this Decree or the measure that is taken by the relevant Minister shall be imprisoned more than one year and the suspension from the civil rights less than ten years may be sentenced. A person who attempts or conspires the violation shall be punished likewise.

8. A person who violates this Decree or the measure that is taken by the relevant Minister shall be subject to arrest, detainment, seizure without the warrant issued by judge.

9. A public officer who violates Article 2 of the Act on the Aggravated Punishment, etc. of Specific Crimes(Aggravated Punishment for Bribery) or an employee who violates Article 5 of the above Act(Loss of National Treasury) shall be additionally punished by fine corresponding to ten times of the amount of bribery or loss of National Treasury.

10. A person who violates this Decree shall be adjudicated at the Court.

11. The relevant Minister may rule affairs to enforce this Decree.

12. The Minister of National Defense may accede to a request of Seoul City Mayor, Busan City Mayor or Governor for the mobilization of military force to maintain public orders and securities.

13. The measure taken by the relevant Minister according to this Decree shall not be subject to judicial review.

Supplementary Provision

14. This decree shall take effect from May 13, 15:00, 1975.

Summary of the Decision

1. Jurisdiction over the Constitutional Review of Decrees

Article 107 Section 1 and 2 of the Constitution divides the authorities of constitutional review on legal norms applicable to a case in court by investing the Constitutional Court with the authority of constitutional review on 'statutes' and the Supreme Court with the authority of judicial review on 'orders, rules or dispositions' that are subordinate to statutes. Whether legal norms are to be considered 'statutes' should be determined according to the effects of the provisions regardless of their form or name of legislation, thereby including both formal statutes that are enacted by the National Assembly and rules that have equivalent effects to statutes. Therefore, the Constitutional Court has the proper jurisdiction to conduct constitutional review on the Decrees, as the Decrees have at least the effects of statutes.

2. Standard for the Constitutional Review of Decrees

A. The preamble of the Constitution declares the sameness and continuity of the Constitution since its enactment on July 12, 1948, implying that only the current Constitution holds constitutional normative power. The *Yushin* Constitution was revised by the peoples' will upon the reflection that part of the *Yushin* Constitution and Decrees severely infringed the fundamental rights and injured the basic principles of liberal democracy. History shows that the Constitution has been revised to extend and enhance the fundamental rights of the people. Also, the

Constitutional Court's construction of the Constitution is the process of exploring and confirming the special values embodied by the Constitution. Therefore, the applicable standard for constitutional review by the Constitutional Court shall accord with the current Constitution which holds normative power at the time of adjudication.

B. Article 53 Section 4 of the *Yushin* Constitution stated that 'the emergency decrees shall not be subject to judicial review.'

Nonetheless, exercise of national emergency rights under highly political determination is subject to constitutional review at the Constitutional Court if it is related to the infringement of the fundamental rights of the people. The clause exempting judicial review is a serious exception to modern constitutionalism and collides with other constitutional provisions including protection of fundamental rights and the constitutional review system. In addition, the current Constitution refused to succeed upon self-reflection the clause exempting judicial review by repealing such clause in the emergency economic orders and emergency orders. Therefore, the constitutionality of the Decrees shall be reviewed under the current Constitution, excluding the application of Article 53 Section 4 of the *Yushin* Constitution.

3. Constitutionality of Decree Nos. 1 and 2

A. The fundamental ideal embodied in the preamble and body of the Constitution is based on the essential principles of constitutional democracy, which is founded upon the principle of sovereignty and liberal democracy. As other constitutional principles are grounded on the same premises, this should be the standard for construing the Constitution and laws, as well as setting forth the restriction in exercising legislative authority and direction of policy making, thereby being the paramount value to be respected by the government agencies and the people.

The right to amend and repeal the Constitution to strive for the

improved Constitution should be protected as one of the most fundamental rights of the people. It is a core of the political right protected by the Constitution to express opposite political views against the policy, morality or legitimacy of the governing power.

B. To spread political ideas through legal assembly or demonstration or to gather people of the same mind through a signature-seeking campaign would not be a threat to national security. Rather, such act represents the essence protected by 'liberal democracy' that is the fundamental principle of the Constitution. Any government action or law that blocks any criticism of the government, instead of using reasonable publicity activities or persuasion, should not be justified as it does not adhere to the fundamental principles of liberal democracy in the Constitution.

C. Even assuming that opposition against the *Yushin* Constitution or radical opinions to revise the constitution were intensively and collectively being expressed during a certain period, it cannot be deemed as a national emergency warranting emergency decrees.

D. Decree Nos. 1 and 2 was enacted on the premise that any act to assert the revision of the Constitution was a crime threatening national security. Considering the principle of sovereignty and liberal democracy that are the fundamental principles of the Constitution, such legislative purpose is not justified and the appropriateness of means required for restricting fundamental rights is not met.

E. The national emergency right including martial law or emergency decree may be exercised only in times of national crisis such as war, incident, and natural disaster that fails to be contained by ordinary constitutional measures under the rule of law. Also the determination of national crisis should not be solely vested on the head of state. In addition, the national emergency right should be exercised for the protection of national security and basic orders of liberal democracy.

Especially, the national emergency right is an extraordinary and exceptional measure responding to temporary crisis. Therefore it should be limited to temporary and provisional measures. Decree No. 1 and 2 constrained the opposition movement against the *Yushin* Constitution and severely infringed on the right to express political opinions, exceeding the limit of the national emergency right. In this sense the legislative purposes of the Decrees are not justified and their methods improper.

F. The people shall have the right to express their political ideas including the assertion to revise the Constitution. This right is the fundamental value of the liberal democratic constitution and an indispensable element of democratic politics.

Decree No. 1 prohibiting any expression negative of the *Yushin* Constitution and criminally prosecuting violation thereof is a sweeping, broad and extreme measure, thereby requiring clarity at the highest level. The measure taken by the Decree No. 1 is virtually the last resort reserved for the actual danger that is the urgent, clear and substantial threat which cannot be prevented by restriction on time, place or method of individual expression.

Nevertheless, Decree Nos. 1 and 2 punished any act of expressing opposition or negative opinion against the *Yushin* Constitution, including simply expressing one's views on the Constitution regardless of necessity of the invocation of the national emergency right, at the Emergency Court-Martial. Also the Decrees fail to specify an act subject to the punishment. Therefore, Decree No. 1 and 2 violates the Constitution by abusing the state punishment power beyond the legitimate restriction on the freedom of expression; by violating the principle of clarity under the principle of *nulla poena*; and by infringing the political rights regarding the revision of the Constitution, the right to national referendum, the doctrine of arrest by warrants, freedom of body, and the right to trial.

4. Constitutionality of Decree No. 9

A. A 'concern that North Korea may provoke war upon miscalculation' is an ever present peril under the reality of hostile confrontation between South and North. Nevertheless, an 'increase of possibility of the North invading the South' is an abstract and subjective perception of situation and does not suffice as a national crisis that justifies emergency measures. Emergency measures should be authorized only by the social consensus that an emergent national crisis exists in which the usual exercise of government powers stipulated by the constitution cannot possibly be sufficient.

Decree No. 9 was in existence for 4 years and 7 months, from its promulgation on May 13, 1975 to its repeal on December 8, 1979. This is long enough to amount to two thirds of the seven years that the *Yushin* Constitution was in existence. It certainly is circumstantial evidence that the urgent national crisis Decree No. 9 sought to resolve, namely the imminent possibility of an invasion by North Korea, was an ordinary dilemma that has always been and should be constantly encountered until unification, or at least peace arrangements is established in the Korean Peninsula.

B. The people who have sovereign rights and the power to revise the Constitution deserve the inherent right to raise issues on the *Yushin* Constitution or to assert or petition for its revision. Nonetheless, Decree No. 9 presumed criticism against the *Yushin* Constitution as a crime threatening national security by impeding 'all-out national security posture grounded on national consensus' in 'national crisis where the concern North Korea may provoke war by miscalculation is enormous.' Therefore, the purpose of Decree No. 9 is not legitimate under the principle of sovereignty that is the fundamental principle of the Constitution.

C. The concept of a unified public opinion is presupposed by

totalitarianism that suppresses the freedoms of the people. Rather, in a diversified democratic society, guarantee of free expression and reaching public consensus through free discussion is the way to form national consensus. Therefore, the means taken by Decree No. 9 is not appropriate in the means to reach national consensus and harmony.

Resorting to rebellion or revolt to express political opinions opposing the *Yushin* Constitution surely cannot be allowed because it destroys the basic orders of the Constitution. Nevertheless, as rebellion or revolt is prohibited under the normal constitutional order, it can be regulated by applying criminal laws and other related laws, without exercising the national emergency right. Therefore, Decree No. 9 does not satisfy the reasonableness of the means in restricting the fundamental rights.

D. Decree No. 9 that stipulated a complete ban on any claim regarding the revision or repeal of the *Yushin* Constitution violates the principle of clarity, the political right regarding the revision of the Constitution, freedom of expression, freedom of assembly, doctrine of arrest by warrants, freedom of body, and academic freedom for the same reasons as Decree Nos. 1 and 2.

Decree No. 9, further, prohibited any assembly, protest, political activity of students and authorized the relevant minister to take measures to expel a student from school or to temporarily or permanently close the school affiliated with such student, thereby infringing the freedom of assembly of students, freedom of learning, autonomy of universities, and principle of personal responsibility by punishing the school or organization affiliated with such students.

Therefore, Decree No. 9 is in violation of the Constitution.

2. Punishment of Insult as Criminal Offense

[25-1 KCCR 506, 2012Hun-Ba37, June 27, 2013]

In this case, the Constitutional Court held that Article 311 of the Criminal Act which penalizes the act of publicly insulting another person neither contradicts the rule of clarity nor violates the freedom of speech by failing the least restrictive means test.

Background of the Case

1. The complainant was prosecuted on charges of insult and violation of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (defamation) by making posts, including one on the members' page of the OO Party website calling the victim “mediocre, an unheard of nobody” and another on his OO blog branding the victim “the unheard of nobody named Pyein.” The complainant was consequently sentenced to 3 million Korean won in fines by the trial court (2009KoDan6302, Seoul Central District Court). He filed an appeal with the court of appeals but was denied (2010No615, Seoul High Court), and his appeal to the Supreme Court was denied again on December 22, 2011 (2010Do10130, Supreme Court).

2. The complainant, with the appeal pending before the Supreme Court, filed a motion to request constitutional review of Article 311 of the Criminal Act which penalizes insult, claiming that it is against the rule of clarity required by nulla crimen sine lege and that it violates the freedom of speech (2011ChoKi245, Supreme Court). The motion was denied on December 22, 2011 and upon being served the decision on December 26, the complainant filed this complaint on January 25, 2012 pursuant to Article 68(2) of the Constitutional Court Act.

Provision at Issue

The subject of review is whether Article 311 of the Criminal Act (amended as Act No. 5057, Dec. 29, 1995)(hereinafter the "Provision") is constitutional, and the Provision states as follows:

Article 311 (Insult)

A person who publicly insults another shall be punished by imprisonment or imprisonment without prison labor for not more than one year or by a fine not exceeding two million won. <Amended by Act No. 5057, Dec. 29, 1995>

Summary of the Decision

1. Whether "insult" in the Provision is against the rule of clarity

'Insult' as an element of crime is an abstract judgment or an expression of derogatory emotion unaccompanied by factual statements that can undermine one's social reputation. Given the legal interest, legislative purpose, etc. of penalizing the crime of insult, it does not appear to be significantly difficult for an ordinary citizen with common sense and conventional legal mind to predict what kind of acts are banned. Also the Supreme Court sets forth an objective standard for interpreting what insult means, which poses no concern for arbitrary interpretation by law enforcement agencies. Thus, the "insult" stated in the Provision is not against the rule of clarity.

2. Whether the Provision violates freedom of speech by failing the least restrictive means test

If an expression insulting someone's character is made publicly, the victim's social value will be degraded and the potential of his/her life and development as a member of society will inevitably be affected. Therefore, the act of defamation using insulting words definitely needs to

be prohibited. Additionally, considering, among others, that insult is punishable only by the victim's complaint and has relatively low statutory maximum, and that courts generally seek adequate balance between the freedom of speech and protection of reputation by appropriately applying Article 20 of the Criminal Act on “justifiable act”, the Provision does not violate the freedom of speech.

Dissenting Opinion of Three Justices

The scope of “insult” in the Provision as an element of crime is excessively broad, and all negative or derogatory expressions regarding someone may amount to insult as they are likely to undermine one's social reputation. In the same vein, not just hateful cursing of someone humiliating enough to tear down his/her character, but satirical, humorous literary expressions that use ridicule to expose and criticize the world, or twisting of negative contents into the form of polite expressions, or newly coined words on the Internet that are somewhat coarse, etc. are also punishable as a crime of insult. As a result, even expressions that warrant the protection of the Constitution can be regulated.

Criminal punishment of insult limits the possibility of raising issues in social communities and addressing them constructively through free exchange of different views and criticisms. If some negative languages or critical expressions on sensitive political, social issues used in political, academic debates or communications are branded as insult and thus regulated, this will threaten political, academic statements and restrain the possibility of open debates. This may lead to weakening the essential function of the freedom of speech.

In addition, the exercise of the state's authority to punish crime prescribed by criminal law should be confined to the minimum. Merely an abstract judgment or a derogatory expression may be regulated

through the self correcting mechanism of civil society or an imposition of civil liability. Penalizing the act of insulting do not meet international human rights standards either, as it is partially abolished or no longer enforced in a large number of countries.

Consequently, the Provision does not satisfy the least restrictive means requirement and thus violates the freedom of speech.

3. Public Health Promotion Act Designating Internet Café as Non-smoking Zone

[25-1 KCCR 570, 2011Hun-Ma315 · 509, 2012Hun-Ma386(consolidated), June 27, 2013]

In this case, the Constitutional Court held that the part "business providing internet computer game facilities" of the Article 9 Section 4 Item 23 of the Public Health Promotion Act(hereinafter, the "Act"), which mandates the entire area of an Internet Café(or PC room) to be smoke free; Article 34 Section 1 Item 2 of the Act in relation to the part "business providing internet computer game facilities" in the Article 9 Section 4 Item 24, which imposes penalty for violation of the provision; and the part of Section 1 of the Addenda of the Act stipulating that "the revised provision of Article 9 Section 4 Item 23 of the Act will be effective after two years from the day of its promulgation" do not infringe upon the complainants' freedom of occupation and property rights.

Background of the Case

Complainants are the owners of game centers providing internet computer games (hereinafter, "Internet Café") and had been running business with both smoking and non smoking sections. After the revision of the Act on June 7, 2011, however, they were required to designate the entire area of an Internet Café to be smoke free and the Act imposed penalty upon violation of this obligation. These provisions were scheduled to be effective after two years from the day of promulgation. The complainants filed this constitutional complaint arguing that Article 9 Section 4 Item 23 and Article 24 Section1 Item 1 of the Act and Article 1 of the Addenda infringe upon their freedom of occupation and property right.

Provisions at Issue

The subject of review are whether the part "business providing internet computer game facilities" of Article 9 Section 4 Item 23 (hereinafter, the 'Non-smoking Area Provision') of the Public Health Promotion Act (revised as Act No. 10781, June 7, 2011); the part "business providing internet computer game facilities" of Article 9 Section 4 Item 23 and Item 24 (hereinafter the 'Fine Provision') and the part of Section 1 of the Addenda of the Act stipulating that "the revised provision of Article 9 Section 4 Item 23 of the Act will be effective after two years from the day of its promulgation" (hereinafter, the 'Supplementary Provision') infringe upon the complainants' fundamental rights. The provisions at issue (underlined) are as follows:

Public Health Promotion Act (revised as Act No. 10781, June 7, 2011)

Article 9 (Measures for non-smoking) Owners, occupants, or managers of the following public facilities shall wholly designate such facilities as a non-smoking area, or divide such facilities as non-smoking areas and smoking areas which are to be designated as such. In such cases, owners, occupants, or managers of facilities whose area is designated as a smoking area shall comply with the standards for establishment prescribed by Ordinance of the Ministry of Health and Welfare, including installing ventilation facilities and partitions in such smoking areas.

23. Juvenile game providing business, general game providing business, business providing internet computer game facilities and combined distribution and game providing business defined in the Game Industry Promotion Act

Article 34(Fines for Negligence) A person falling under any of the following subparagraphs shall be punished by a fine for negligence of three million won or less:

2. A person who fails to designate the whole area of facilities used by the public as a non-smoking area, or categorize and designate the

facilities concerned as smoking and non-smoking areas, in violation of the former part of Article 9 Section 4.

Addenda

Article 1 (enforcement date) This Act shall enter into force six months after the date of its promulgation. Provided, that Article 8 Section 3; Article 9 Section 4(excluding Item 23) and Section 7; Article9-2; Article 9-3; Article 31 Section 1 and 2; Article 34 Section 1 Item 2 and 3; and Article 34 Section 2 Item 2 shall enter into force one year and six months after its promulgation and Article 9 Section 4 Item 23 shall enter into force two years after its promulgation.

Summary of the Decision

1. Fine Provision

The Fine Provision imposing fines is applied only when the obligation provision (Non-smoking Area Provision) is violated as a prerequisite. Also the complainants do not assert its unconstitutionality but simply argue that the Fine Provision should also be held unconstitutional because the Non-smoking Area Provision, as a basis of imposing fines, is unconstitutional. Therefore, the Fine Provision is not justiciable for failing to fulfill the directness element.

2. Constitutionality of the Non-smoking Area Provision and the Supplementary Provision

(1) Freedom to conduct one's occupation

(a) Whether the provisions violate the principle against excessive restriction

The legislative purposes of the Non-smoking Area Provision are to protect non-smokers including juveniles from being forced to breathe second hand smoke, to protect non-smokers' rights and thereby to promote public heath, through designating the whole area of public

facilities like Internet Cafés as smoking free zones. Such purposes are legitimate and designating the Internet Cafe as a complete smoke free zone is an effective and appropriate means to achieve the legislative purposes.

Simply dividing smoking and non smoking areas by installing partitions or screens in between is insufficient to effectively solve the second hand smoking problem in public facilities like Internet Cafes where many people visit and stay and to promote public health. The most effective way is to designate the whole area as a non-smoking zone, thereby completely blocking non smokers from being forced to breathe second hand smoke. It is hard to predicate that there exist less restrictive or equally effective alternatives of restricting freedom of occupation other than designating the whole area of internet café as a non smoking zone. Therefore, the Non-smoking Area Provision satisfies the principle of least restriction. Moreover, as the Provision does not absolutely prohibit people from running the internet café business itself but places restriction on the way to conduct such business, it cannot be regarded as overly limiting complainants' freedom to conduct their occupation. In contrast, the public interests to protect non smokers from being forced to breathe second hand smoke and to promote public heath are very important. Therefore, the Non-smoking Area Provision strikes a balance between legal interests.

(b) Whether the provisions fails to protect public confidence in law

Given the circumstances, complainants had reasonable notice to expect that the co-existence of smoking and non-smoking areas would be temporary and that a complete smoking ban in Internet Café would be implemented in the near future. Also, even after an Internet Café is designated as a smoke free zone, the existing facilities may still be fully or partially used through renovation or interior changes. Therefore, the complainants' confidence in law is not the kind of interest that requires an absolute protection regardless of amendments in law, and the infringement on the interest does not seem significant. Also, the

Supplementary Provision in this case provides a two year grace period during which the complainants can prepare for changes. Neither does the two year period seem too short for the complainants to accommodate to the changes.

(c) Therefore, the Non-smoking Area Provision and the Supplementary Provision in this case do not infringe on the complainants' freedom to conduct occupation, in violation of the principle against excessive restriction or the principle of protection of confidence in law.

(2) Whether the Non-smoking Area Provision infringes upon the right to property

Implementation of the Non-smoking Area Provision may cause possible decrease or loss in the complainants' business profits as less customers who smoke cigarettes are expected to visit Internet Cafes. But this is merely conjecture about the damage to the future interest or possible profit, which cannot be regarded as infringement on the constitutionally protected property right. Also, as it is clear that the Non-smoking Area Provision does not mean to force the complainants to demolish existing facilities or modify the interior design of their Internet Cafes, the complainants' right to the facilities is not infringed. Therefore, although the complainants may be required to demolish or modify facilities for the existing smoking section due to the entire smoking ban, the limitation imposed on the property right is merely indirect and a non legal disadvantage of the Provision. Therefore, the Non-smoking Area Provision does not infringe the complainants' right to property.

4. National Health Insurance Act

[25-2(A) KCCR 40, 2010Hun-Ba51, July 25, 2013]

In this case, the Constitutional Court upheld the following provisions as constitutional. Article 5(1) and Article 62(1) of the former National Health Insurance Act, which require all citizens to subscribe to national health insurance; Article 62(5), 64(1) of the same Act and Article 9(1) of the former Act on Long-Term Care Insurance for the Aged that set forth different standards for calculating insurance costs between employer provided and locally provided health insurance policy-holders; and Article 64(3), 65(3) of the former National Health Insurance Act and Article 9(2) of the Act on Long-Term Care Insurance, which stipulate that contribution points, premium rates, etc. of insurances shall be prescribed by Presidential Decree.

Background of the Case

On November 28, 2008, the complainant, who is covered by locally provided health insurance, filed an administrative lawsuit seeking to revoke the charge of health insurance and long-term care insurance premiums, but the trial court dismissed the case (2008GuHab5224, Busan District Court) and the subsequent appeals were all denied (2009 Nu3538, Busan High Court and 2010Du788, Supreme Court). The complainant, with an appeal pending at the appellate court, filed a motion requesting constitutional review of the provisions of the National Health Insurance Act which provide for the said charges, but when the motion was denied on December 4, 2009, the complainant filed this constitutional complaint on January 19, 2010.

Provisions at Issue

The subject matter of review is the constitutionality of ① Article 5(1) of the former National Health Insurance Act(revised as Act No.8034,

Oct. 4, 2006 but before revised as Act No. 11141, Dec. 31, 2011) and 62(1) of the former National Health Insurance Act(enacted as Act No.5854, Feb. 8, 1999 but before revised as Act No. 11141, Dec. 31, 2011) (hereinafter jointly referred to as the "Mandatory Subscription Provisions"), ② Article 62(5), 64(1) of the same Act (revised as Act No. 8153, Dec. 30, 2006 but before revised as Act No. 11141, Dec. 31, 2011) and Article 9(1) of the former Act on Long-Term Care Insurance for the Aged(enacted as Act No. 8403, Apr. 27, 2007 but before revised as Act No. 11141, Dec. 31, 2011) (hereinafter together referred to as the "Insurance Premium Calculation Provisions"), and ③ Article 64(3), 65(3) of the former National Health Insurance Act (revised as Act No. 8153, Dec. 30, 2006 but before revised as Act No. 11141, Dec. 31, 2011) and Article 9(2) of the Act on Long-Term Care Insurance(enacted as Act No. 8403, Apr. 27, 2007) (hereinafter together referred to as the "Delegation Provisions"), which are as follows:

Former National Health Insurance Act (Revised as Act No. 8034, Oct. 4, 2006 but before revised as Act No. 11141, Dec. 31, 2011)

Article 5 (Eligible Persons, etc.)

(1) Korean nationals who reside within Korea shall become policyholders (hereinafter referred to as "policyholder") of the health insurance referred to in this Act (hereinafter referred to as "health insurance") or their dependents: Provided, That this shall not apply to any of the following persons:

1. Persons who receive medical benefits under the provisions of the Medical Care Assistance Act (hereinafter referred to as "persons eligible for medical care");

2. Persons who receive medical care under the provisions of the Act on the Honorable Treatment of Persons of Distinguished Services to Independence and the Act on the Honorable Treatment and Support of Persons, etc. of Distinguished Services to the State (hereinafter referred to as "persons eligible for medical care for distinguished service"): Provided, That any of the following persons shall be a policyholder or a

dependent:

(a) A person from among persons eligible for medical care for distinguished service, who requests the insurer to provide him/her with health insurance cover;

(b) A person who does not request the insurer that he/she be excluded from health insurance cover, despite of change of his/her status from a person under the coverage of the health insurance to a person eligible for medical care for distinguished service.

Former National Health Insurance Act (Enacted as Act No. 5854, Feb. 8, 1999 but before revised as Act No. 11141, Dec. 31, 2011)

Article 62 (Insurance Premiums)

(1) To meet the expenses incurred for the health insurance program, the Corporation shall collect insurance premiums from the persons obligated to pay insurance premiums referred to in Article 68.

Former National Health Insurance Act (Revised as Act No. 8153 ,Dec. 30, 2006 abut before amended as Act No. 11141, Dec. 31, 2011)

Article 62 (Insurance Premiums)

(5) The amount of the monthly insurance premium per month for a locally provided policyholder shall be calculated per unit of household, but the insurance premium per month for the household to which a locally provided policyholder belongs shall be the amount obtained by multiplying the monetary value per contribution point under Article 65(3) by the contribution points calculated under Article 64.

Article 64 (Contribution Point)

(1) The contribution point provided for in the provisions of Article 69 (5) shall be set taking into account the income, property, standard of living and the participation rate in economic activities, etc. of each of the locally provided policyholders and the upper limit and the lowest limit thereof may be set according to the standards prescribed by Presidential Decree.

(3) Methods and standards for calculating contribution points and other

necessary matters shall be prescribed by Presidential Decree.

Article 65 (Insurance Premium Rate, etc.)

(3) The monetary value per contribution point for each of the locally provided policyholders shall be determined by Presidential Decree after undergoing deliberation by the Deliberative Committee.

Former Act on Long-Term Care Insurance for the Aged (Enacted as Act No. 8403, Apr. 27, 2007 but before revised as Act No. 11141, Dec. 31, 2011)

Article 9 (Calculation of Long-Term Care Insurance Premiums)

(1) Long-term care insurance premiums shall be calculated by subtracting expenses abated or deductible pursuant to Article 66 or 66-2 of the National Health Insurance Act from the amount of insurance premiums calculated in accordance with Article 62(4) and (5) of the aforesaid Act and then by multiplying the amount after subtraction by the relevant long-term care insurance premiums rate.

Act on Long-Term Care Insurance for the Aged (Enacted as Act No. 8403, Apr. 27, 2007)

Article 9 (Calculation of Long-Term Care Insurance Premiums)

2) The long-term care insurance premiums rate under paragraph (1) shall be prescribed by Presidential Decree, subject to deliberation by the Long-Term Care Committee established under Article 45.

Summary of the Decision

1. Ruling on the Mandatory Subscription Provisions

Mandatory subscription to health insurance policies prescribed by the National Health Insurance Act is an appropriate and essential measure for providing the economically disadvantaged with basic medical service and achieving distribution of income and risk. Therefore, it is deemed that the complainant's right to pursue happiness and property rights has

not been violated.

2. Ruling on the Insurance Premium Calculation Provisions

Unlike the employer provided insurance policy-holders whose insurance premiums are determined by their income level, the insurance premium of the locally provided insurance policy-holders are calculated based on not just their income but also their property, standard of living, economic participation rate, etc. This distinction was made to establish the insurance premium rates at a level commensurate with individual economic capabilities by taking into account the fundamental difference between the two groups in terms of the percentage of taxable income, types of income, and so forth. Therefore, the complainant's right to equality have not been infringed.

3. Ruling on the Delegation Provisions

It is likely that matters of fact concerning insurance finances will take different forms and change constantly. It is therefore highly necessary to apply a flexible regulation in establishing the insurance premium rate given that health insurance is subject to change depending on the economic, social situations of the time. Furthermore, a comprehensive look at the overall system and relevant provisions of the National Health Insurance Act allow us to fully predict the scope and limitations of the contents to be included in the presidential decree. Therefore, delegating the details of contribution points, insurance premium rates, etc. to a presidential decree does not contradict the principle of statutory reservation or prohibition against blanket delegation of legislative authority.

5. Aggravated Punishment on Parricide

[25-2(A) KCCR 82, 2011Hun-Ba267, July 25, 2013]

In this case, the Constitutional Court held that Article 250 Section 2 of the Criminal Act that prescribes a person who kills one's (legal) lineal ascendant to be sentenced to death or imprisonment for life or for not less seven years, does not violate the right to equality of offenders who are lineal descendants.

Introduction of the Case

Complainant was prosecuted and convicted for killing his own father at the trial and appellate court. He filed an appeal with the Supreme Court. While the appeal was pending, the complainant filed a motion to request constitutional review of Article 250 Section 2 of the Criminal Act that prescribes a person who kills one's (legal) lineal ascendant to be sentenced to death or imprisonment for life or for not less seven years for violating the principle of equality. When the Supreme Court dismissed the motion, complainant filed this constitutional complaint.

Provision at Issue

The subject matter of review is whether the part that ‘a person who kills one's own lineal ascendant’ of Article 250 Section 2 of the Criminal Act (hereinafter referred to as the “Provision”) is unconstitutional, which states as follows:

Criminal Act (revised as Act No. 5057 on December 29, 1995)

Article 250 (Murder, Killing Ascendant)

(2) A person who kills one's own or any lineal ascendant of one's spouse shall be punished by death, imprisonment for life or for not less seven years.

Summary of the Decision

Principle of equality under Article 11 Section 1 of the Constitution represents equality before law that prohibits any unreasonable discrimination in enacting legislation and applying laws. The legislature is invested with broad discretion to determine the types and degree of criminal punishment according to the nature of the crime, benefit of the law, culture and history of our society, and values and legal consciousness of the citizens, etc.

From the Joseon Dynasty to the present, parricide has been punished in an aggravated way, under which lies Confucian values and traditional ideas that emphasize filial duty. The depravity of parricide also justifies intensive social condemnation, compared to general murder. Furthermore, revision of 1995 amended the punishment of 'death or life imprisonment' into 'death, life imprisonment or imprisonment for more than seven years', thereby settling the problem of 'imposing appropriate punishment according to liability' which was previously insufficient.

Therefore, the Provision does not violate the principle of equality that requires balance in criminal punishments.

Dissenting Opinion of Two Justices

A person is punished by general murder (Article 250 Section 1 of the Criminal Act) if he/she kills a spouse, lineal descendant or a special benefactor not legally related. The punishment would be even mitigated if a lineal ascendant kills his/her infant for disgrace or concealment (Article 251 of the Criminal Act). In contrast, the Provision imposes aggravated punishment on parricide only based on legal relationship, without considering any circumstance such as custody, caring or attachment. As such, the Provision is not in consonance to democratic family relationship protected by the Constitution. The flat increase of minimum punishment by rule, without considering the intent of crime, makes reasonable determination of sentencing difficult. Such regulation is

hard to find reference from the perspective of comparative law. Therefore, discrimination by the Provision cannot be reasonably justified, thus violating the principle of equality under the Constitution.

6. Punishing Violation of Permissible Temporary Worker Agency

[25-2(A) KCCR 106, 2011Hun-Ba395, July 25, 2013]

In this case, the Constitutional Court held that the provisions of former and current "Act on the Protection, etc. of Temporary Workers" providing for criminal punishment of those engaging in temporary worker agency business outside the scope permitted by the Act are not in violation of the clarity rule under *nulla poena sine lege*, or the principle of punishment by statute.

Background of the Case

(1) The complainant was prosecuted on charges of violating the Act on the Protection, etc. of Temporary Workers by, in effect, conducting temporary worker agency business in jobs directly related to manufacturing production, since the employees of the complainant engaged in tire packaging at a factory of OO Tire under the direction and instruction of the tire company's manager. Consequently, the complainant was sentenced to a fine.

(2) With an appellate case pending at the court of appeals, the complainant filed a motion requesting constitutional review of Article 43 Section 1 of the former and current Acts on the Protection, etc. of Temporary Workers. However, the request was denied by the Gwangju High Court (2011ChoKi3), and the complainant filed a constitutional complaint with the Constitutional Court on December 27, 2011.

Provisions at Issue

The subject matter of review is the constitutionality of a) the part that states "A person who carries on temporary worker agency business in violation of Article 5 (4)" in Article 43 Section 1 of the former Act on the Protection, etc. of Temporary Workers (Enacted Act No. 5512, Feb.

20, 1998 and before being amended by Act No. 8076, Dec. 21, 2006) and b) the part that states "A person who carries on temporary worker agency business in violation of Article 5 (5)" in Article 43 Section 1 of the current Act (Amended by Act No. 8076, Dec. 21, 2006), which are hereinafter jointly referred to as the "Provisions" and specified below:

Act on the Protection, etc. of Temporary Workers (Enacted Act No. 5512, Feb. 20, 1998, later amended by Act No. 8076, Dec. 21, 2006)

Article 43 (Penal Provisions)

Any of the following persons shall be punished by imprisonment for not more than three years or by a fine not exceeding 20 million won:

1. A person who carries on temporary worker agency business in violation of Article 5 (4), 6 (1), (2) or 7 (1);

Act on the Protection, etc. of Temporary Workers (Amended by Act No. 8076, Dec. 21, 2006)

Article 43 (Penal Provisions)

Any of the following persons shall be punished by imprisonment for not more than three years or by a fine not exceeding 20 million won:

1. A person who carries on temporary worker agency business in violation of Article 5 (5), 6 (1), (2) and (4) or 7 (1);

Summary of the Decision

1. Whether Rule of Clarity under the Principle of *nulla poena sine lege* is Violated

It is defined in the Act that the term "temporary placement of workers" refers to "engaging a worker employed by a temporary worker agency in services for a user company under the direction and instruction of the user company in accordance with the terms and conditions of a contract on temporary placement of workers, while maintaining his/her employment relationship with the temporary worker

agency.” As such, given that the purpose of the temporary placement contract is to provide labor and that the user company is entitled to direction and instruction of the temporary workers in specific works, temporary placement of workers differs from the “contract for work” in the Civil Act whose purpose is to complete the performance of work agreed and under which the contractor has no right to direction and instruction. The courts make judgments on whether a particular case constitutes “temporary placement of workers” based on comprehensive consideration of practical factors, such as contractual purpose and the user company's authority of direction and instruction in the enforcement of contract, regardless of the format or title of the contract. Therefore, the standard for interpreting the concept of “temporary placement of workers” is set forth based on the Act's definitive provision and its nature, as well as the judge's complementary interpretation. Subsequently, the Provisions are not in violation of the rule of clarity under the Principle of *nulla poena sine lege.*

2. Whether the Rule against Excessive Restriction is Violated

The Provisions limit the permitted scope of temporary worker agency business given the nature of indirect employment which, compared to direct employment, bears a bigger risk of being disadvantageous in terms of status and wage. This is to ultimately promote direct employment of workers and guarantee adequate wage by ensuring appropriate operation of temporary worker agency business. As such, legislative purpose of the Provisions are justified and it appears to be an appropriate means to limit the works for temporary placement of workers and to impose criminal punishment on user companies which violate the restriction.

Works requiring professional knowledge, skills or experience or the nature of duties are permitted to place temporary workers, except for works directly related to production in the manufacturing industry; Notwithstanding the aforementioned, temporary workers may be placed

for certain periods if a vacancy occurs due to child birth, an illness, injury, etc. or if there is a need to temporarily or intermittently secure manpower, except in areas that are absolutely forbidden such as construction sites. This, consequently, provides for a considerably extensive area of work permitted for temporary worker agency business (Article 5, 6 of the Act). Although the jobs of direct relevance to manufacturing production and those performed at a construction site, etc. cannot be assumed by temporary workers, there is good reason to exclude these types of jobs from temporary worker agency business for the following reasons: Allowing temporary placement for jobs directly related to manufacturing production may result in poorer working conditions such as employment instability due to a change of labor force in the manufacturing industry to one that is primarily derived from indirect employment; All works of construction, harbor stevedore and seamen are of harmful and hazardous nature and therefore should be conducted under the user company's direction and instruction on the specific sites, deeming them inappropriate for temporary placement of workers

Also, as for the non-compliance charges or negligence penalties, if the statute violation can lead to huge financial gains, there is a likelihood that people would rather brave paying fines to maintain contracts on temporary placement of workers. In this light, it is hard to conclude that an administrative regulation like such fines alone is sufficient in fulfilling the legislative purpose of the Provisions.

Therefore, the Provisions are not to be deemed to excessively restrict the freedom of occupation of those intending to conduct a temporary worker agency business.

7. Imposing criminal punishment on financial company staffs who received money or valuables

[25-2(A) KCCR 122, 2011Hun-Ba397, 2012Hun-Ba407(consolidated), July 25, 2013]

In this case, the Constitutional Court held that Article 5 Section 4 Item 5 of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes, which punishes any officer or employee of a financial institution who accepts money or other benefits in connection with his/her duties by life imprisonment or imprisonment with prison labor for not less than 10 years when the value of the money or profit accepted is 100 million won or more, violates neither the principle of proportionality between responsibility and punishment nor breaks the balance in the punishment system.

Background of the Case

(1) Complainant A, who was manager of OO Trust Company, was indicted for 'receiving 270 million won from investors in connection of his job duties to undertake asset management for investors and return the benefits from the investment' in violation of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes (acceptance of property). On November 30, 2011, the district court sentenced him to five years' imprisonment and the Supreme Court upheld the lower court's sentence. While the case was pending in the district court, complainant A filed a motion to request for constitutional review of Article 5 Section 4 Item 1 of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes but the motion was denied. Upon which complainant A filed this constitutional complaint on December 28, 2011.

(2) Complainant B was indicted for 'receiving money and valuables worth 200 million won from Lee O-i and others in connection of his job duties as a deputy general manager of OO Bank in charge of purchase, management and payment of advertisement' in violation of the Act on

the Aggravated Punishment, etc. of Specific Economic Crimes (acceptance of property). On June 22, 2012, the District Court sentenced him to five years' imprisonment and the lower court's sentence was finalized by the high court. While the case was pending in the high court, complainant B filed a motion to request for constitutional review of Article 5 Section 4 Item 1 of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes, but the motion was denied. Upon which complainant B filed this constitutional complaint on November 20, 2012.

Provisions at Issue

The subject of review is whether Article 5 Section 4 Item 1 of the former Act on the Aggravated Punishment. Etc. of Specific Economic Crimes (amended as Act No. 8444, May 17, 2007, but before revised as Act No. 11304, February 10, 2012) and Article 5 Section 4 Item 1 of the Act on the Aggravated Punishment. Etc. of Specific Economic Crimes (amended as Act No. 11304, February 10, 2012) (hereinafter together referred to the “Provision”) is constitutional.

Former Act on the Aggravated Punishment Etc. of Specific Economic Crimes (amended as Act No. 8444 on May 17, 2007, but before revised as Act No. 11304 on February 10, 2012)

Article 5(Crime of Acceptance of Property)

(4) In cases referred to in paragraphs (1) through (3), if the value of the money or other profit accepted, demanded or promised (hereinafter referred to as an “accepted amount”), is 30 million won or more, the punishment shall be aggravated as follows:

1. When the accepted amount is 100 million won or more, he shall be punished by life imprisonment or by imprisonment with prison labor for not less than ten years;

Act on the Aggravated Punishment. Etc. of Specific Economic Crimes (amended as Act No. 11304 on February 10, 2012)

Article 5(Crime of Acceptance of Property)

(4) In cases referred to in paragraphs (1) through (3), if the value of the money or other profit accepted, demanded or promised (hereinafter referred to as an "accepted amount"), is 30 million won or more, the punishment shall be aggravated as follows:

1. When the accepted amount is 100 million won or more, he shall be punished by life imprisonment or by imprisonment with prison labor for not less than ten years;

Summary of the Decision

1. Whether the Provision violates the principle of proportionality between responsibility and punishment

Financial institutions are private companies, but considering the gravity of financial business in affecting the economy and life of our citizens, it is very important for them to perform their duties transparently and fairly in order for the proper operation of market economy. In this regard, securing and maintaining transparency and integrity in the work of financial institutions and their staffs can be considered as a very important public interest. Therefore, aggravated punishment upon acceptance of money or other profits in relation to one's job on a par with punishment of bribery has legitimate reasons. When an officer or employee of a financial institution is indicted for accepting money or other benefits of 100 million won or more in connection with his/her duties, the judge who can nevertheless mitigate punishment in extenuation of circumstances, is prevented from sentencing probation unless the case falls under the category of mitigation stipulated by law. This is the result of legislative decision placing emphasis on the gravity of action and culpability of the crime, which does not excessively restrict judicial discretion in sentencing. Regarding the crime of accepting money or valuables in connection with one's job, criminal intent and elements of the crime, etc. are comparatively well categorized, compared to other

crimes in general. Also as damage and ills on our the national economy inflicted by the crime worsen as the value of money or profits received increases, it is reasonable to see that the more the value of money or profit received increases, the more culpability will be attached to the crime. Although the value of money or profits received is not the only standard that decides the relative seriousness of a crime, it is nevertheless an important standard in deciding the range of punishment. Therefore the Provision which aggravates punishment according to the value of money or profits received has reasonable ground and does not violate the principle of responsibility and punishment.

2. Whether the Provision breaks the balance in punishment system

The crime of acceptance of money or valuables in connection with one's job duties committed by attorney at law or public accountant, etc., which requires ‘improper solicitation’ as one of the elements of the crime, affects only the people who are directly related to the case. But the crime by staff of financial institutions, through collapse of integrity and public character of financial institutions, widely affects society and may have serious economic impact. For this reason, the legislature requires staff of financial institutions the same level of integrity as public officials. Therefore, even though the Provision places a graver and harsher punishment than on attorney at law or public accountant, etc., it does not break the balance in the punishment system.

Dissenting Opinion of Four Justices

1. Whether the Provision violates the principle of proportionality between responsibility and punishment

In principle, a criminal sanction may be imposed in the private sector of the economy only when the order of fair competition based on freedom and creativity is impaired by ‘improper solicitation.’ This is

because the private sector is based on freedom and creativity as opposed to the public economy sector where integrity and incorruptibility are specially valued. Cases and legislation of other countries also show that statutory sentences or sentencing guidelines for the crime of receiving money or valuables in relation to jobs in the private sector are lower than those for the crime of bribery by public officials. Other additional elements should also be satisfied to be punishable as a crime of receiving money or valuables, such as 'for the purpose of influencing or being compensated' (the crime of acceptance of money or valuables under the US federal law). In our legal system, it is very rare to punish an individual, as opposed to public officials, who accepts money or valuables in connection with his/her duties without requiring the element of 'improper solicitation.' The Provision is the only statutory provision that imposes aggravated punishment depending on the value of money or other profits accepted. It is common to mitigate a punishment in extenuating circumstance in the current sentencing practice so that, for example, in such cases where the value of money or other profits accepted exceeds 100 million, the courts uniformly sentence five year imprisonment in general even though the actual values of money or profits accepted in each case may differ even by four times or more. In most cases, punishment and sentences are mitigated. The Provision, however, stipulates that when the accepted amount is 100 million won or more, he shall be punished by life imprisonment or by imprisonment with prison labor for not less than ten years without consideration of the nature of crime such as the criminal's character or behavior, criminal record, criminal intent or circumstances after conduct of crime, etc. As a result, the judge's discretion in sentencing is severely restricted as it is impossible for the judges to suspend sentence even when they decide to mitigate punishment unless there is any separately stipulated basis for the mitigation of punishment. Therefore, the Provision violates the principle of proportionality between responsibility and punishment.

2. Whether the Provision breaks the balance in the punishment system

The Provision stipulates excessively harsh punishment, compared to other crimes of accepting profits in connection with ones' job duties with similar nature and legal interests to be protected. For accountants or attorneys who execute duties strongly related to public value, the sentence is lower than the crime of bribery committed by public officials, or a fine can be an alternative. Also there is no provision stipulating aggravated punishment in accordance to the value of profits accepted. Moreover the element of ‘improper solicitation’ is also required to constitute such a crime. Therefore, the Provision violates the principle of equality, running afoul of the rule of balance in the punishment system.

8. Intrusion upon Habitation and Indecent Act by Compulsion

[25-2(A) KCCR 212, 2012Hun-Ba320, July 25, 2013]

In this case, the Court upheld the part of Article 3(1) of the former Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes providing that, "A person who commits a crime prescribed in Article 298 (Indecent Act by Compulsion) of the Criminal Act while committing a crime under Article 319(1) (Intrusion upon Habitation) of the same Act shall be punished by imprisonment for life or for not less than five years." The Court ruled that it does not violate the rule of proportionality between crime and punishment or the rule of equality before the law.

Background of the Case

The complainant was indicted and sentenced to imprisonment for having violated both Article 319(1) (Intrusion upon Habitation) and Article 298 (Indecent Act by Compulsion) of the Criminal Act. With his appeal pending, the complainant filed a motion for constitutional review of Article 3(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes but when denied, filed this constitutional complaint.

Provision at Issue

The subject of review is the constitutionality of the part of Article 3(1) of the former Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes (enacted as Act No. 10258, Apr. 15, 2010 but before revised as Act No. 11556, Dec. 18, 2012, hereinafter "Sexual Crimes Punishment Act") stating, "A person who commits a crime prescribed in Article 298 (Indecent Act by Compulsion) of the Criminal Act while committing a crime under Article 319 (1) (Intrusion upon Habitation) of the same Act shall be punished by imprisonment for life or for not less than five years (hereinafter the "Provision)." The Provision is set out

below:

Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes

Article 3 (Aggravated Robbery, Rape, etc.)

(1) A person who commits a crime prescribed in any of Articles 297 through 299 of the Criminal Act while committing a crime under Article 319 (1), 330, 331 or 342 (limited to an attempt to commit a crime under Article 330 or 331) of the same Act shall be punished by imprisonment for life or for not less than five years.

Summary of the Decision

1. Whether the Rule of Proportionality between Crime and Punishment is Violated

Indecent act by force following a residential intrusion is a combination of offenses, namely intrusion upon habitation (Article 319(1), Criminal Act) and indecent act by compulsion (Article 298, Criminal Act). Prohibition of indecent acts using violence or intimidation is intended to protect the right of sexual determination. This right is essentially linked to personality of individuals, and the victims of such indecency may experience serious mental, emotional disorders. Meanwhile, residence, the center of private life, is also inseparable from people's personality. As such, the safety of life, body and property, as well as the private domain of individuals as the minimum condition for happiness cannot be protected unless the inviolability of residence is guaranteed. And when the right of sexual determination is infringed in such a residential property, the resulting damage can be even more serious. Furthermore, if this offense is committed in the presence of the victim's spouse or family, it would not merely indicate a violation of the victim's right of sexual determination; it may even result in a thorough destruction of a family, which functions as the basic unit of life. The legislature has

newly introduced the criminal element of "indecent act by force following a residential break-in" to the Sexual Crimes Punishment Act in order to impose an aggravated penalty on perpetrators for infringing on such a significant interest in committing a combination of offences. This legislative action is necessary and desirable.

As the statutory punishment prescribed in the Provision is imprisonment for life or not less than five years, the judge has the liberty to grant suspended execution of sentence through discretionary mitigation at any time when there are extenuating circumstances for committing the crime. Admittedly, fines cannot be imposed, but excluding fines from statutory penalty is nevertheless not unreasonable given the grave unlawfulness of residential break-in and indecent act by force. For this reason, the Provision does not violate the principle of proportionality that requires the severity of penalties to be proportionate to the gravity of the crime.

2. Whether Principle of Equality before the Law is Violated

The concept of indecent act by compulsion is overbroad, and the damage thereof more often than not is relatively minor and less unlawful compared to rape. Yet, in practice it can be commonplace to have cases where even general acts of indecency not amounting to imitative rape, such as oral sexual intercourse as provided in Article 297-2 of the Criminal Act, should be penalized more heavily than or at least equally as rape or imitative rape depending on the behavioral element, gravity and nature of the crime committed. Uniform imposition of lighter punishment for indecent act by compulsion, by mechanically dividing indecent act by compulsion and rape both following a residential break-in, may rather result in an unbalanced punishment in specific cases. The legislature has established different statutory punishment for indecent act by compulsion, imitative rape and rape respectively in the penal code. However, in case of incorporating a new criminal element of concurrent crimes which combine a regular crime and additional

behavioral element (residential trespass) into special penal law, the Criminal Act will not necessarily be applied as it is; a new evaluation may be required depending on what behavioral element is additionally considered. In this case, when residential trespass is combined with indecent act by compulsion, the legislature decided to impose equal statutory punishment as that for rape or imitative rape taking place after residential trespass on grounds that they are not much different from each other in terms of the protected interest, gravity of crime, reprehensibility, etc, while allowing the judge to sentence the responsible individual to an adequate term corresponding to the conduct or gravity of the crime.

A mere comparison between rape and indecent act by compulsion could easily lead to a conclusion that rape is more grave a crime that deserves higher level of punishment than the latter, but both rape after a residential break-in and an indecent act by force after a residential break-in are very grave crimes in their own right and therefore the difference in gravity between the two is relatively insignificant. In addition, the slightly unconstitutional element possibly implied in the statutory punishment may be overcome through judge's sentencing that matches crime with punishment. So if there is unreasonableness in sentences due to the same statutory punishment for rape after a residential break-in and indecent act by force after a residential break-in, this can be corrected through the judge's sentencing in specific cases. Therefore, it cannot be said that the Provision significantly lacks legitimacy or fails to strike balance of interests under the criminal punishment system and violating the principle of equality.

Dissenting Opinion by Five Justices

1. Whether Principle of Proportionality is Violated

The essence of indecent act by compulsion following a residential

trespass is the indecent act by compulsion. The type of indecent act by compulsion is very broad in scope, which means it involves unlawful acts no less illegal than rape, such as acts inserting one's sexual organ into another's mouth or anus or any instrument into another's genital organ, as well as acts that have much less impact on the right to sexual determination compared to rape. Article 298 of the Criminal Act (Indecent Act by Compulsion) provides that a person who, through violence or intimidation, commits an indecent act on another shall be punished by imprisonment (not more than ten years) or by a fine (not exceeding fifteen million won), and therefore even a relatively minor form of indecent act by compulsion that can be sufficiently punished by fine is also prescribed in the Act. This has been reflected by the legislature: Article 4 or 7 of the Sexual Crimes Punishment Act differentiates rape from indecent act by force and imposes more severe punishment for rape. Also Article 6 and 7, regarding indecent act by compulsion, set apart ones that almost amount to rape such as anal sexual intercourse, etc. from others that do not and subject the former to more severe punishment. Recently, Article 297-2 of the Criminal Act has been newly established to categorize as imitative rape indecent act by compulsion that amount to rape such as acts inserting one's sexual organ into another's mouth or anus or any instrument into another's genital organ, and thereby separate it from other acts of indecency using force, subjecting the former to heavier punishment.

Regarding the ceiling of statutory punishment, Article 42 of the Criminal Act on the term of imprisonment, etc. was amended. The maximum prison term has been raised from 15 years to 30 years (50 years for aggravated punishment), therefore this amendment applies to rape under the Criminal Act accordingly (maximum sentence for indecent act by compulsion under the Criminal Act remains the same at 10 years). This change has greatly broadened the range of maximum sentence between the two crimes from 5 to 20 years, which has greatly increased the need to specify the maximum sentence for respective

crimes. Nevertheless, the Provision stipulates that committing indecent act by compulsion while trespassing residence should be, just like committing rape following a residential break-in, put to imprisonment for life or for not less than five years (maximum sentence is also set at life imprisonment or 30 years in prison, just as rape following a residential break-in). Even indecent act by compulsion much less intrusive of the right to sexual determination than rape is subject to punishment equal to that of the rape in case it is committed on the occasion of a residential break-in. This is against the principle of proportionality that requires penalties to be proportionate to the gravity of crime.

2. Whether Principle of Equality is Violated

Statutory punishment prescribed in the Criminal Act, the general law, reflects a coherent value system for every protected interest, which should be respected unless there is a change of circumstances. Article 297 (Rape) and 298 (Indecent Act by Compulsion) of the Criminal Act provides that the minimum and maximum prison term of rape shall be, with elements of various kinds including gravity of crime and protected interest taken into account, almost 3 years and 20 years higher respectively than indecent act by compulsion. Yet, the Provision imposes equal punishment on indecent act by compulsion and rape, which vary greatly in the nature and gravity of crime, merely because the two offenses have occurred concurrently with residential break-in. This is a violation of the equality principle by treating equally those assessed to be essentially different.

3. Opinion Holding the Provision Conditionally Unconstitutional

Ultimately, on condition that the Provision applies to indecent act by force, with the exception of acts inserting the genitals into the inner part of the other person's body (excluding genitals) such as mouth or anus or inserting part of the body (excluding genitals), such as fingers, or any

object into the other person's genitals or anus, it contradicts the principle of proportionality and justice of the criminal punishment system and is therefore contrary to Article 11 of the Constitution defining all citizens to be equal before the law. For this reason, the Provision is in violation of the Constitution.

9. Consolidation of Mobile Service Provider Identification Numbers

[25-2(A) KCCR 244, 2011Hun-Ma63 · 468(Consolidated), July 25, 2013]

In this case, the Constitutional Court held that among the orders of compliance to the mobile network providers by the Korean Communications Commission on October 15, 2010, the "Temporary permission for mobile number portability(allowing users to switch from one mobile network provider to another while retaining their existing mobile phone numbers) between 2G service to 3G service from January 1, 2011 to December 31, 2013, regarding users with 'mobile service provider identification numbers(the first three digits of cell phone number, hereinafter SPI number)' other than 010 and who have submitted prior consent to change their mobile carrier identification numbers into 010", is not in violation of the complainants' right to pursue happiness, etc.

Background of the Case

The Communication Committee under the former Ministry of Information and Communication decided on January 2002 to consolidate the different SPI numbers (011, 016, 017, 018, 019) assigned to each mobile carrier into one number (010) in the long term, for the following reasons: Which are to prevent SPI numbers from being recognized as service provider's brand; to effectively manage mobile phone numbers; and to promote users' convenience and benefit through fair competition among mobile carriers. Following this decision, the users of 3G service began to use 010 as SPI number, and since January 2004, SPI number 010 has been assigned to new 2G service subscribers and users who tried to change their telephone numbers. Meanwhile, in June 2006, the 'mobile number portability system', which allows users to switch from one mobile network provider to another while retaining their existing mobile phone numbers, was launched. But by the decision of the Communication Committee, the mobile number portability system was applied only to those who used SPI number 010. Afterwards, the Korea Communications

Commission which succeeded the Communication Committee under the former Ministry of Information and Communication decided to introduce the 'temporary mobile number portability system.' This is to enable 2G service users with SPI numbers other than 010, to switch their service to 3G from January 1, 2011 to December 31, 2013 while retaining their existing mobile phone numbers, but on the condition that they agree in advance to switch their SPI numbers to 010 from January 1, 2014. In order to execute this plan, the Commission rendered an order of compliance to mobile service providers. The complainants who are the users of 2G service using SPI numbers other than 010 filed this constitutional complaint, arguing that the Commission's plan to consolidate SPI numbers and the restriction on switching mobile phone numbers violate their fundamental rights.

Subject Matter of Review

The subject matter of review is the part in the orders of compliance to the mobile network providers by the Korean Communications Commission on October 15, 2010, which states "Temporary permission for mobile number portability(allowing users to switch from one mobile network provider to another while retaining their existing mobile phone numbers) between 2G service to 3G service from January 1, 2011 to December 31, 2013, regarding users with 'mobile service provider identification numbers(the first three digits of cell phone number, hereinafter SPI number)' other than 010 and who have submitted prior consent to change their mobile carrier identification numbers into 010", (hereinafter, the "temporary mobile number portability") infringes on the complainants' fundamental rights.

Summary of the Decision

1. Principle of Statutory Reservation

Article 58 Section 1 of the former Telecommunications Business Act

enables the Korea Communications Commission to establish and implement a plan for mobile phone number portability. According to Article 58 Section 3 of the aforementioned Act, Korea Communications Commission may order the relevant mobile carriers to take measures necessary for the implementation of a plan for mobile number portability. As the order of compliance of October 15, 2010 was issued on the basis of the aforementioned provisions, it does not violate the principle of statutory reservation.

2. Right to Personality, Right to Control Personal Information and Property Rights

We are of the opinion the mobile phone numbers are relevant to neither people's personality nor human dignity. The complainants' personal information is not collected or used by the order of compliance issued on October 15, 2010 against their will. Also mobile phone numbers are limited state assets and the complainants' use of such numbers is simply based upon the service contract with the mobile carriers. Therefore, the order of compliance does not infringe on the complainants' right to personality, right to control personal information or property rights.

3. Right to Pursue Happiness

Consolidation of SPI numbers is necessary 1) to promote user's convenience and benefit; 2) to reserve sufficient supply of mobile phone numbers for the future demand of mobile phone numbers and the introduction of new service; and 3) to resolve the problem that SPI numbers themselves become brands of mobile carriers. To accomplish the purposes of the policy of mobile phone number consolidation, it is inevitable to place restriction on mobile number portability.

Also, the order of compliance issued on October 15, 2010 on temporary mobile number portability does not directly force users to

change their mobile phone numbers. It provides other alternative measures to diminish users' inconvenience caused by mobile phone number change such as automatic transfer service to the old numbers or the old mobile phone numbers display service. In this sense, the order of compliance does not place unacceptable burden on the complainants. Further, 95% of the current mobile service users use 010. Considering all the facts, the private interests restricted by the policy of mobile phone number consolidation cannot be considered as far greater than the public interests to be accomplished by the policy. Therefore, the order of compliance does not infringe on the complainants' right to pursue happiness without legitimate reasons.

Dissenting Opinion of Three Justices

The mobile number portability system implemented in June 2006 enables users who had already been using 010 to switch their service retaining existing numbers. But other users like the complainants who have been using SPI numbers other than 010 were not allowed mobile number portability from the start. Therefore, the temporary mobile number portability is meant to give benefits to the users using SPI numbers other than 010. In this sense, the order of compliance on the temporary mobile number portability has no relevance on the complainants' fundamental rights. Therefore, the constitutional complaint is not justiciable.

10. Fee on Inspection and Issuance of Resident Registration Record Cards

[25-2(A) KCCR 259, 2011Hun-Ma364, July 25, 2013]

In this case, the Constitutional Court held that Article 29(1), etc. of the Resident Registration Act that levy a certain amount of fees for inspection of a resident registration record card or issuance of a certified copy or abstract of such record card do not infringe on the complainants' rights of self-determination over personal data, property and equality, etc. The reasoning was that the collection of fees in itself is justifiable and that the amount of fees charged is not excessive, compared to the costs incurred to provide the services.

Background of the Case

1. The Resident Registration Act was first enacted as Act No. 1067 on May 10, 1962, following the abrogation of "*Kiryu* Act" (preceded by No. 32 "Chosun *Kiryu* Order" and No. 235 "Chosun *Kiryu* Procedure Rule" of the Japanese Governor-General Office Decree, which were enacted on September 26, 1942 before Korea's liberation from the Japanese colonial rule and amended several times thereafter), which was designed to "identify the residential information of residents and keep a record of population movement at all times."

2. Even before the existence of *Kiryu* Act when the Chosun *Kiryu* Procedure Rule was in force, there already were regulations charging service fees to those requesting inspection of their resident registration record cards (then dubbed "*kiryubu*") or issuance of certified copies or abstracts of such record cards, which indicates that imposition of fees for such service had been in place for a relatively long period. In the 1960s, 10 KRW was charged for inspection, and 20 KRW for issuance of a certified copy or abstract of a resident registration record card. After several amendments thereafter, now 300 KRW is charged for inspection

and 400 KRW for a certified copy/abstract.

3. When levied a certain amount of fees pursuant to Article 29(1) of the Resident Registration Act and Article 17(1) of the Enforcement Decree of the same Act, the complainants filed a constitutional complaint in this case, arguing that their rights to property, self-determination over personal data, and equality had been violated.

Subject Matter of Review

The subject matter of review is whether the complainants' fundamental rights have been violated by Article 29(1) of the former Resident Registration Act (amended as Act No. 8852, Feb. 29, 2008 but before revised as Act No. 11690, Mar. 23, 2013) and the portion of the Act's Enforcement Decree (amended as Ordinance No. 104 of the Ministry of Public Administration and Security, Sept. 10, 2009) concerning service fees charged for inspection and issuance of a resident registration record card (hereinafter jointly referred to as the "Provisions"), which are as follows:

Former Resident Registration Act (amended as Act No. 8852, Feb. 29, 2008 but before revised as Act No. 11690, Mar. 23, 2013)

Article 29 (Inspection or Issuance of Certified Copy or Abstract)

(1) Any person who wishes to inspect a resident registration record card or to obtain a certified copy or an abstract of such record card shall pay the fee prescribed by Ordinance of the Ministry of Public Administration and Security and file an application with the head of the competent Si/ Gun/ Gu (including the head of a non-autonomous Gu) or the head of the competent Eup/ Myeon/ Dong or branch office (hereinafter referred to as the "head of the agency allowing the inspection of a resident registration record card or issuing a certified copy or an abstract thereof").

Enforcement Decree of the Resident Registration Act (Amended as Ordinance of the Ministry of Public Administration and Security, Sept. 10, 2009)

Article 17 (Service Charges)

(1) Service charges may be collected as prescribed by Article 29(1): Provided, That the inspection of a resident registration record card or issuance of a certified copy or an abstract thereof in an electronic format shall be free of charge.

1. A 300 KRW fee per document is charged for inspection (including the inspection of move-in households, and the same shall apply hereinafter).

2. A 400 KRW fee per document is charged for issuance of a certified copy or an abstract (Service for persons other than the resident concerned pursuant to Article 29(2)(2) and (6) of the Act is charged 500 KRW per document).

Summary of the Decision

1. Whether rights to self-determination have been violated

Collection of service fees for issuance of a resident registration record card under the Provisions is aimed at "compensating for the costs" incurred in using the human, non-human facilities of administrative agencies (time and efforts of responsible public employees, printing costs) with the purpose of providing the "benefit" generated by submitting the notarized certificate of identity or social status to public institutions, private companies, or a third party. The fees are charged to those who request the issuance of certified copies/abstracts of resident registration record cards. Therefore, the imposition of fees is, in itself, justifiable.

The public employees in charge at administrative agencies have to take time and efforts, although in small amounts, to issue certified copies/ abstracts of resident registration record cards, and materials and facilities

such as papers and toner are consumed when using the printer. Thus, the costs need to be compensated through collection of service fees. Even in the case of inspecting such record cards, the responsible staff has to perform the service of searching cards for individuals on the computer for review, and the fees for browsing are fixed at a rate lower than those charged for the issuance of certified copies/abstracts, allowing for the absence of printing costs, etc. In this sense, the fees levied by the Provisions are not so overly expensive as to violate the complainants' rights to self-determination over personal data.

2. Whether property rights have been violated

Collection of service fees for inspection and issuance of resident registration record cards is made to compensate for the costs incurred to provide benefits such as identity verification by using the human, non-human facilities of administrative agencies, which makes the levy of charges itself justifiable. Moreover, the amount of fees, compared to the costs incurred, are not fixed at an excessively high or unreasonable rate. Therefore, we do not believe that the Provisions violate the property rights of the complainants.

3. Whether equality rights have been violated

When a resident registration record card is inspected or a certified copy/abstract thereof is issued in an electronic format using the Internet, no facility or service of the competent administrative agency is used other than the maintenance and management of computerized information system related to resident registration. In this context, the Provisions have reasonable grounds to discriminate against, by levying a certain amount of fees, those who inspect such record card or obtain a certified copy/abstract thereof through personal visits, in favor of those who do so electronically. Therefore, the Provisions do not infringe on the equality rights of the complainants.

11. Limit of Voting Age

[25-2(A) KCCR 306, 2012Hun-Ma174, July 25, 2013]

In this case, the Constitutional Court of Korea held that Article 15(1) of the Public Official Election Act, which sets the voting age at 19 for Presidential election and National Assembly election, does not infringe on the right to vote, etc. of people under 19 years of age.

Background of the Case

The complainant filed this constitutional complaint on February 23, 2012 when he realized that he will be unable to exercise his voting right for being under 19 years of age as of the election date for the 19th National Assembly Election and the 18th Presidential Election, arguing that Article 15 of the Public Official Election Act, which sets the voting age at 19, infringes on his rights to equality and the right to vote.

Provision at Issue

The subject matter of review is whether Article 15(1) of the Public Official Election Act (amended as Act No. 11071 on November 7, 2011) infringes on the fundamental rights of people under 19 years. The contents of the provision at issue are as follows.

Public Official Election Act (amended by Act No. 11071 on November 7, 2011)

Article 15 (Voting Right)

(1) A national of 19 years of age or above shall have a voting right for the elections of the President and the members of the National Assembly: Provided, That a voting right in the elections of National Assembly members of local constituencies shall only be granted to a national of 19 years of age or above who falls under any of the following subparagraphs, as of the basis date of preparation of the

electoral register pursuant to Article 37(1):

a. A person whose resident registration has been made in the relevant local constituency for the National Assembly;

b. A person whose residence is within the election district of the relevant local constituency for the National Assembly and who has been enrolled in the report register of domestic domicile thereof for not less than three months pursuant to Article 6 (1) of the Act on the Immigration and Legal Status of Overseas Koreans.

Summary of the Decision

The principle of universal election requires that any person at or above a certain age retain voting rights. The principle, in its presumption, imposes a restriction on the voting right as to people under a specified age, because a certain level of political decision-making ability is a prerequisite for exercising voting rights.

Article 24 of the Constitution prescribes that "[a]ll citizens shall have the right to vote under the conditions as prescribed by Act", delegating the authority to decide voting age to the legislature.

The legislature decided the voting age to be 19 upon the consideration that minors who are under 19 years are in reality still in the process of forming political and social viewpoints or are practically dependent on parents, teachers or other guardians in their daily lives, and thus cannot be regarded to possess the mental and physical autonomy sufficient enough to make political decisions by themselves.

Although the voting age is set at 18 in many countries, it is a matter to be decided depending on each country's specific situations. Further, the fact that other laws recognize persons at or above 18 years as capable of working or joining the military does not make it necessary to apply the same standard with respect to the ability to exercise a voting

right. We thus cannot say that the legislature's decision to set the voting age at 19 was unreasonable.

Because the legislature did not act unreasonably in excess of its legislative discretionary power in setting the voting age at 19, there was no infringement on the right to vote, etc. of people under19 years of age.

Dissenting Opinion of Three Justices

The legislature would exceed the scope of legislative authority if persons of a certain age, though retaining political decision-making ability, are prevented from exercising their voting rights due to a voting age set at an older age.

Since the last adjustment made to set the voting age at 19, our society has experienced remarkable, unprecedented changes, which prominently heightened the level of political consciousness among people, including young persons. In this context, we should assume that people at an age of completing secondary education possess the ability to make political decisions on their own.

People between the age of 18 and 19, who are at the age of completing secondary school, develop keen interests in the issues of employment and education and, as a generation most familiar with information and communication technologies, especially the Internet, attain considerable maturity in their political and social decision-making ability. Thus, they should be regarded to have the ability to make political decisions on their own.

Other laws, including the Military Service Act and the Labor Standards Act, recognize that people at or above 18 years have reached the level of mental and physical abilities to participate in the formation

of the State and society. Compared with people at the age of 18 in many other countries that have set the voting age at 18, people at the same age in our country cannot be deemed to be less capable of making political decisions.

Then, the legislature's decision to set the voting age at 19 when people at or above 18 years of age have the ability to make political decisions on their own, exceeds the scope of legislative authority and infringes upon the right to vote, etc. of people between the age of 18 and 19.

12. Restriction of Balloting Hours

[25-2(A) KCCR 324, 2012Hun-Ma815 · 905(consolidated), July 25, 2013]

In the case, the Constitutional Court dismissed the request to review on the constitutionality of legislative inaction for not granting paid holiday for election day. The Court also held that Article 155 Section 1 of the Public Official Election Act that restricts balloting hours by stipulating a polling place shall be closed at 6:00 p.m. on election day, does not violate the right to vote.

Background of the Case

Facing the 18th Presidential Election on December 19, 2012, complainants filed this constitutional complaint against the legislative inaction for not granting paid holiday for election day despite the election day being Wednesday that is a weekday, and Article 155 Section 1 of the Public Official Election Act that stipulates a polling place shall be open from 6 a.m. to 6 p.m. on election day (Wednesday). The complainants argued that it is impossible for them who are owner-operators or day-workers to arrive at a polling place by 6 p.m. on weekdays, due to the nature of their occupations.

Provision at Issue

The subject of review are a) whether the legislative inaction for not granting paid holiday for the presidential election day violates the fundamental rights of the complainants; and b) whether the part of 'at 6 p.m.' of Article 155 Section 1 of the Public Official Election Act (revised as Act No. 7189 on March 12, 2004) (hereinafter referred to as the "Provision") violates their fundamental rights. The contents of the Provision are stated as follows:

Public Official Election Act (revised as Act no. 7189 on March 12,

2004)

Article 155 (Balloting Hours)

(1) A polling station shall open at 6 a.m. and close at 6 p.m. (8 p.m. in the special election, etc.) on the election day: Provided, That if there are electors waiting to vote at the polling station at the time it is closed, the number tickets shall be given to them and the polling station shall be closed after they finish voting.

Summary of the Decision

1. Legislative obligation to grant paid holiday for election-day

Legislative obligation under the Constitution is a required element for the constitutional complaint against legislative inaction. Article 1 Section 2 of the Constitution provides the principle of national sovereignty; Article 24 of the Constitution provides the right to vote; and Article 34 of the Constitution provides the right to humane livelihood. However, these articles alone do not specify any express legislative obligation to grant a paid holiday for an election day (Wednesday, in case of an election upon the termination of office). The legislature is vested with the discretion to choose, among various means, any measure to protect the right to vote. Therefore, the complaint against legislative inaction for not grating paid holiday for election- day lacks justiciability.

2. Whether the Provision violates the right to vote

The Provision intends to confirm the result of election and to ensure the exercise of right to vote while allocating administrative resources to manage balloting and ballot-counting at a proper level. The Provision requires opening a polling place at 6 a.m. to enable balloting before usual business hours. Article 10 of the Labor Standards Act stipulates an employer shall not reject a request from a worker to grant time necessary to exercise the right to vote during work hours, guaranteeing a

voter who is a worker to be allowed to vote during work hours. In addition, a voter may vote absentee at any absentee polling station during the absentee ballot period (from 5 days prior to an election to 2 days prior to an election, Friday and Saturday in case of election upon the termination of office) without prior registration, according to the integrated electoral register that was established after filing of this constitutional complaint. An election upon the termination of office is also designated as a holiday of public office. In sum, the Provision is a way to coordinate the protection of the right to vote and the necessity of limiting ballot hours, and does not deprive voters of substantial opportunities to exercise their right to vote. Therefore, the Provision does not violate the right to vote under the principle against excessive restriction.

3. Whether the Provision violates the right to equality

The Provision provides that a polling place shall be close earlier for an election upon the termination office than for a special election. But the difference in open hours is due to the fact that a special election is neither a holiday of public office nor rarely a stipulated holiday of private enterprise. Also a special election is held only in certain electoral districts imposing comparatively minor burden in extending ballot hours. Therefore, such discrimination is based on reasonable grounds, thus the Provision does not violate the right to equality.

13. Reduction of Public Officials' Pension and Retroactive Application

[25-2(A) KCCR 382, 2010Hun-Ba354, 2011Hun-Ba36·44, 2012Hun-Ba48 (consolidated), August 29, 2013]

In this case, the Constitutional Court held constitutional Article 64 Section 1 Item 1 of the Public Officials Pension Act which stipulates reduction of retirement benefits in a case where a present or former public official is sentenced to imprisonment without labor or heavier punishment due to a cause in performing his/her official duties, excluding cases where such sentence is caused 'by negligence not related to his/her official duties' and 'by negligence in the course of complying with an order lawfully issued by his/her superior.' But the Court held unconstitutional Article 1 and latter part of Article 7 Section 1 of the Addenda of the Public Officials Pension Act which prescribe retroactive application of Article 64 Section 1 of the aforementioned Act.

Background of the Case

(1) Complainants are former public officials who retired after being sentenced to imprisonment without labor or heavier punishment and have been receiving reduced retirement pension, etc., subject to Article 64 Section 1 Item 1 of the former Public Officials Pension Act (revised as Act No. 5117, December 29, 1995 but before revised as Act No. 9905, December 31, 2009) (hereinafter, the 'Provision of Former Act').

(2) On March 29, 2007, the Constitutional Court held that the Provision of the Former Act is incompatible with the Constitution and ordered temporary application until December 31, 2008. But the legislature failed to revise the provision by the deadline, and thereby the Provision of Former Act lost its effect. Whereupon the Government Employees Pension Service paid the complainants the full amount of retirement benefits, etc. from January 1, 2009.

(3) Meanwhile, Article 64 Section 1 Item 1 of the Public Officials Pension Act was revised on December 31, 2009, stipulating that even if a public official is sentenced to imprisonment without prison labor or heavier punishment, if such sentence is caused 'by negligence not related to his/her official duties' and 'by negligence in the course of complying with an order lawfully issued by his/her superior', the amount of the retirement benefits shall not be reduced. The proviso of Article 1 and the latter part of Article 7 Section of the Addenda prescribed that the amended provisions of Article 64 shall apply from January 1, 2009.

(4) The Government Employees Pension Service sought redemption of half of the complainants' retirement benefits, etc., already paid and also reduced the amount of the retirement benefits to be paid. The complainants, while filing an administrative suit against the aforementioned administrative action by the Government Employees Pension Service, filed this constitutional complaint on Article 64 Section 1 Item 1 of the Public Officials Pension Act and the proviso of Article 1 and the latter part of Article 7 Section 1 of the Public Officials Pension Act Addenda (No. 9905 on December 31, 2009).

Provisions at Issue

The subject matters of this case are whether 1) Article 64 Section 1 Item 1 of the Public Officials Pension Act (revised as Act No. 9905, December 31, 2009)(hereinafter, the 'Reduction Provision') and 2) the proviso of Article 1 and the latter part of Article 7 Section 1(hereinafter, 'the Addenda Provisions') are constitutional. The provisions at issue are as follows:

Public Officials Pension Act (revised as Act No. 9905, December 31, 2009)

Article 64 (Restriction on Benefits due to Penalties, etc.)

(1) Where a present or former public official falls under any of the following subparagraphs, part of his/her retirement benefits and retirement allowances shall be reduced before payment as prescribed by

Presidential Decree. In such cases, the amount of the retirement benefits shall not be reduced below the amount calculated by adding the interest of specified in Article 379 of the Civil Code to the total amount of contribution paid:

1. when he/she is sentenced to imprisonment without prison labor or heavier punishment due to a ground accrued in performing his/her official duties (excluding cases where such sentence is cause by negligence not related to his/her official duties and by negligence in the course of complying with an order lawfully issued by his/her superior)

Public Officials Pension Act (No. 9905, December 31, 2009) Addenda

Article 1 (Enforcement Date)

This Act shall enter into force on the date of its promulgation: Provided, That the amended provisions of Article 64 shall enter into force on January 1, 2009.

Article 7 (Transitional Measures for Payment of Benefits)

(1) the payment of benefits, a ground for the payment of which has accrued before this Act enters into force shall be governed by the former provisions: Provided, That the amended provisions of Article 47(2) shall also apply to persons for which a ground for benefits has accrued before this Act enters into force and the amended provisions of Article 64 shall also apply to the payment of a retirement pension or early retirement pension which is payable after January 1, 2009 to annuitants of a retirement pension or early retirement pension prior to January 1, 2009, as well as retirement benefits and retirement allowances a ground of the payment of which has accrued after January 1, 2009.

Summary of the Decision

1. Whether the Reduction Provision is contradictory to the binding force of the decision of incompatibility with the Constitution

The Constitutional Court, in 2005 Hun-Ba33 decision, held that Article

64 Section 1 of the former Public Officials Pension Act, which reduced the amount of retirement benefits even when a public official was punished by negligence ‘not related to his/her official duties’, is incompatible with the Constitution as the provision infringed upon the public officials' fundamental rights. The Reduction Provision is the amended version pursuant to the Court's decision. Even for a crime not related to the official duties, if such a crime falls under the category of intentional offense, it should be considered as violating public officials' duty to abide by law and regulations, their duty of integrity, and the duty to maintain dignity, etc. Therefore, even though such crimes are not excluded from the grounds for reduction of retirement benefits, it is not against the decision of incompatibility with the Constitution. Thus the Reduction Provision is not contradictory to the binding force of the decision of incompatibility with the Constitution.

2. Whether the Reduction Provision violates the property right and the right to humane livelihood

The legislative purpose of the Reduction Provision is to prevent public officials from committing crimes and to make them properly and faithfully conduct their public duties while in office. These purposes are legitimate and the Reduction Provision can be considered as a proper means to achieve them. The Reduction Provision excludes cases where a crime is caused ‘by negligence not related to official duties’ and ‘by negligence in the course of complying with an order lawfully issued by superior’ from the grounds for the reduction of retirement benefits, etc. And such reduction of payment shall be applied only to the case where a public official is sentenced to ‘imprisonment without prison labor or heavier punishment.’ This shows that the Reduction Provision categorizes crimes subject to the reduction of payment as narrow as possible to the extent that it can sufficiently achieve the legislative purposes. Also the Reduction Provision provides for the scope of payment reduction not exceeding the shares of the state or local governments. Considering these

facts, the Reduction Provision also meets the requirement of minimum restriction.

The complainants' infringed private interest is the reduction of partial amount of retirement benefits, but considering the facts that this was basically caused by their own culpability; the public interest to maintain people's trust in individual public officials or the public service as a whole is considerably more important. Also considering that the Reduction Provision far more narrows down the grounds for payment reduction than the Provision of the Former Act, thereby minimizing the infringement on the private interests, the Provision successfully strikes the balance between legal interests.

Therefore, the Reduction Provision does not violate the complainants' property right and the right to humane livelihood.

3. Whether the Reduction Provision violates the principle of equality

Given the facts that there is a basic difference between the government employees pension system and the national pension plan or the retirement allowance system; the Reduction Provision, unlike the Provision of the Former Act, excludes negligence crimes not related to the official duties or public position from the grounds of payment reduction; the payment reduction merely amounts to the shares borne by the state; and the purposes of the Reduction Provision are to pre-empt crimes committed by public officials and to maintain order in the public service, we cannot conclude that the Reduction Provision unreasonably discriminate public officials against the national pension subscribers or the employees under the Labor Standard Act. Therefore, the Reduction Provision does not violate the principle of equality.

4. Whether the Addenda Provisions violate the principle of prohibition against retroactive legislation

In this case, the complainants had been fully paid retirement benefits

from January 1, 2009 to December 31, 2009, but due to the Addenda Provisions were required to return 1/2 of the retirement benefits received in 2009. The Addenda Provisions apply retroactively to the part of retirement benefits that the complainants were completely paid and therefore it regulates factual and legal relations already settled and completed, which is retroactive legislation prohibited by Article 13 Section 2 of the Constitution.

In order for the retroactive legislation to be allowed as an exception, there should be important public interests by which such a retroactive legislation can be justified. The decision whether a retroactive law can be an exceptionally allowed or not should be based on a strict standard. Although an amended version pursuant to the Court's decision was anticipated and there was ample time from the Court's decision on March 29, 2007 to the time limit for temporary application on December 31, 2008, the legislature did not revise the provision. Accordingly, the complainants were paid full retirement benefits from January 1, 2009 to December 31, 2009 and this is totally or mainly due to the failure of the legislature to revise the provision. Therefore, the redemption of retirement benefits, etc., from the complainants seems to impute all the responsibility of execution of law by error of a state organ to the complainants who do not have faults or bear responsibility. Then, it seems potent that the complainants did not expect to be asked to retroactively return the retirement benefits pursuant to the belatedly revised Addenda Provisions, and therefore, their expectation interest should not be considered minimal.

Meanwhile, the legislative interests intended to be achieved by the Addenda Provisions are prevention of crime committed by public officials, encouragement of integrity in performing public duties, improvement of people's trust in public officials and effective execution of sanction. But these interests can be sufficiently achieved by other means such as the *ipso facto* retirement of public officials who commit crimes or the reduction of their future benefit. Also the financial and monetary interests conserved by the Addenda Provisions do not seem

considerably large. On the contrary, public interests such as the legislature's duty to abide by the Constitutional Court's incompatibility decision within the time limit for temporary application and the stability of legal relations through prompt legislation are very important. Considering that public confidence in these interests are related to the objective confidence in judicial and legislative branches, the requirement of protecting confidence takes priority over public interests.

Therefore, the Addenda Provisions is retroactive legislation prohibited under Article 13 of the Constitution, and does not fall under the exceptions. Subsequently, the Addenda Provisions infringe on the complainants' property rights in violation of the principle against retroactive legislation.

Partial Dissenting Opinion on the Reduction Provision of Two Justices

In case a public official commits a crime, public interests may sufficiently be achieved by criminally punishing the public officials or, in certain cases, depriving them of their positions. Nevertheless, if legislation aims to reduce retirement benefits in addition to the aforementioned sanctions, there should be the special situation where the legislative purposes cannot be achieved by any other means. For crimes not related to official duties, the damage to people's trust in public service is little or close to none, compared to crimes in relation to official duties. Therefore in these cases it is more reasonable to limit the scope of payment reduction to the extent the legislative purposes can be achieved, depending on the degree of culpability or nature of crimes such as antinational crime or despicable crime. However, the Reduction Provision provides a uniform ground for the reduction of retirement benefits, etc., even for those who commit a crime not related to their official duties. Therefore, the Reduction Provision infringes on the complainants' property right in violation of the principle against excessive restriction.

Also, the Reduction Provision violates the principle of equality, as it

unreasonably discriminates public officials against general citizens or employees.

Therefore, the Reduction Provision violates the complainants' property right and the principle of equality.

Partial Dissenting Opinion on the Addenda Provisions of Two Justices

Reflecting on the Court's decision of incompatibility to the Constitution regarding the Provision of Former Act and the following process of revision, the Addenda Provisions cannot be considered as providing a new legal judgment on a matter that has already been legally decided, infringing on the people's confidence and legal stability. Rather, the provisions should be regarded as simply filling the legal vacuum, including even the constitutional portion of the former Act, created by the expiration of temporary application period decided in the incompatibility decision. Moreover, the retired public officials who received full retirement benefits, etc., were notified that they might be required to return the retirement benefits pursuant to the upcoming revision. Therefore, they may well have understood the possibility that their retirement benefits, etc. could be retroactively reduced after the revision of the related provisions. Such legislative vacuum falls into a case where expectation interests are small due to the uncertainty and confusion in legal status.

Also, paying full amount of retirement benefits, etc. simply based on the coincidental delay in legislation by the National Assembly is against the public interests to increase people trust in public service, to come up with effective measures to sanction and to realize social justice and equality. Therefore, the Addenda Provisions which restrict such a payment can be considered as contributing to achieve important public interests.

As the government employees pension system has also been suffering from chronic deficit, becoming a burden to the national treasury, the public interest to preserve finance for the government employee pension

plan is also very important.

Therefore, the Addenda Provisions can be considered as a case in which retroactive legislation is justified due to the existence of great public interest in precedence over the principle of protection of confidence.

For the forgoing reasons, the Addenda Provisions do not violate the Constitution, as they are a justified exception to retroactive legislation.

14. Duty Suspension of the President of Agricultural Cooperatives

[25-2(A) KCCR 477, 2010Hun-Ma562 · 574 · 774, 2013Hun-Ma469 (consolidated), August 29, 2013]

In this case, the Constitutional Court held that the provisions of the Agricultural Cooperatives Act which direct a cooperative member of an agricultural or a livestock cooperative to replace its president when the president is sentenced to imprisonment without prison labor or heavier punishment even before the sentence is finalized, fail to meet the least restrictive means requirement and thus violate the complainants' rights to occupation and equality. The Court thus declared the provisions unconstitutional.

Background of the Case

(1) The complainants, who had been elected as presidents of regional agricultural or livestock cooperatives, were sentenced to imprisonment without prison labor or heavier punishment at the criminal trial court and were subsequently suspended from their duties pursuant to Article 46(4)(3) and Article 107(1) of the Agricultural Cooperatives Act.

(2) The complainants filed this constitutional complaint, arguing that the provisions above violate not only the presumption of innocence principle but also their right to occupation and equality guaranteed by the Constitution.

Subject Matter of Review

The subject matter of review is whether the portion of Article 46(4)(3) of the Agricultural Cooperatives Act (revised as Act No. 9761, Jun. 9, 2009) concerning the “president” and the part of Article 107(1) of the same Act regarding the “president” of Article 46(4)(3) (hereinafter jointly referred to as the “Provisions,” and the Act's amendment history is specified as the above since the said portion of Article 107(1) has not

been amended since Jun. 9, 2009) violate the fundamental rights of the complainants. The Provisions are as follows:

Agricultural Cooperatives Act (Revise as Act No. 9761, Jun. 9, 2009)
Article 46 (Duties of Members)
(4) A director designated by the order decided by the Board of Directors shall replace the president (a director who is not a cooperative member shall be excluded) or the standing director when he/she is incapable of performing duties due to one of the following reasons (excluding subparagraph 5 in the case of standing director):
3. A person who is sentenced to imprisonment without prison labor or heavier punishment but whose sentence is not finalized
Article 107 (Application Mutatis Mutandis)
(1) Article 14(2), Article 15 to 18, Article 19(2) and (3), Article 20, Article 21, Article 21-3, Article 22 to 24, Article 24-2, Article 25 to 28 (excluding Article 28(2)), Article 29 to 50, Article 50-2, Article 51 to 56, Article 57(2) to (7), Article 58 to 65, Article 65-2, Article 66, Article 67, Article 67-2, Article 68 to 75, Article 75-2, Article 76 to 102 shall apply mutatis mutandis to matters related to regional livestock cooperatives.

Summary of the Decision

1. Whether freedom of occupation has been violated

The Provisions may well be in violation of the presumption of innocence principle as they disadvantage the presidents of cooperatives in the form of duty suspension even before their sentence has been finalized. Also agricultural and livestock cooperatives, which are private economic actors organized autonomously by workers in the agricultural and livestock industry, should be immune from government intervention to the greatest extent possible. In this light, strict review is required to decide whether the restriction on fundamental rights by the Provisions meet the least restrictive means requirement.

However, the trust of cooperative members or the general public in the president may be lost in the course of investigation or indictment of the president or due to relevant press releases, before the final decision ordering imprisonment without prison labor or heavier punishment. Furthermore, public trust can also be undermined for reasons such as pursuit of bad projects in management, political mistakes, unethical private life. Cooperative members can help prevent significant loss or risks to normal operation of the cooperative through other ways than resorting to the Provisions, that is, by filing for a preliminary injunction to temporarily suspend the president from his/her duties; and even if the president is sentenced to imprisonment without prison labor or heavier punishment, he/she is not physically absent as far as he/she is indicted without physical detention, and it is thus hard to justify the need to suspend him/her from office for the cooperative's operation. Given the above, in case the president is “sentenced to imprisonment without prison labor or heavier punishment,” excluding the president immediately from his/her office without giving consideration to other conditions is hardly the best and inevitable way to gain trust from cooperative members and the general public and to ensure job commitment.

Even if the Provisions do impose suspension from duty to serve the legislative purpose, the conditions for such imposition should be limited to crimes whose risks to the president's performance of duties are obviously too “concrete” to wait until his/her sentence is finalized. Yet, the Provisions simply apply to an infinite scope of all crimes that face imprisonment without prison labor or heavier punishment. The Provisions do not allow for considering elements such as whether the president's crime was related to duty and was committed in the course of or after election, whether the crime was by intention or negligence, and whether the extent to which the type and nature of the crime undermines public trust is too serious for the president to continue his/her duties. Therefore it fails to satisfy the least restrictive means test. In addition, criminal procedure does not review the need for the president's suspension from

duty and is merely a means to decide whether the defendant's act is guilty or not and to inflict punishment according to the gravity of crime. This means the penalty of suspension solely based on the court's sentence is also contrary to the principle of least restriction on fundamental rights.

The public interest intended to be served by the Provisions are ambiguous, while the disadvantage faced by the cooperative president who is suspended from duty indefinitely until his/her sentence is finalized just because he/she has been sentenced to imprisonment without prison labor or heavier punishment is a substantive and already existing infringement on his/her fundamental rights, which is no less important than the abovementioned public interest. If so, the Provisions do not meet the balance of interest.

2. Whether equality rights have been violated

Even public officials such as National Assembly members or heads of local governments, whose office imply much higher publicness and whose duties require far more public trust compared to a cooperative president, do not have any regulations to suspend them from duties solely based on the fact that they have been sentenced to imprisonment without prison labor or heavier punishment. On the contrary, in the case of the presidents of agricultural and livestock cooperatives, there is less necessity for duty suspension compared to National Assembly members or local government heads. And under certain circumstances, preliminary injunction for suspension from duty can be issued under civil procedure rules. Therefore, imposing penalty of duty suspension immediately after a cooperative president is sentenced to imprisonment without prison labor or heavier punishment do not qualify as reasonable discrimination.

Also, in the cases of the presidents of the National Federation of Fisheries Cooperatives, National Credit Union Federation, and Small and

Medium Enterprise Cooperatives, who, in essence, share the same characters as the president of agricultural and livestock cooperatives in that they are officers of private corporations yet required of publicness and integrity of a financial institution, there are no such provisions on suspension from duty as the Provisions, which impose duty suspension only on the presidents of agricultural and livestock cooperatives simply because they have been sentenced to imprisonment without prison labor or heavier punishment. Therefore, this penalty under the Provisions amounts to arbitrary discrimination against the complainants and thus violates their right to equality.

15. Attorney Visitation Prohibiting Physical Contact

[25-2(A) KCCR 494, 2011Hun-Ma122, August 29, 2013]

In this case, the Constitutional Court of Korea held that Article 58(4) of the Administration and Treatment of Correctional Inmates Act, which requires in principle that an inmate's meeting with an outside person take place in a place equipped with a device to prevent physical contact even when the inmate's attorney visits, infringes on the inmate's right of access to trial in violation of the Constitution. The Court thus made a declaration of constitutional incompatibility and ordered interim continuance.

Background of the Case

1. The complainant filed a constitutional complaint (2010Hun-Ma755), seeking decision that the physical examination performed by the prison during his detention at the OO Prison was unconstitutional. On February 23, 2011, the complainant requested a meeting with his court-appointed attorney for the constitutional complaint case at a defense counsel meeting room, rather than at an audio/video recording meeting room. The request, however, was denied for the reason that he was a convicted prisoner, not a detainee. Consequently his meeting with the attorney took place in an audio/video recording meeting room equipped with a device that prevents physical contact.

2. On March 8, 2011, the complainant filed this constitutional complaint, seeking a decision that Article 41 of the Administration and Treatment of Correctional Inmates Act (hereinafter “the Act”) and Article 62 of the Enforcement Decree of the Act, which regulates audio recording and video recording of visitations, as well as Article 58 of the Enforcement Decree of the Act, which requires in principle that visitation take place at a place equipped with a device to prevent physical contact, except for the cases in which an unconvicted prisoner meets his or her defense counsel, are unconstitutional.

Provisions at Issue

The subject matter of review is whether Article 41(2) and (3) of the Act (amended as Act No. 8728 on December 21, 2007), Article 62 of the Enforcement Decree of the Act (amended as Presidential Decree No. 21095 on October 29, 2008) (hereinafter jointly referred to as "Recording Provision") and Article 58(4) of the Enforcement Decree of the Act (amended as Presidential Decree No. 21095 on October 29, 2008; hereinafter "Meeting Provision") infringe on the complainant's fundamental rights.

Administration and Treatment of Correctional Inmates Act (amended as Act No.8728 on December 21, 2007)

Article 41 (Meeting) (2) If any ground falling under any of the following subparagraphs exists, any warden may have a correctional officer listen to, document, audio record or video record the details of meeting of prisoners:

1. Where prisoners are likely to engage in any behavior to destroy evidence or to conflict with criminal law;
2. Where it is necessary for the edification of convicted prisoners or their rehabilitation into society;
3. Where it is necessary for the maintenance of security and order of the institution.

(3) In cases of audio recording and video recording under paragraph (2), each warden shall notify the relevant prisoner and his/her visitor of such fact in advance.

Enforcement Decree of the Administration and Treatment of Correctional Inmates Act (amended by Presidential Decree No. 21095 on October 29, 2008)

Article 58 (Meeting) (4) A meeting of a prisoner with an outside person shall be conducted at a place where the device to prevent physical contact have been installed: Provided, That this shall not apply

to cases where any unconvicted prisoner meets with his/her defense counsel.

Article 62 (Listening to, Documenting, Audio Recording and Video Recording of Details of Meeting)

(1) Any warden may have a correctional officer participate in a meeting of a prisoner, other than an unconvicted prisoner who meet with his/her defense counsel, to listen to and document the contents of the meeting under Article 41(2) of the Act.

(2) Unless any special condition exists, each warden shall have a correctional officer inform prisoners and their visitors of the fact to audio record and video record the details of meeting in an appropriate manner, orally or in writing, in advance before they enter a meeting room, under Article 41(3) of the Act.

(3) Each warden shall designate a handler of meeting information to protect and manage the archives of meetings that have been listened to, audio recorded or video recorded under Article 41(2) of the Act, and no handler of meeting information shall use, for unjustified purposes, any meeting information which he/she has come to his/her knowledge in the course of his/her duties, by disclosing, handling without authority or providing it for any other person's use, etc.

(4) Where a warden is requested from the related agencies to provide the archives of meeting referred to in paragraph (3) for any ground falling under any of the following subparagraphs, he/she may provide such archives:

1. Where it is necessary for the trials of the courts;

2. Where it is necessary to investigate a crime, and institute and maintain a public prosecution.

(5) In cases of providing the archives audio recorded or video recorded under paragraph (4), the relevant warden shall have the handler of meeting information provided for in paragraph (3) input the name of organization requesting the provision of such archives, purpose of request, grounds for provision, scope of requested provision, and other necessary matters, to a management program of archives audio recorded

or video recorded, and then separately record such archives on portable storage medium and provide them.

Summary of the Decision

1. Recording Provision (Article 41(2) and (3) of the Act and Article 62 of the Enforcement Decree of the Act)

The legal effects such as restriction on freedom by Article 41(2) and (3) of the Act and Article 62 of the Enforcement Decree of the Act are not the result of the provisions itself. Rather, infringement on the complainant's fundamental rights may occur only through specific enforcement actions, *e.g.* audio-recording and video-recording, by the warden based on these provisions. Therefore, the part of the complaint regarding the Recording Provision is inadmissible for failing to satisfy the requirement of direct applicability.

2. Meeting Provision (Article 58(4) of the Enforcement Decree of the Act)

Under Article 58(4) of the Enforcement Decree of the Act, attorney visitation must in principle take place at a place equipped with a device that prevents physical contact, when the legal dispute for which the inmate seeks the attorney's assistance is not a criminal but a civil, administrative or constitutional case. As a result, prisoners experience difficulties in efficiently preparing trials. Especially when the inmate intends to bring a lawsuit against the State regarding treatment in the correctional institution, the principle of equal weapons is under threat, because information on the lawsuit can be disclosed to the opposing party. The public nature, ethics and social responsibility that bind any attorney in performing his or her profession, will minimize the possibility of an attorney in engaging in an act of destroying evidence, assisting escape or bringing into the prison prohibited items, *e.g.* drugs.

In addition, such potential misuse of attorney visitation can be prevented if exception applies when special circumstances justify the concern for harm to the order of the correctional institution. As such, Article 58(4) of the Enforcement Decree of the Act excessively restricts the complainant's right of access to trial in violation of the principle against excessive restriction and thus violates the Constitution.

If the Court decides that the above provision be immediately invalidated, however, it would concurrently have the effect of invalidating the general provision that requires prisoner visitation to normally occur in a place equipped with a device that prevents physical contact, as well as the provision that grants exception to unconvicted prisoners for meeting with defense counsel. This may create a threat to legal stability. Thus, it is necessary that the provision remains in force until the administration amends the provision to be compatible with the Constitution. The administration shall amend the provision no later than July 31, 2014 and, if no amendment is made until then, the Provision shall lose its effect from August 1, 2014.

Dissenting Opinion of Two Justices

The Act provides a broad exception to the regulations on visitation for inmates who have shown outstanding performance in the correctional program, allowing them to have the meeting at a place without a device to prevent physical contact. Even if the meeting takes place in an area where such device is installed, there is no restriction at all in terms of communication using the microphone console, or visual verification of documents and evidence materials, other than the obstacle in receiving materials through physical contact. In addition, an inmate can sufficiently exchange opinions with his or her attorney by corresponding through letters or using the opportunity to communicate during court appearance for trial. A special treatment of attorney visitation can lead to a problem of unreasonable discrimination against other representatives for litigation

(*e.g.* legal representative, family, patent agent) who are not attorneys. Also, we cannot ignore the side effects caused by inmates who would misuse their right to attorney visitation. Further, the public interest in maintaining order and safety of the correctional institution is greater than the disadvantage to the inmate brought about by the provision above. In conclusion, because Article 58(4) of the Enforcement Decree of the Act does not excessively restrict the complainant's right of access to the courts, it does not violate the Constitution.

16. Delay in Lending Books at Prison Library

[25-2(A) KCCR 571, 2012Hun-Ma886, August 29, 2013]

In this case, the Constitutional Court decided that the warden's forbearance to lend legal materials to prepare for a prisoner's retrial for a certain period does not violate the Constitution. The 'constitutional obligation to assist prisoners in preparing lawsuit' imposed on warden demands substantial protection of right to trial of prisoners from the entire perspective through any effective measure. As this is not limited to lending legal materials, if the warden assisted the complainant in preparing trial during the delayed period of lending legal materials through other measures, such as consultation, there is no breach of the obligation.

Background of the Case

1. Complainant requested measures to appoint a counsel for his retrial and constitutional complaint during his detention at OO Detention Center.

2. After being transferred to OO Correctional Institution, complainant filed a request to use a solitary cell, which was declined for lack of facilities.

3. Complainant made a request to use legal materials maintained in the inmate library at OO Correctional Institution for preparing his retrial, but was not allowed for more than one month.

4. Accordingly, complainant filed this constitutional complaint, alleging that the forbearance by the warden of OO Detention Center to appoint a counsel and the rejection of the aforementioned request to use a solitary cell and the forbearance to lend legal materials by the warden of OO Correctional Institution infringed his right to trial and the right to privacy.

Subject Matter of Review

The subject of review is whether (1) the forbearance of the warden OO Detention Center to respond to a request for appointment of counsel (hereinafter, “the forbearance of appointment of counsel”), (2) the rejection of the warden of OO Correctional Institution to a request to use a solitary cell (hereinafter, “the rejection of use of a solitary cell”), and (3) the forbearance of the warden of OO Correctional Institution to lend legal materials (hereinafter, “the forbearance to lend books”) violate the complainant's fundamental rights.

Summary of the Decision

1. Regarding complaint on the forbearance of appointment of counsel

Complainant consulted a public-service judge advocate at Korea Legal Aid Corporation with regard to his retrial and constitutional complaint. Upon a request to appoint counsel for constitutional complaint, he received from a prison officer printed materials giving information about proceedings of constitutional complaint and application process for a court-appointed counsel, that are available at the website of the Constitutional Court. Considering the application form of court appointed counsel for constitutional complaint is not required to be standardized and may sufficiently be hand-written by a prisoner and submitted to the Constitutional Court, the warden of OO Detention Center sufficiently assisted the complainant in filing constitutional complaint and applying for a court-appointed counsel. As such the omission of governmental power, namely forbearance of appointment of counsel is found not to exist.

2. Regarding complaint on the rejection of use of a solitary cell

The right to change a cell or designate a certain cell does not belong

to a prisoner. Rather a determination of designation of a cell is within the discretion of the warden. Therefore, the rejection of use of a solitary cell is not an exercise of governmental power that is subject to constitutional complaint.

3. Regarding complaint on the forbearance to lend Books

The Constitution and related laws do not impose the 'obligations to lend requested books to a prisoner in a certain period or purchase lost books for loan to a prisoner' on the warden.

Instead, warden is imposed 'constitutional obligations to assist prisoners in preparing and progressing a lawsuit' under the right to trial of Article 27 Section 1 of the Constitution as prisoners face practical difficulties in being protected the right to trial. The problems include gathering evidence, appointing and consulting a counsel, accessing to information related to trial, and attending at trial and oral argument.

Nevertheless, a specific measure in assisting prisoners should be determined by the warden with the overall consideration of diverse aspects of several systems and circumstances of a correctional institution. As long as the prisoners' right to trial is effectively guaranteed from the perspective of the entire system, the constitutional obligations imposed on warden does not necessarily have to be satisfied by lending legal materials.

The records of this case reveal that the warden of OO Correctional Institution provided proper and effective assistance to prisoners in preparing lawsuit during the delay of loaning books, considering the fact that prisoners can have access to information by printing out web-pages or copying materials if they are proven to be an urgent materials necessary for trial and prisoners may use a consultation service at the correctional institution. Therefore, the 'constitutional obligation to assist a prisoner in preparing lawsuit' is not violated.

17. Requirement for Full Adoption

[25-2(A) KCCR 610, 2011Hun-Ga42, September 26, 2013]

In this case, the Court held that Article 908-2 Section 1 Clause 1 of the former Civil Act, which prevents full adoption by single persons, by stipulating that, in principle, only couples who have been married for three or more years are entitled to full adoption, does not infringe on the single persons' right to equality and family life and is therefore not in violation of the Constitution.

Background of the Case

1. The complainant is a female doctor and single. When her very close friend Mr. Park O-Sik died in 2005, she actively engaged in the child care of his children Park O-Ni and Yu O-Yeop (Park O-Jin before surname and name change) by, among others, funding living expenses for late Mr. Park's wife Yu O-Dong and children, maintaining a close, family-like relationship. The complainant concluded, after consulting with Yu O-Dong and the children, that it would be best for the sake of their welfare if she raised the children and applied for full adoption of Park O-Ni and Yu O-Yeop But the application was denied on November 13, 2009, on the ground that the complainant was not married.

2. On November 11, 2010, the complainant made an additional attempt to apply for full adoption of Yu O-Yeop and with the application pending, filed for a motion requesting constitutional review, on December 31, 2010, of Article 908-2 Section 1 Clause 1 of the former Civil Act that prevents full adoption by singles, arguing that it violates her rights to equality and pursuit of happiness. The competent court granted the motion and on December 5, 2011, filed a request for the review with the Constitutional Court.

Provision at Issue

The subject matter of review is the constitutionality of Article 908-2

Section 1 Clause 1 of the former Civil Act (amended as Act No. 7427, Mar. 31, 2005 and before being amended as Act No. 11300, Feb. 10, 2012)(hereinafter referred to as the "Provision") which is as follows:

Former Civil Act (amended by Act No. 7427, Mar. 31, 2005 and before being amended by Act No. 11300, Feb. 10, 2012)

Article 908-2 (Requisites, etc. for Full Adoption)

(1) Any person who intends to make the full adoption of a child shall make a request to the Family Court for such full adoption after meeting the following requirements:

1. The adoption shall be made jointly by the husband and wife who have been married for three years or more: Provided, That where either of the husband and wife who have been married for one year or more makes the full adoption of the spouse's child as his or her one, the same shall not apply;

Court Opinion by Four Justices

1. Whether unmarried people's rights to equality is violated

The Provision limits the eligibility for full adoption only to married persons, with a view to promoting the welfare of adopted children by ensuring that they are adopted into a family capable of providing stable nurturing environment. In single-parent families, unlike married couple ones, the adoptive father or mother alone is responsible for raising children. Allowing a single to be an adoptive parent would end up producing a single-parent family and, therefore, a de facto extramarital child. Accordingly, it is highly likely that single-parent families are disadvantaged in terms of raising adopted children. Furthermore, if an unmarried person is entitled to full adoption, the adopted child will be registered as a child either without a father or mother on the Family Relation Certificate, which may practically obscure the meaning of specifying the fully adopted child as a "biological child." Meanwhile, the

Act on Special Cases Concerning Adoption states that even unmarried persons can be adoptive parents when certain conditions are met. But this type of adoption differs from full adoption under the Civil Act in terms of scope, requirement, procedure, etc. In this context, there is good reason why the Civil Act, unlike the Act on Special Cases Concerning Adoption, excludes singles from those eligible for full adoption. Therefore, the Provision does not infringe on the singles people's rights to equality.

2. Whether single people's rights to decide and establish a family (hereinafter "the right to family life") has been violated

The Provision aims to enhance the welfare of adopted children by allowing them to be adopted into families that can afford stable child care environment. As single-parent families are disadvantaged in raising adopted children compared to married couple families, denying singles the right to full adoption is an appropriate means to achieving the aforementioned legislative purpose. Moreover, an adult single can establish a family through general adoption although not through full adoption; the adopted child, in accordance with Article 781 of the Civil Act, can alter his or her surname and origin of surname to succeed that of the adoptive parent with the court's approval; and the Family Relation Certificate alone does not reveal the fact that the child was adopted. Although the adopted child keeps his or her kinship prior to adoption in the case of general adoption, it is possible to create a family environment where the adopted child can feel the sense of belonging and inclusion under the framework of general adoption. The Provision promotes the welfare of adopted children by allowing them to be adopted into stable families based on marital relationship and thereby to grow in a better child care condition. Single people may have their right to family life somewhat restricted as their full adoption is prevented, but since they are still allowed to make general adoption, the limit on private interest is not necessarily bigger than the abovementioned public

interest. In sum, the Provision does not violate the rule against excessive restriction and thus neither infringes on the singles' freedom of family life.

Dissenting Opinion of Five Justices

As much as there may be married persons who are not suitable for full adoption, there may also be single people who are capable of providing a nurturing environment beneficial to adopted children. Marital relationship at the time of full adoption may change later due to divorce, etc. If so, the fact that the adoptive parent was married when the adoption was made is not an absolute guarantee of a child raising environment conducive to the child's welfare. Since the current full adoption system requires court permission for the purpose of enhancing children's welfare, when a single applies for full adoption, the court may take into account a number of circumstances and decide whether to grant the application or not. For this reason, prohibiting full adoption on the sole ground of unmarried status will prevent full adoption by even those who can afford a stable nurturing environment. As social prejudice against single-parent families is one that should be eradicated than promoted, banning full adoption by singles on this ground rather reinforces the social prejudice and is therefore unreasonable. Meanwhile, the Family Relation Certificate and other certificates on the Family Relation Register are merely “tools” to register and certify the generation and alteration of citizens' family relations. This cannot serve as the basis for excluding singles from full adoption. Furthermore, stating only a father or mother on the Family Relation Register is also one way of indicating the biological parent and child relationship. As such, allowing singles to carry out full adoption does not necessarily hinder the register's function of revealing biological relationships. Adoption under the Act on Special Cases Concerning Adoption and full adoption under the Civil Act have common grounds in that both are permitted upon the court's decision based on consideration of the adopting parent's motive,

child care ability, etc. Also both of the Acts put the adopted child's welfare as their top priority. Therefore, the essential difference between the two Acts is not big enough to exclude singles only in the case of full adoption under the Civil Act. This being the case, banning single persons from full adoption solely because the person is unmarried is not considered an appropriate means to guarantee the welfare of adoptive children.

Furthermore, even if a single person is entitled to general adoption, full adoption is likely to generate more solid, stable parent-child relationship. Also, there may be cases where the surname and the origin of surname cannot be altered. In such a case, general adoption on the certificate stipulated in the Family Relation Registration Act, compared to full adoption, is more likely to reveal the fact that the child was adopted. Therefore, for a single adoptive parent who wishes to provide the best nurturing environment where the adopted child can fully mingle with the new family and thus build a relationship resembling that of a biological parent and child, general adoption cannot be a substitute for full adoption.

Denying even eligible single persons the right to full adoption when it is possible to ensure the welfare of adopted children through court admission results in reducing the opportunity for children not enjoying appropriate support and protection to be raised in a better family environment through full adoption, thereby undermining the promotion of adopted children's welfare.

For these reasons, the Provision infringes on the single people's rights to equality and family life.

18. Worker's Injury Inflicted during Commuting

[25-2(A) KCCR 630, 2012Hun-Ka16, September 26, 2013]

In this case, the Constitutional Court held that Article 37 Section 1 Item 1 (c) of the Industrial Accident Compensation Insurance Act does not violate the principle of equality. Under the law an accident is recognized as an 'occupational accident' only when a worker suffers injury, disease or disability or dies due to any off-premise accident occurring while he/she commutes to or from work using a transportation means provided by the employer or other similar means under the direction and control of the employer (Judgment of constitutionality was made as the opinion of non-conformity to the Constitution was the majority, but nevertheless fell behind the quorum of six Justices needed for declaring unconstitutionality).

Background of the Case

(1) The petitioner had been working for OO Television Network as chief of technology. On July 27, 2011 he received an emergency call from the company that the company building was flooded due to the prolonged local torrential downpour. On his way to comply with the call order, he was buried and injured from the landslide that occurred around Mt. Woomyeon located in the Southern district of Seoul at 8:25 a.m. Due to the accident, he was diagnosed with tetraplegia and spinal cord compression, etc.

(2) On September 2, 2011, the petitioner filed an application for medical care benefit pursuant to the Industrial Accident Compensation Insurance Act to the Korea Workers' Compensation & Welfare Service(hereinafter the 'Service') but the application was denied on September 16, 2011 on the basis that the injury could not qualify as resulting from an 'occupational accident.' The petitioner filed an administrative suit to vacate the Service's disposition in the Seoul Administrative Court on December 16, 2011(2011GuDan30741). While

the case was pending, the petitioner also filed a motion to request for a constitutional review of Article 37 Section 1 Item 1 (c) of the Industrial Accident Compensation Insurance Act on January 30, 2012. The court granted the motion and requested constitutional review on July 27, 2012.

Provision at Issue

The subject matter of review is whether Article 37 Section 1 Item 1 (c) of the Industrial Accident Compensation Insurance Act (Revised as Act No. 9988, Jan. 27, 2010) (hereinafter, the "Provision") is constitutional. The Provision at issue is as follows:

Article 37 (Standards for Recognition of Occupational Accidents)

(1) If a worker suffers any injury, disease or disability or dies due to any of the following causes, it shall be deemed an occupational accident: Provided, That this shall not apply where there is no proximate causal relationship between his/her duties and the accident:

1. Accident on duty:

(c) Any accident that occurs while he/she commutes to or from work using a transportation means provided by the employer concerned or other similar means under the control and management of his/her employer.

Summary of the Decision

1. Discrimination between benefited employees and non-benefited employees

The Worker's Compensation Insurance (hereinafter, the "WCI") is a no-fault compensation system in which an injured employee is entitled to receive benefit for an occupational injury without proving fault or negligence. This is based on the notion of liability insurance. In this regard, it is reasonable that workers who are injured while commuting routinely and not under the control and management of employer may

not be eligible for the WCI. The right to receive the WCI is a statutory right created by specific legislation, where a wide range of legislative discretion is recognized. Meanwhile the Supreme Court has applied more flexible interpretation in deciding whether an accident while commuting can qualify as an occupational injury, thereby expanding the scope of protection for those who are injured during commuting. Also it is legitimate to provide different compensation for those injured during a business trip from those injured during regular commute since a business trip is under the specific direction and control of the employer. While some foreign legislation on worker's compensation insurance covers a commuting accident occurring on the habitual route between workplace and home, some of the insurance premium must also be paid by employees, unlike our legislation where the employers pay all the cost for insurance. Considering the above-mentioned facts, we conclude that the Provision does not violate the principle of equality by awarding arbitrary and unreasonable discrimination, even though it does not recognize employers' injury sustained during the daily commute to or from work with use of personal vehicles or public transportation (hereinafter, “non-benefited employers”) as occupational accident, as opposed to employees who commute by vehicles provided by their employers or by similar means (hereinafter, “benefited workers”).

2. Discrimination between public officials and general workers

Given the legal characteristics of the WCI scheme to provide compensation for no-fault liability; the difference in status and position between regular employees and public officials; the differences in statutory basis, purposes and nature of public officials' pension system and worker's compensation; the difference in types and quality of benefits between public officials' pension system and worker's compensation (benefits under the WCI is more diverse and sufficient); the difference in sources of payment; the possible increase in financial burden of the WCI scheme by recognizing normal commute injuries as

industrial injuries; and the wide legislative discretion in the WIC scheme, the Provision cannot be deemed to arbitrarily discriminate against general employees even though it does not recognize normal commute accidents as occupational accidents.

Opinion of Incompatibility to the Constitution of Five Justices

1. Discrimination between benefited employees and non-benefited employees

It is true that worker's compensation also functions as assisting and financially supporting the injured employee's livelihood. Therefore, it is more compatible with the life assisting function of the worker's compensation to protect employees through recognizing injuries sustained during ordinary commute from/to work, which is no different to injuries sustained during a business trip, as occupational injuries. But the Provision unreasonably excludes non-benefited employees from coverage without any proper basis. In many countries like Germany, France and Japan, commute injuries have been compensable for a long time. In Korea, however, in spite of the long debate on this issue, there has yet to be any specific legislation for the protection of employees injured by commute accidents. Possible financial difficulties the worker's compensation might suffer can be overcome by state's active exercise of the right to indemnity against the injurer, or by limiting the scope of compensation only to injuries occurred while commuting through normal and routine route and ordinary transportation means, or by making employees share some of the insurance fee with employers. In contrast, the physiological, physical and financial damages to the injured but not-benefited employees are very serious. Therefore, the Provision, which arbitrarily discriminates against non-benefited employees by imposing unreasonable financial disadvantage on them, violates the principle of equality.

2. Discrimination between public officials and general employers

Considering the facts that commuting of general employees and public officials are practically the same; the purposes of worker's compensation scheme and civil service injury benefit scheme are basically the same in that both are designed to protect workers from all kinds of occupational injuries or disease; both schemes share similarity in operation methods and way of securing financial resource, we are of the opinion that the Provision is problematic in excluding normal commute injury from insurance benefits, unlike the civil service injury benefit scheme. But as we already held that the Provision is in violation of the principle of equality for discriminating on non-benefited employers, it seems redundant to go further with this issue.

3. Decision of incompatibility with the Constitution

If the Court holds the Provision unconstitutional, even the minimum legal basis for recognizing a certain commuting injury as an occupational injury will become void immediately, thereby leading to a legal vacuum and confusion. Therefore, it is desirable for the Court to declare the Provision as incompatible with the Constitution, making the Provision to be tentatively applied until the legislature amends it in accordance with the principle of equality.

19. Audio Recording and Documenting Inmate-Attorney Meeting

[25-2(B) KCCR 26, 2011Hun-Ma398, September 26, 2013]

In this case, the Constitutional Court of Korea held that an inmate complainant's right to trial was violated by the act of the warden who audio recorded and documented the content of the inmate's meeting with his court-appointed attorney to discuss matters on a constitutional complaint case

Background of the Case

The complainant, who is an inmate, filed a constitutional complaint seeking a decision that the prison regulation on hairstyle is unconstitutional. Afterwards, he had two visitations with his court-appointed attorney. During the course, the respondent warden arranged the visitations to take place in an area in which the device to prevent physical contact is installed and also audio recorded and documented the content of the meeting.

On July 19, 2011, the complainant filed this constitutional complaint seeking a decision that the act of audio recording and documenting the meeting with his attorney (hereinafter “the Act of Recording”) is unconstitutional.

Subject Matter of Review

The subject matter of review is whether the Act of Recording was constitutional.

Summary of the Decision

If the content of an inmate's meeting with his or her attorney is audio or video recorded, the content is exposed to the prison, which is a third

party. This puts the inmate and attorney in a position to be extremely careful in their conversation, especially when the opposing party of the lawsuit is the State or prison and the content concerns maltreatment in the correctional institution. In such cases, an audio or video recording of the content of the meeting effectively nullify the principle of equal weapons, which is to ensure that both parties are on an equal footing.

The possibility that an attorney would commit or engage in an illegal act by conspiring with an inmate through the meeting is close to none, because attorneys, even compared to other professions, are subject to a higher standard of public responsibility in the profession. In addition, it is hard to contemplate that audio or video recording is required for the purpose of edification or social rehabilitation of the inmate, when the content of the meeting with attorney concerns preparation of a lawsuit.

Therefore, any audio or video recording of an inmate's meeting with his or her attorney should not be allowed. When special circumstances indicate objectively and specifically that the inmate, in conspiracy with his or her attorney, would commit an act that is against the law or that would disturb the order of the prison, the warden can prevent the meeting itself to achieve correctional purposes.

In this case, the act of audio recording and documenting the content of the meeting, which should not be allowed considering the purpose and nature of the meeting as a visitation by the complainant's court-appointed attorney for a constitutional complaint case, infringes on the complainant's right to trial.

Dissenting Opinion of Two Justices

While an inmate's right to have a meeting with an outside person is recognized, it is necessary to maintain discipline and order within any correctional institution which supervises a large number of inmates as a

group. Therefore, the freedom of an inmate as to visitation has internal limitation, and the extent to which an inmate's right to visitation is recognized essentially falls under the policy-making authority of the legislature.

The complainant was designated as one of “inmates of special concern”, meaning he is subject to a stricter supervision, for his crimes of assaulting and causing injury to correctional officers. Moreover, he has a history of being punished for violations of prison rules for multiple times. Considering these facts, the Act of Recording in this case not only serves a legitimate purpose of preventing destruction of evidence and any further criminal acts and maintaining safety and order of the correctional institution, but also is a use of an appropriate measure.

The Administration and Treatment of Correctional Inmates Act sets the principle that the content of an inmate's meeting with an outside person not be listened to, documented, or audio or video recorded. It also provides that the warden may use his or her discretion to allow audio or video recording as an exception only when there exists any special circumstance specified under Article 41(2). In the exceptional situations where audio or video recording is conducted, the inmate should be informed of the fact in advance. Also, the protection of confidentiality and the handling of the audio or video recorded meeting materials should be carried out with utmost care. As such, the Act provides institutional measures to minimize the possibility of infringement on the inmates' fundamental rights that might result from such recording. In addition, an inmate is free to secretly exchange opinions with his or her attorney through letters and may use the opportunity of meeting the attorney during court appearance for trial to sufficiently exchange opinions on confidential matters. A special treatment of attorney visitation can lead to a problem of unreasonable discrimination against other representatives for litigation (*e.g.* legal representative, family,

patent agent) who are not attorneys.

Especially, the complainant was designated as one of the “inmates of special concern”, for his crimes of assaulting and causing injury to correctional officers for three times, and has a history of being punished for violations of prison rules for 27 times. He was also diagnosed to be suspected of having so called “delusion of reference” symptom. Considering his overall characteristics and attitudes in prison at the time, there was reason to suspect that the complainant might behave unexpectedly or make trouble. The necessity to record the content of the inmate's meeting even with his attorney was thus great to help correction and edification and promote rehabilitation into society by keeping track of the complainant's movements. Furthermore, the contents of the constitutional complaint filed by the complainant hardly support a finding that the complainant's right to trial was substantively infringed because of the Act of Recording.

Therefore, the Act of Recording in this case does not constitute an act of excessive restriction or a violation of the complainant's right to trial.

20. Restriction on Bar Exam Application regarding an Offender Sentenced to Suspended Execution of Imprisonment

[25-2(B) KCCR 94, 2012Hun-Ma365, September 26, 2013]

In this case, the Court held that Article 6(3) and Article 7(2) of the National Bar Examination Act do not violate the freedom of occupation and the right to equality. Article 6(3) bans from applying for a bar exam a person for whom two years have not passed since the end of suspension of a sentence of imprisonment without labor or heavier punishment. Article 7(2) singles out only the military service period to be excluded from the limitation period of five years during which a person is obligated to apply for the bar exam after obtaining a juris doctorate degree at a professional law school.

Background of the Case

(1) The complainant was sentenced to suspended execution of one-year imprisonment without labor for violating the Act on Special Cases Concerning the Settlement of Traffic Accidents, and the ruling was finalized on February 11, 2012.

(2) The complainant entered law school in March 2010 and earned a master's degree in February 2013. The complainant tried to apply for the second national bar exam conducted in January 2013. But Article 6(3) of the National Bar Examination Act bans from applying for a bar exam a person for whom two years have not passed since the end of suspension of a sentence of imprisonment without labor or heavier punishment, and the complainant was unable to apply until February 10, 2015.

(3) The complainant, therefore, filed this constitutional complaint requesting constitutional review of Article 5(2) of the Attorney-at-Law Act and Article 6(3) and 7 of the National Bar Examination Act.

Provisions at Issue

The subject of review is whether Article 5(2) of the Attorney-at-Law Act (amended as Act No. 8991, Mar. 28, 2008) (hereinafter the "Attorney Disqualification Provision"), Article 6(3) of the National Bar Examination Act (enacted as Act No. 9747, May 28, 2009) (hereinafter "Exam Disqualification Provision") and Article 7(2) of the same Act (hereinafter "Exception to Exam Limitation Period") infringe on the fundamental rights of the complainant and thus violate the Constitution. The Provisions are set out below:

Attorney-at-Law Act (Amended as Act No. 8991, Mar. 28, 2008)

Article 5 (Grounds for Disqualification of Attorneys-at-Law)

Any person falling under any of the following subparagraphs shall be disqualified from being an attorney-at-law:

2. A person who is sentenced to a stay of execution of imprisonment without prison labor or heavier punishment and for whom two years have yet to elapse since the lapse of the stay period;

National Bar Examination Act (Amended as Act No. 9747, May 28, 2009)

Article 6 (Reasons for Disqualification)

A person falling under any of the following subparagraphs may not apply for the Examination during the period of the Examination announced under Article 4:

3. A person for whom two years have not passed since the end of the suspension of a sentence of imprisonment with labor or heavier punishment;

Article 7 (Limitation of Period and Number of Applications)

(2) Where a person has completed mandatory military service under the Military Service Act or the Military Personnel Management Act, after the person earns a juris doctorate degree from a professional law school under Article 18 (1) of the Act on the Establishment and Management of Professional Law Schools, the period of military service

shall not be included in the period of application for the Exam under subparagraph (1).

Summary of the Decision

1. Judgment on the Attorney Disqualification Provision

The complainant is not qualified as attorney and is thus not subject to the Attorney Disqualification Provision, which differs from the Exam Disqualification Provision in terms of legislative intent and specific content governed. Therefore, the complainant does not satisfy the self-relevance requirement related to the Attorney Disqualification Provision, and the complaint filed against this Provision is non-justiciable.

2. Judgment on the Exam Disqualification Provision

The Exam Disqualification Provision aims to secure and maintain the important public interest of removing from the service of attorneys at law those who have been sentenced to suspended execution of imprisonment without labor or heavier punishment and thus cannot retain fairness and credibility as attorney. In this sense, the Exam Disqualification Provision does not infringe on the complainant's freedom of occupation.

Patent agents, real estate agents, and labor consultants are essentially different from attorneys at law in the work they perform, social status, etc. As such, not providing for disqualification conditions for applying exams or having difference in the disqualifying period and standard time point regarding qualifying examinations for the former professions do not infringe on the complainant's right to equality.

3. Judgment on the Exception to Exam Limitation Period Provision

The Exception to Exam Limitation Period Provision is designed to

prevent dissipation of law school education and guarantee equality between bar exam applicants. It cannot be said that the legislature overstepped its discretion just because exceptions in calculating the exam period have not been adopted to prevent disadvantages attributable to one's own liability of criminal sanctions. In particular, the possibility to pass the bar exam still exists even when reasons for exam disqualification occur and application opportunities are reduced. Also courts have the liberty to put into consideration the disqualifying period within the scope of sentencing discretion. Therefore, it is scarcely the case that a person will not be given even one opportunity to apply for a bar exam when sentenced to suspended execution of imprisonment, except for cases where his/her conduct or nature of crime is so significantly grave as to harm the integrity of an attorney. The Exception Provision requires applicants to obtain the license to practice law before the effect of law school education dissipates save for a special reason, namely performing mandatory military service, which in itself is closely associated with the positive qualifications of a professional attorney. Thus, even if someone, in a very slim chance, is not granted even one opportunity to take the bar exam, this is cannot considered a legislative overstepping and a violation of the freedom of occupation.

While those who perform military service are fulfilling their duty of national defense provided in the Constitution, the complainant who is disqualified from taking the bar exam due to having been sentenced to suspended execution of imprisonment without labor or heavier punishment, is being sanctioned for his/her own socially reprehensible liability. For this reason, specifically excluding only the military service period from the exam application period has rational grounds, and therefore the Exception Provision does not infringe on the complainant's right to equality.

Dissenting Opinion of Three Justices on the Exception to Exam Limitation Period Provision

As Article 7(1) of the National Bar Examination Act already restricts the time limit and frequency of applying for the bar exam, additional reduction in the time period and number of opportunities for taking the bar exam due to some disqualifying reasons constitutes a not- half-as minor restriction on fundamental rights. Furthermore, whether the number of exam applications is reduced and to what number of times will depend on coincidental circumstances such as the time of ruling, which is not directly associated with liability of the offender. There could even be cases where a person has earned a master's degree from a professional law school yet completely denied the chance to apply for a bar exam. This, in fact, results in a permanent denial of the opportunity to become an attorney by a coincidental circumstance, which amounts to excessive restriction of the rights of those intending to take the bar exam. In particular, those who have already been practicing law with an obtained license and have been sentenced to suspended execution of imprisonment without labor or heavier punishment, are allowed to continue their service after the designated period set forth in the Attorney Disqualification Provision. In comparison, the Exception Provision ends up requiring the prospective bar exam applicants of higher level of ethics than those already practicing law. This difference clearly lacks systematic balance and constitutes a significant overstepping of legislative discretion in forming the attorney license system, which is contrary to the principle of the least restrictive alternative. Therefore, the Exception Provision fails the least restrictive means requirement and infringes on the complainant's occupational freedom.

21. Accomplice's Statement in Report of Trial

[25-2(B) KCCR 141, 2011Hun-Ba79, October 24, 2013]

In this case, the Constitutional Court of Korea held that Article 315(3) of the Criminal Procedure Act, which sets forth as one of the *ipso facto* evidence 'other document prepared under circumstances that specially support its credibility', does not violate the principle of clarity. The court also held that interpreting the provision to include such report of trial that contains the statement of an accomplice who is a defendant in a different case, does not infringe on a defendant's right to a fair trial.

Background of the Case

1. The complainant was found guilty on October 14, 2010 by the Daejeon District Court on charges that he solicited Lim and Jo to commit violent acts and Lim O-Yeong and Cho O-Gu then inflicted injury on the victim using a dangerous item.

2. The accomplices, Lim and Jo, were indicted and convicted beforehand and, in their criminal trial, stated that the complainant solicited the above violent acts. The report of the trial which contained the statements was admitted as evidence in the complainant's criminal trial to prove the complainant's guilt. The complainant appealed. The complainant argued in appeal court that Article 315(3) of the Criminal Procedure Act, which provided the basis for the admission of the above-mentioned report of trial as evidence, is against the Constitution and moved the court to submit a request for constitutional review of the statute. When the motion was denied, the complainant filed this constitutional complaint.

Provision at Issue

Criminal Procedure Act (enacted by Act No.341 on September 23,

1954)

Article 315 (Documents Admitted Ipso Facto Evidence) The following documents may be admitted as evidence:

3. Other document prepared under circumstances that specially support its credibility.

Summary of the Decision

1. Whether the principle of clarity is violated

The Provision does not precisely define the meaning of ‘other document prepared under circumstances that specially support its credibility.’ However, the structure and the legislative purposes of the provisions of the Criminal Procedure Act related to hearsay rules, which is a system to safeguard the defendant's right to cross-examination, and the use of the term ‘other’ in the Provision implying that the documents listed in Article 315(1) and (2) are examples of ‘document prepared under circumstances that specially support its credibility’, indicate the following: ‘Other document prepared under circumstances that specially support its credibility’ prescribed in the Provision can be interpreted to mean a ‘document upon which a high degree of credibility is guaranteed by circumstances such that the question of whether the opportunity to cross-examination is provided becomes immaterial’, comparable to those certification documents issued by public authorities and the documents produced in the ordinary course of business listed respectively under Article 315(1) and (2). As such, the meaning of the Provision can be understood without difficulty by ordinary people with average common sense. It can also be recognized by the judges who use supplementary value judgment, and such supplementary interpretation is unlikely to be swayed by personal preference. Therefore, the Provision does not violate the principle of clarity.

2. Whether the principle against excessive restriction is violated

The Provision intends to prevent results counter to the discovery of substantive truth and judicial economy, which are also constitutional mandates on the Criminal Procedure Act, by applying hearsay rules in every case without exception. Accordingly, the Provision has legitimate legislative purpose and adopts a proper means. Additionally, as long as the document admissible under the Provision is interpreted to be a document with credibility supported by circumstances such that providing the opportunity to cross-examination becomes unnecessary, the restriction on the defendant's right to defend oneself is already narrowed to the least possible extent.

Meanwhile, at issue is whether the Provision unjustly restricts a defendant's right to defend oneself, by admitting the report of trial that contains the statement of an accomplice who is a defendant in a different case and thereby allowing excessively broad exceptions to the hearsay rules. However, considering the nature of the document and the strict legal procedure that applies when it is made, the report of trial is secured with a high degree of voluntariness of statement, correctness of entry and procedural legitimacy. Moreover, in the adversary system adopted by the Criminal Procedure Act, statement of the defendant in a public trial is examined and impeached by the prosecutor who acts as the opposing party. For these reasons, such statement cannot be treated same as a unilateral statement by a third person. There is consequently a clear difference, in terms of the external circumstances relevant to the credibility of the document, between the statements contained in the report of trial, which is part of in-court statement, and other forms of hearsay statements. If the admissibility of such report of trial is uniformly denied, it would be a contradiction in the legal system in that reports written by investigation agencies, which are less credible than the reports of trial, are admitted under certain conditions, whereas the reports of trial, which are secured with a higher degree of voluntariness and

credibility, are denied admissibility as evidence. Further, it would seriously hinder the discovery of substantive truth because any report of trial that contains the statement of an accomplice would be out of deliberation in the concerned proceeding despite its probative power. Considering the foregoing reasons, interpreting the Provision to include reports of trial that contain the statement of an accomplice as a defendant in a different case does not cause an excessive restriction on a defendant's right to defend oneself amounting to an infringement on the defendant's right to a fair trial.

Concurring Opinion of Three Justices

A report of trial that contains the statement of an accomplice may be one secured with a high degree of voluntariness and procedural legitimacy because the statement is made in front of the judge in an open court. However, there is ample possibility that the accomplice might have made a false statement with the intention to shift the responsibility to the defendant in the concerned case. Therefore, a legitimate doubt may be raised as to whether such statement falls into a category where a high degree of credibility is guaranteed by circumstances 'such that providing the opportunity to cross-examination becomes unnecessary.' As such, there is doubt in the interpretation of the Provision, on the view of systemic interpretation, about including the reports of trial that contain the statement of an accomplice. It is desirable for the legislature to write the law clearly to avoid the possibility of infringement on the right to a fair trial and improve the criminal procedural system under the principles of the protection of fundamental rights and the rule of law, *e.g.* by admitting the statement of the accomplice in the report of trial only when the accomplice appears in court as witness and makes an inconsistent statement with his prior statement contained in the report of trial. Thus, the Provision should be accordingly revised.

22. Disclosure of Personal Information

[25-2(B) KCCR 156, 2011Hun-Ba106 · 107(consolidated), October 24, 2013]

In this case, the Court upheld the constitutionality of Article 38 Section 1 Item 1 of the former Act on the Protection of Children and Juveniles from Sexual Abuse that mandate the court to order the disclosure of personal information in case a person commits sexual assault against a child or juvenile.

Background of the Case

Following prosecution on charges including adultery with a minor less than 13 years old, the complainants were convicted and ordered to disclose their personal information. Thus, they filed for motion to request constitutional review of Article 38 Section 1 Item 1 of the Act on the Protection of Children and Juveniles from Sexual Abuse, which requires the court to order offenders of sexual assault against a child or juvenile to disclose their personal information. When this request was denied, the complainants filed this constitutional complaint.

Provision at Issue

The subject of review is the constitutionality of Article 38 Section 1 Item 1 of the former Act on the Protection of Children and Juveniles from Sexual Abuse (amended as Act No. 10260, Apr. 15, 2010 but before revised as Act No. 11572, Dec.18, 2012)(hereinafter referred to as the "Provision"), which is set out below:

Act on the Protection of Children and Juveniles from Sexual Abuse (Amended as Act No.10260, Apr. 15, 2010 but before revised as Act No. 11572, Dec. 18, 2012)

Article 49 (Disclosure of Registered Information)

(1) With respect to any of the following persons, the court shall

pronounce an order to disclose information prescribed in paragraph(3) through an information and communications network during the registration period prescribed in Article 45(1) of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes (hereinafter referred to as "order to disclose information") in concurrence with a judgment on a sex offense case against a child or juvenile: Provided, That the same shall not apply where the accused is a child or juvenile, or any other special circumstance against disclosure of personal information exists.:

1. A person who commits sexual assault against a child or juvenile;

Summary of the Decision

1. Review on Rule against Excessive Restriction

The Provision aims to protect children and juveniles from sexual abuse and to defend society, which indicates that it serves legitimate purpose and appropriate means. Meanwhile, the scope of those affected and the period of personal data disclosure under the provision is limited. The judge decides whether to order disclosure considering "particular circumstances." There are mechanisms to minimize the damage from disclosure. All of the above indicate that the least restrictive means have been used. Moreover, the purpose of "protecting children and juveniles from sexual abuse" is a very significant public interest compared to the private interest infringed by the provision, which strikes a balance of interests as well. For this reason, the Provision does not violate the least restrictive means requirement or infringe on the complainants' right to personal liberty and self-determination over personal information.

2. Review on Principle of Equal Protection before the Law

Unlike those who commit sexual violence offense against children and juveniles, those who commit regular crimes against children and

juveniles are not obligated to disclose their personal information. But the two cannot be seen as identical comparison groups as regular crimes against children or juveniles, unlike sexual crimes, is criminalized in order to protect life, physical integrity, or property rights of juveniles. Meanwhile, those who commit sexual offenses other than sexual assault against children and juveniles are not subject to disclosure of personal information either, but this distinction is based on an overall consideration of the extent of illegality, social circumstances at time of legislation, public legal sentiment, etc. This means it cannot be seen as arbitrary and unreasonable discrimination. Therefore, the Provision is not in violation of the principle of equal protection before the law.

3. Review of Other Claims by Complainants

The complainants contest that the Provision violates due process and their right to trial, but it is only when the defendant is convicted that the judge can order disclosure of personal information after full consideration of various circumstances. In this sense, the Provision cannot be deemed to violate due process or infringe on the complainants' right to trial.

The complainants also allege that the Provision breaches the double jeopardy principle. However, this doctrine is designed to bar multiple convictions for the same offense. Imposing penalty and ordering personal information disclosure at the same time in a single trial addressing the same criminal act is irrelevant to double jeopardy.

Dissenting Opinion of Two Justices

The Provision serves legitimate purpose, but studies about sexual violence crimes against children and juveniles do not confirm the deterrence effect of disclosing personal information, which indicates that the Provision fails to provide an appropriate means. The personal information disclosure under the Provision is executed through

information and communication networks, which resembles the badge of shame as the modern version of the “scarlet letter.” This is not just a matter of stigma or exclusion against ex-offenders of sexual abuse. The disclosure is highly likely to foreclose the possibility of the offenders' normal return to society; may cause mental pain even to innocent family members and deprive them of their foundation for livelihood; and the scope of those affected by disclosure is too broad as there is no detailed standard for review, for instance risk of recidivism, while the judge is obliged in principle to order disclosure of personal information. Thus, the Provision hardly satisfies the least restrictive means requirement. Also, the crime deterrence effect is too uncertain while the offenders' fundamental rights are seriously undermined, which even fails to achieve the balance of interests. Therefore, the Provision is in breach of the Constitution as it violates the rule against excessive restriction and infringes on the complainants' right to personal liberty and self-determination over personal data.

23. Time Limit of Filing for Formal Trial

[25-2(B) KCCR 224, 2012Hun-Ba428, October 24, 2013]

In this case, the Court held that Article 453(1) of the Criminal Procedure Act, which provides that a motion for formal trial should be filed "within seven days from service of the notice of a summary order", does not infringe on the summary judgment defendant's right to formal trial or the right to equality.

Background of the Case

(1) The complainant received a summary order imposing 1 million Korean won in fines for violating the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (defamation), etc. on August 17, 2012. The copy of the said summary order was initially received by the complainant's mother on September 7, 2012 and delivered to the complainant on the following day. The complainant applied for restoration of the right to formal court proceedings on September 17, 2012, after failing to comply with the designated time limit under Article 453(1) of the Criminal Procedure Act based on notice being delivered on September 7, 2012. However, the application was denied.

(2) The complainant filed an immediate appeal against the decision and filed for motion to request constitutional review of Article 452(1) of the Criminal Procedure Act that stipulates the time limit for filing formal proceedings as "within seven days from service of the notice of a summary order." However, the motion was denied, and the complainant filed this constitutional complaint.

Provision at Issue

The subject of review is the constitutionality of the part of Article 452(1) of the Criminal Procedure Act (enacted Act No. 341, Sept. 23, 1954) which

concerns the defendant (hereinafter the “Provision”), which is set out below:

Criminal Procedure Act
Article 453 (Demand for Formal Trial)
(1) A public prosecutor or the defendant may apply for formal trial within seven days from the day on which he has received notification of a summary order. A defendant may not waive his right to demand formal trial.

Summary of the Decision

1. Whether the Right to Trial is Infringed

The legislature has reasonable discretion in establishing the “time limit for requesting trial or filing an appeal”, which is part of the right to trial as provided in Article 27(1) of the Constitution. However, legislative discretion has its limitations ast it may not make it virtually impossible to file suit or appeal or make it difficult through unreasonable, unjustifiable means and thereby render insignificant the right to trial.

Summary judgment is notified by service of a written order unlike regular criminal trials, so the actual time limit for appeal against summary procedures can be shortened under the Provision compared to regular criminal cases. However, summary procedures are applied in minor cases where only fines and penalties are imposed so that minor cases are dealt with promptly, allowing efficient allocation of judicial resources for the right to trial of citizens to be faithfully protected. Therefore, such limit on the time period for filing an appeal has reasonable grounds. In addition, when a failure to comply with the time limit for filing formal trial stems from causes not attributable to the defendant's responsibilities, the summary order defendant is entitled to seek relief through applying for restoration rights. Appeal against summary judgments is simple in its subject and scope, and there is no

need to specify the reason for appeal either, which means the request for formal trial does not require much time and effort.

Therefore, the Provision does not infringe on the right to request formal proceedings of a defendant who has been issued a summary order by overstepping the reasonable boundary of legislative discretion.

2. Whether the Right to Equality is Infringed

The essence of dispute in civil litigation involves private matters or individual remedies, so it is not so urgent to finalize the proceedings promptly in civil litigation as in the case of criminal litigation. Meanwhile, criminal procedure, which is an exercise of the state's authority to punish crime, strongly requires matters of law to be promptly finalized to prevent destruction or distortion of evidence for substantial fact-finding, and to promptly enforce punishment for general and special prevention, etc.

In addition, summary proceedings deal with relatively minor offences punished only by fines and penalties, the cases that do not involve restriction on the right to life and personal liberty as opposed to criminal procedures. Stressing promptness and efficiency in such minor cases will enable efficient allocation of judicial resources as a whole, which can be a way of protecting the constitutional right to trial more effectively.

In that sense, setting a different time limit for appealing against a summary order than that for appeals against rulings of civil, administrative trials, or applying the same time limit as in regular criminal cases both has reasonable grounds. Thus, the Provision does not infringe on the equality rights of the summary order defendants.

Dissenting Opinion of Four Justices

Article 27(3) of the Constitution provides for fundamental rights of the

accused to public trial in criminal cases. Article 27(1) of the Constitution guarantees the right to trial, which includes the right to a fair trial in which the adversary system and principle of oral proceedings are to be observed and where the parties concerned are given the full right to attack and defend, such as reply to, prove or disprove the charged facts. Therefore, summary proceedings conducted in written briefs not public trial, and based on materials unilaterally submitted by the prosecutor, are an exception to the right trial guaranteed by the Constitution.

The defendant who has received a summary order can restore his/her constitutional right to trial restrained in such an exceptional procedure by filing for formal proceedings. The legislature should carefully note the said significance of the request for formal trial and establish a system for appeal against summary procedures so that fundamental rights of the defendant are not arbitrarily infringed.

Yet, the provision on supplementary service of the Civil Procedure Act shall apply *mutatis mutandis* to the notification of summary orders, which indicates that summary orders served to a representative of the defendant other than the defendant him/herself are also effective. This means that, under the Provision, the time the defendant actually receives the notification of a summary order could be delayed to the point where the exercise of the right to request formal trial becomes irrelevant. In some cases, the defendant could even miss the time limit for formal trial request without knowing the fact that an order has been issued.

The Provision allows for only seven days to file an appeal without taking into account the inevitable incompleteness of “servicing documents”, which becomes the starting point of the filing period. Thus it infringes on the fundamental right “to a fair and public trial” of a defendant who has received summary order, by making it possible to lose the right to request formal trial against his/her will.

24. Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers

[25-2(B) KCCR 248, 2010Hun-Ma219·265(consolidated), October 24, 2013]

In this case, the Constitutional Court held that Article 4 Section 1 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers, which prohibits employers from hiring a fixed term worker for a period exceeding two years, does not infringe upon the complainants' right to contract.

Background of the Case

(1) 2010Hun-Ma219

Complainant had worked for OO Tech. since March 1, 2008 as a factory worker based on short term employment contract. Upon the denial to renew his employment contract by the company on February 28, 2010, he filed this constitutional complaint on April 8, 2010, arguing that Article 4 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers infringes on his fundamental rights.

(2) 2010Hun-Ma265

Complainant Choi O-Soon had worked for OO Trade Co. Ltd for seven years and two months from December 3, 2002 to January 31, 2010 and complainant Sohn O-Soon had worked for the company for nine years and two months from December 20, 2000 to January 31, 2010 as contract based workers. Upon the denial to renew their employment contracts by the company on April 27, 2010, they filed this constitutional complaint on April 8, 2010, arguing that Article 4 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers infringe on their fundamental rights.

Provision at Issue

The subject matter of this case is whether the main text of Article 4

24. Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers

Section 1 of the Act on the Protection, etc. of Fixed Term and Part-Time Workers (revised as Act No. 8074 on December 21, 2006) (hereinafter the 'Provision') infringes on the complainants' fundamental rights. The provision at issue is as follows:

Act on the Protection, etc. of Fixed Term and Part-Time Workers (revised by Act No. 8074 on December 21, 2006)

Article 4 (Employment of Fixed Term Employee) (1) Any employer may hire a fixed-term contract worker for a period not exceeding two years (where his/her fixed-term employment contract is repetitively renewed, the total period of his/her continuous employment shall not exceed two years).

Summary of the Decision

The purpose of the Provision prohibiting any employer from hiring an employee on fixed term contract for a period exceeding two years is to relieve fixed term workers' job insecurity and improve their working conditions through curbing the successive use of fixed term contract workers exceeding a maximum of two years. If a fixed term employment contract is allowed to run without limit, general workers may not be able to refuse the one-sided offer of short term employment contract even when against their will, which could result in increasing temporary, insecure employment and widening the gap between permanent and temporary workers. Therefore, in order to prevent such problems, it is necessary to encourage changing the employment contract into open ended ones by curbing the use of fixed term employment contracts.

It is true that the protection provided by any legislation aiming to maintain fixed term worker's job security can only limited as the employee-employer relationship is basically a private one. As a result, the Provision may, in some cases, cause workers to be temporality unemployed. However, such limitation is inevitable in order to induce employers to transfer fixed term workers' status into an open ended term

basis. And it cannot be denied that the Provision generally has a positive influence on reducing job insecurity or improving working conditions: according to the statistics and resources produced by the Statistics Korea and the Ministry of Employment and Labor, the percentage of employees working under fixed term contracts among all salaried employees has been gradually declining, which shows that employment security has been settling down through switching fixed term appointments into open ended contracts.

Therefore, the Provision does not infringe on the complainants' freedom of contract.

Dissenting Opinion of Two Justices

As it is impossible to transfer all fixed term contracts to open ended contracts after expiration of initial fixed term of two years in the current situation where employability is low, employers may well deny renewal of employment contracts with the fixed term employees. As a result of the Provision, fixed term employees, who used to expect to continue their work at the current workplaces after the expiration of the employment contracts even though on a fixed term basis, may end up being dismissed and unemployed against their will. The government's intervention into the labor market through enacting the Provision has brought about the undesirable result of most fixed term employees losing their jobs with the exception of a few cases where fixed term contracts were transferred to open ended appointments. As such, the Provision fails to stabilize job insecurity or improve working conditions. Rather, it deprives the employees engaged on fixed term contracts of the right to hold fixed term contracts exceeding two years, thereby excessively infringing on the fixed term workers' freedom of contract.

25. Compensation Benefit for Grandchild of the Persons of Distinguished Services to National Independence

[25-2(B) KCCR 263, 2011Hun-Ma724, October 24, 2013]

In this case, the Constitutional Court of Korea held that the relevant part of Article 12(2) and (4)(a) of the Act on the Honorable Treatment of Persons of Distinguished Service to Independence which, in paying compensation for the bereaved family grandchildren of the person of distinguished services to national independence, grants compensation to only one person without exception and gives priority to the eldest grandchild, infringes on the complainant's right to equality and thus is incompatible with the Constitution.

Background of the Case

The complainant is a grandchild on the mother's side of a Person of Distinguished Services to National Independence (PDSNI) who died on December 8, 1943 and is registered as a bereaved family member (grandchild) of the PDSNI along with her older brother. Article 12(2) and (4) of the Act on the Honorable Treatment of Persons of Distinguished Service to Independence, however, grants compensation to only one person giving priority to the eldest grandchild and does not permit any exception in cases where there are more than one grandchild of the same PDSNI. As a result, the complainant's brother became the sole recipient of the compensation, and complainant was found ineligible to be a recipient of the compensation benefit.

The complainant thus filed this constitutional complaint asking the Court to find that the provision above is unconstitutional, arguing that it violates the complainant's right to equality.

Provision at Issue

The subject matter of review is whether the part of limiting the

recipient of the compensation to only one grandchild in Article 12(2) of the Act on the Honorable Treatment of Persons of Distinguished Service to Independence (amended as Act No. 9083 on March 28, 2008) and the part that gives priority to the eldest grandchild in Article 12(4)(a) (hereinafter the "Provision") are in violation of the Constitution by infringing on the complainant's fundamental rights. The contents of the Provision are as follows.

Act on the Honorable Treatment of Persons of Distinguished Service to Independence (amended as Act No. 9083 on March 28, 2008)

Article 12 (Compensation)

(2) The person of distinguished services to national independence and the person who has the first priority among his/her bereaved family members shall be entitled to receive the compensation: Provided, That in the case of the grandchildren, the compensation shall be paid to only one grandchild of the person of distinguished services to national independence who died on or before August 14, 1945, and the right to receive such compensation shall not be transferred to any other grandchild.

(4) Where two or more persons of the same priority exist among the bereaved family members to receive the compensation under paragraph (3), the compensation shall be paid according to the following classification:

a. The oldest shall have priority over the younger, but in the case of the grandchildren, the compensation shall be paid to the oldest of the children of the first child in priority order of the person of distinguished services to national independence.

Summary of the Decision

1. Fundamental rights subject to restriction

The Provision, in granting compensation to bereaved grandchildren of a PDSNI, limits the recipient to only one person without any exception

and gives priority to the eldest person among grandchildren, when there are two or more such grandchildren. The Provision shows differential treatments among grandchildren with respect to the compensation benefit for the bereaved family members and thus raises the issue of whether it violates the complainant's right to equality.

2. Whether the complainant's right to equality is violated

The State's financial capacity is an important factor that should be considered in providing compensation benefit to the bereaved family members of the PDSNI. It is possible, however, to constrain the total amount of the compensation depending on the State's financial capacity while dividing the fixed amount and distribute to multiple members of such family depending on their level of living, at least to tmembers in the same priority order. When there is a member of the family who especially suffers financial difficulties compared to other members of the family and can prove in specificity that other members of the family are not in need of public assistance, the eligibility can be limited to such person who has financial difficulties. As such, there are other ways to actually promote the living of the bereaved family members of the PDSNI without placing additional financial burden on the State. Then, the necessity to limit the recipient of the compensation to only one person among grandchildren without exception is not great, and such limitation is directly counter to the legislative purpose to provide a meaningful compensation benefit for the bereaved family members of the PDSNI to sustain and secure their living.

The financial capacity of a recipient of a social security benefit can be graded based on his or her income and assets, and the procedure to grant the veterans' benefits according to such grade may not carry considerable difficulties. Moreover, administrative convenience can hardly be a public interest of great importance to sacrifice the fundamental rights of individuals in safeguarding the living of the bereaved family of

the PDSNI, and thus cannot justify the restriction that limits the recipient for the compensation to one person without exception.

As the size of family has become smaller since the industrialization era, people have become less economically dependent on their siblings once they get married. Consequently, it is hard to expect that the eldest grandchild would take care of the other younger grandchildren. In addition, there may not be much of a gap in the ages such that one can recognize significant differences among the siblings in the ability to take care of others or the loss in labor capacity. Sometimes, the eldest may be in a better economic situation depending on their job and property. The policy to prioritize the eldest based on 'age' in granting the compensation benefit, therefore, does not comport with the nature of the compensation as an entitlement to social security.

It is true that some exceptions to the Provision exist under the law to grant compensation to a person who primarily took care of the PDSNI or who in agreement is designated as the recipient. The practicality of the exceptions, however, is doubtful, considering the realistic possibility of providing care or the cases in which the eldest grandchild would not cooperate. Nor do other non-monetary benefits for the bereaved family members not eligible for compensation help protecting their living as much as the compensation itself.

As such, the Provision discriminates against the complainant, who is a younger grandchild among the grandchildren of the PDSNI, without a legitimate reason and thus infringes on the complainant's right to equality in violation of the Constitution.

3. Declaration of constitutional incompatibility and order of interim continuance

Because the Provision provides the legal basis to grant compensation

to the bereaved grandchildren of the PDSNI, a plain declaration of the unconstitutionality of the statute would eliminate such legal basis. Further, the legislature should be able to use its discretion to decide the criteria, qualifications and the scope of the recipients entitled to the compensation benefit. The Court therefore orders the legislature to amend the Provision by December 31, 2015 until which the Provision remains in force.

26. Right to Criminal Trial of a Civilian who Damaged Facility for Military Use and Combat

[25-2(B) KCCR 338, 2012Hun-Ga10, November 28, 2013]

In this case, the Constitutional Court of Korea held unconstitutional the part in Article 2(1)(a) of the former Military Court Act that subjects a civilian to jurisdiction of the military court in times of peace when emergency martial law is not declared, where the civilian commits, among crimes prescribed in Article 1(4)(d) of the Military Criminal Act, the crime of damaging 'facility for combat' under Article 69 of the former Military Criminal Act.

Background of the Case

1. The petitioner requesting constitutional review was indicted on charges of damaging a facility for military use within the military base and installation protection zone when he removed a part of the anti-tank protective wall without permission, knowing that the wall is a facility for combat and for military use in the military base and installation protection zone.

2. The petitioner, as a civilian who is neither a soldier nor a civilian worker in the military, was tried by the military court on all charges, because the crime of violating Article 69 of the Military Criminal Act, among the charges, fell under the jurisdiction of the military court.

3. The petitioner asked the Supreme Court to submit a request to the Constitutional Court for constitutional review of the statutory provision that mandates the petitioner, who is not a soldier or a civilian worker in the military, to be tried by the military court. The Supreme Court granted the motion and submitted the request for constitutional review on March 15, 2012.

Provision at Issue

The subject matter of review in this case is whether the part in Article 2(1)(a) of the former Military Court Act that refers to its application to the civilian who committed, among crimes prescribed in Article 1(4)(d) of the Military Criminal Act, the crime of damaging facility for combat under Article 69 of the former Military Criminal Act (hereinafter the "Provision"), violates the Constitution. The contents of the provision are as follows.

Former Military Court Act (amended as Act No. 3993 on December 4, 1987, but before revised as Act No. 9841 on December 29, 2009)

Article 2 (Personal Jurisdiction) (1) Military courts shall have jurisdiction over offenses committed by any of the following persons:

a. Persons prescribed in Article 1(1) through (4) of the Military Criminal Act;

Related Provisions

Former Military Criminal Act (amended as Act No. 3443 on April 17, 1981,but before revised as Act No. 9820 on November 2, 2009)

Article 1 (Persons subject to Application of this Act)

(3) Regarding any of the following persons, this Act shall apply to them as military persons. (subparagraphs omitted)

(4) Regarding Korean nationals or foreigners who perpetrate a crime specified in any of the following subparagraphs, this Act shall apply to them as military persons:

d. A crime under any provision of Articles 66 through 71;

Article 66 (Arson to Military Installations, etc.) (1) A person who damages a military factory, ship, aircraft, or a facility, train, tram, automobile, or bridge for combat by setting fire shall be punished by penalty of death or imprisonment with prison labor for life or for not less than ten years.

Article 69 (Destruction of Military Installations, etc.) A person who damages, or impairs the utility of, goods specified in Article 66 or a railroad, an electric cable, or other installations or goods for military use shall be punished by imprisonment with prison labor for life or for not less than two years.

Summary of the Decision

1. Jurisdiction over Korean nationals who damaged 'facility for combat' under Article 69 of the former Military Criminal Act

According to the Provision, the military court has personal jurisdiction over a Korean national who damaged 'facility for combat' under Article 69 of the former Military Criminal Act.

A 'facility for combat' under Article 69 of the former Military Criminal Act, however, is always a facility that is directly used for military purposes, which constitutes a 'military installation' under the Protection of Military Bases and Installations Act.

A civilian who is neither soldier nor a civilian worker in the military (hereinafter, "civilian") is thus subjected to a trial by the military court under the Provision even when no emergency martial law is declared, if the civilian has allegedly caused damages on a 'military installation' constituting a 'facility for combat.'

2. 'Military articles' under Article 27(2) of the Constitution

Article 27(2) of the Constitution, which provides for the military court to exercise jurisdiction over civilians in times of peace, does not include a crime involving military installations.

Under the former Constitution, Article 26(2) which regulated crimes

regarding military articles and crimes regarding military installations separately, the term ‘military articles’ clearly did not include ‘military installations.’ The same term ‘military articles’ was used in both the former and the current constitutional provisions that set forth the same regulations. But when the current Constitution was amended it clearly intended to exclude jurisdiction of the military court over civilians who commit crimes related to military installation. Also Article 27(2) of the Constitution that stipulates the extent of jurisdiction of the military court over civilians should be narrowly interpreted. Considering these facts, it would only comport with the Constitution if the term ‘military articles’ under Article 27(2) of the current Constitution is interpreted not to include ‘military installations.’

3. Conclusion

Therefore, the Provision, which forces civilians who allegedly damaged a ‘facility for combat’ among ‘military installations’ to be always tried by the military court, violates Article 27(2) of the Constitution, which excludes civilians who commit crimes related to military installations from the jurisdiction of the military court with exception when emergency martial law is proclaimed. It also infringes on the civilians' right to be tried by judges established by the Constitution and the law.

Concurring Opinion of Two Justices

1. Because the term ‘military articles’ under Article 27(2) of the Constitution broadly refers to ‘any items that are or can be used for military purpose’, it should include ‘military installations’ regardless of whether it is movable or immovable. The current Constitution can be understood as a revision to avoid repetition in the former Constitution, for ‘military articles’ naturally include ‘military installations.’ Therefore, a ‘facility for combat’ under the Provision also falls within the meaning of military articles under Article 27(2) of the Constitution.

2. Article 27(2) of the Constitution narrowly grants jurisdiction to the military court only in cases ‘prescribed by law’ among crimes involving ‘important’ military articles. It does not subject civilians who have committed crimes involving all military articles to trial by the military court in times of peace.

However, the Provision forces any civilians who allegedly damaged ‘facility for combat’ in times of peace, regardless of its military importance, to be tried by the military court. Thus the Provision fails to limit the scope to crimes, by type and content, involving important military articles that only by subjecting such crimes to trial by the military court would satisfy special circumstances to preserve the organizations and functions of the military. Therefore, the Provision, in violation of the principle against excessive restriction, infringes on the peoples' right to be tried in an ordinary court, not a military court.

27. Open Board Director of the Private School Act

[25-2(B) KCCR 398, 2007Hun-Ma1189 · 1190(consolidated), November 28, 2013]

In this case, the Constitutional Court decided that Article 14 Sections 3 and 4, Article 21 Section 5, Article 25 Section 3, Article 25-3 Section 1, Article 26-2 Section 1, proviso of Article 53 Section 3, Article 54-3 Section 3 of the Private School Act do not violate the basic rights of the complainants. The provisions stipulate respectively, the open board director, open-type auditor, term of temporary directors, normalization of educational foundation for which temporary directors are appointed, university deliberation committee, restriction on reappointment of the head of an elementary school and secondary school, and restriction on appointment of spouse of the head director of educational foundation as the headmaster.

Background of the Case

The complainants are educational foundations (school juristic persons) that establish and administrate a private school, directors or former directors of an educational foundation, heads of school, and enrolled students and their parents of a private school. They filed this constitutional complaint, alleging that their basic rights were violated by the several provisions of the Private School Act revised as Act No. 7802 on December 29, 2005 and the Private School Act revised as Act No. 8545 on July 27, 2007.

Provisions at Issue

The subject matter of review is whether Article 14 Sections 3 and 4, Article 21 Section 5, Article 25 Section 3, Article 25-3 Section 1, Article 26-2 Section 1, proviso of Article 53 Section 3, Article 54-3 Section 3 of the Private School Act (revised as Act No. 8545 on July

27, 2007) are unconstitutional. The provisions at issue are stated as follows:

Private School Act (revised as Act No. 8545 on July 27, 2007)

Article 14 (Executives)

(3) Every educational foundation shall select and appoint directors who correspond to one fourth (Provided, That the numbers below decimal point shall be rounded up) of the fixed number of directors referred to in the provisions of paragraph (1) (hereinafter referred to as "open board directors") from among the multiples of persons who are recommended by the open board director recommendation committee referred to in the provisions of paragraph (4).

(4) The open board director recommendation committee (hereinafter referred to as "recommendation committee") shall be established at the university deliberation committee referred to in the provisions of Article 26-2 (hereinafter referred to as "university deliberation committee") or the school operating committee referred to in the provisions of Article 31 of the Elementary and Secondary Education Act (hereinafter referred to as "school operating committee"), and its organization, operation and composition shall be determined by its articles of association and the fixed number of the members of the recommendation committee shall be odd number not less than five and one half of the members of the recommendation committee shall be recommended by the university deliberation committee or the school operating committee: Provided, That in cases of the school juristic person that establishes and operates the university and graduate school of which sole purpose is to train religion leaders as prescribed by Presidential Decree, the relevant religious group shall recommend one half of the members of the recommendation committee.

Article 21 (Restrictions on Appointment of Executives)

(5) One of the auditors who are posted in an educational foundation shall be the person who is recommended by the recommendation committee.

Article 25 (Appointment of Temporary Director)

(3) Temporary directors shall hold office until a cause referred to in paragraph (1) is removed: Provided, That their term of office may not exceed three years from the date they are selected and appointed.

Article 25-3 (Normalization of Educational Foundation for which Temporary Directors are Selected and Appointed)

(1) When the grounds of the selections and appointments of temporary directors who are selected and appointed pursuant to the provisions of Article 25 are deemed to be annulled, notwithstanding the provisions of Article 20, the competent agency shall promptly dismiss them through the deliberation of the mediation committee and select and appoint directors.

Article 26-2 (University Deliberation Committee)

(1) The university deliberation committee mandated to deliberate on the matters falling under any of the following subparagraphs shall be set up in each of university educational institutions: Provided, That the matters in subparagraphs 3 and 4 shall be subject to consultation:

1. Matters concerning development plan of the university;
2. Matters concerning establishment or amendment of school regulations;
3. Matters concerning establishment or amendment of a charter of the university;
4. Matters concerning operation of university educational course;
5. Matters concerning recommendation by the members of recommendation committee;
6. Other important matters concerning education determined by the articles of association.

Article 53 (Appointment and Dismissal of Head of School)

(3) The terms of office for the heads of various levels of schools and the terms of office of the managers of private schools that are juristic persons shall be set by the articles of association and the terms of office of the managers of private schools who are private persons shall be set by the rules and the terms of office for them shall not exceed four years and they may be reappointed: Provided, That the head of an elementary

school and a secondary school may be reappointed only once.

Article 54-3 (Restrictions on Appointment)

(3) The chief director of any educational foundation and anyone who is related with the person falling under each of the following subparagraphs shall be prohibited from being appointed to the head of the school that has been established and operated by the relevant school juristic person: Provided, That the same shall not apply to those who obtain the consent from not less than two-thirds of the fixed number of directors and approval of the competent agency:

1. The spouse;
2. The lineal ascendant and the lineal descendant and their spouses.

Summary of the Decision

1. Article 14 Sections 3 and 4 of the Private School Act on the Open Board Director

The provision intends to enhance transparency and fairness of private school administration and provide opportunities for members of the school to participate in school administration. Considering the ratio of open board directors among the whole number of directors, proportion of members of the open board director recommendation committee who are recommended by the university deliberation committee and school administration committee, necessity of ex ante and preventive measures to secure transparency of administration of the educational foundation, the provision does not violate the freedom of private school of an educational foundation and its right to equality.

2. Article 21 Section 5 of the Private School Act on the Open Auditor

The provision intends to improve transparency and credibility of private school administration by establishing reliability of audit and enhancing its responsibility. Considering that the number of an open

auditor is limited to one and that the purpose of an auditor resides in supervising the appropriateness of an educational foundation and school administration, the provision does not infringe upon the freedom of private school of an educational foundation.

3. Article 25 Section 3 of the Private School Act on the Terms of Temporary Directors

The provision does not specify the term of a temporary director. But considering that a temporary director should hold office until the ground of his/her appointment is resolved and that the law provides measures to prevent an inappropriately prolonged period under a temporary director, the provision does not violate the freedom of private school of an educational foundation and former directors.

4. Article 25-3 Section 1 of the Private School Act requiring deliberation of the private school dispute mediation committee on appointing directors for normalization of educational foundation under temporary directors

Considering that the private school dispute mediation committee holds fairness and professionalism in its composition and function, that the identity of an educational foundation is succeeded and maintained through the articles of school that represent the founding principle not through continuity of directors tracing back to the founder, and that the committee may hear opinions of former directors during its deliberation for normalization, the provision does not infringe upon the freedom of private school of an educational foundation and former directors.

5. Article 26-2 Section 1 of the Private School Act on the University Deliberation Committee

The university deliberation committee only deliberates or recommends

on significant issues that belong to university autonomy and does not restrict the decision-making rights of board of directors. Also university deliberation committee may be composed by the educational foundation according to the articles of school. Therefore, the provision does not violate the freedom of private school of an educational foundation.

6. Proviso of Article 53 Section 3 of the Private School Act on restricting the number of reappointment of the head of an elementary school and a secondary school to one

The provision intends to prevent aging and bureaucratizing of a head of school and to invigorate teaching staff through the interchange of personnel, conforming to the education laws that separate school administration from education. Also the provision guarantees term of office up to 8 years and only restricts reappointment at the same school. Therefore, it does not violate the freedom of private school of an educational foundation or the freedom of occupation and right to equality of head of school.

7. Article 54-3 Section 3 of the Private School Act on the restriction of appointing as the head of school a person who is specially related to the Chief Director of the educational foundation

The provision requires the consent of more than two-thirds of the fixed number of directors and approval of the competent agency when appointing as head of school established and operated by the relevant educational foundation, a person who is related to the chief director as a spouse, lineal ascendant or lineal descendant or spouse of lineal descendant. The purpose resides in the protection of independence of school by separating management of educational foundation and school administration, securing the public nature and transparency of private schools. Therefore, it does not infringe upon the right to occupation of spouse of a chief director of educational foundation or freedom of private

school.

Dissenting Opinion on Article 14 Sections 3 and 4 of the Private School Act by One Justice

A director of an educational foundation, as member of the board of directors which is the highest decision making body as well as enforcing body, represents the freedom of private school operation. The authority to appoint board of directors is the essence of independence and autonomy of the educational foundation. The provision mandates private schools, even including most private schools that are normally managed, to appoint so-called open board directors who correspond to one fourth of the fixed number of directors, regardless of the decision of an educational foundation. This infringes upon the core value of autonomous decision making by an educational foundation and the essence of board of directors of an educational foundation. Considering the weight of private schools, especially in higher educational institutions, in the number of schools and students, as well as the historic nature of private schools that come down from the ancient period of the Three States, the necessity to secure the function and autonomy of private schools, the nature of board of directors of an educational foundation, and the problems arising out of open board directors, the provision violates the Constitution by infringing the freedom of private school of educational foundations.

Dissenting Opinion on Article 25-3 Section 1 of the Private School Act by Four Justices

The founding principles of an educational foundation are enforced by directors who are members of the board of directors that is the decision making body as well as enforcing body. As such, the founder appoints the first directors who successively appoint incoming directors which ensures permanent succession of the founding principles. This is the

essence of the system of board of directors in an educational foundation. The temporary director system of the Private School Act is meant to realize the founding principles of an educational foundation by dispatching a temporary director in times of crisis and to achieve swift normalization. It should not be regarded as sanctions against the former directors who brought about the crisis by depriving the management right of the former directors or altering the management structure of an educational foundation. This requires providing minimum measures to maintain the identity of an educational foundation and provide permanency of founding principles during the transition process from temporary directors to normal board of directors. Nonetheless, the initiative to appoint normal directors is invested with the private school dispute mediation committee, while the legal rights of the former directors to be heard are not secured. This may lead to the severance of continuity of educational foundation in terms of human resources, thereby making realization of founding principles far from certain. Therefore, it infringes upon the essential nature of freedom of private school of former directors and educational foundations against the principle against the excessive restriction.

Dissenting Opinion on Proviso of Article 53 Section 3 of the Private School Act by Four Justices

The back-scratching alliance of head of school and educational foundation due to long terms of office has already resolved by prohibiting concurrent offices of chief director and head of school and prohibiting spouse of chief director, etc. to being appointed as head of school. Accordingly, restricting the re-appointment of head of school is not directly related to solving the above-mentioned problem. In addition, unlike public schools, personnel appointment in private school is executed within an education foundation or school. Therefore restriction on the number of re-appointment of head of school hardly can be effective in vitalizing the teaching staff in private schools as a whole. As

the head of school affects the growth and progress of students through the administration and education, it would be desirable to provide a long term of office for a competent head of school upon the decision of an educational foundation or a member of school. Also, it would correspond to the purpose of the Private School Act that allows discretion in deciding the term of office of head of school by the articles of association. Therefore, the restriction of re-appointment of head of elementary school and secondary school to one time infringes on their freedom of occupation and also violates the freedom of private school of an educational foundation operating elementary school or secondary school.

28. Election Campaign by Spouse of Preliminary Candidate

[25-2(B) KCCR 473, 2011Hun-Ma267, November 28, 2013]

In this case, the Constitutional Court of Korea held that Article 60-3(2)(c) of the Public Official Election Act discriminates against preliminary candidates who do not have a spouse and thus infringes on the right to equality in violation of the Constitution. The provision allows one person who is designated by the spouse of a preliminary candidate, among persons accompanying the spouse, to conduct election campaigns for the preliminary candidate by handing out the candidate's name cards or appealing for support.

Background of the Case

1. The complainant was preparing to register as a preliminary candidate for member of the OO District Council of Seoul in the re-election and by-election of October 26, 2011.

2. Article 60-3(2)(a) of the Public Official Election Act prescribes the scope of persons who can independently hand out the candidate's name cards or appeal for support to include only the spouse and the lineal ascendants or descendants of the preliminary candidate. Article 60-3(2)(c) of the same Act permits one person who is designated by the spouse among the persons accompanying the spouse to hand out the candidate's name cards or appeal for support. The complainant filed this constitutional complaint on May 17, 2011, arguing that the provisions violate the rights to equality and freedom of occupation of the complainant who does not have a spouse or any ascendants or descendants.

Provision at Issue

The subject matter of review is whether Article 60-3(2)(a) of the Public Official Election Act (amended as Act No. 9974 on January 25,

2010; hereinafter "Provision (a)") and the part related to 'spouse' in Article 60-3(2)(c) of the same Act (hereinafter "Provision (c)") infringe on the complainant's fundamental rights. The contents of the provisions are as follows.

Public Official Election Act (amended as Act No. 9974 on January 25, 2010)

Article 60-3 (Election Campaigns by Preliminary Candidates, etc.)

(2) Any one falling under any of the following subparagraphs may hand out name cards of a preliminary candidate or appeal for support from voters under paragraph (1)(b), in order to conduct an election campaign for a preliminary candidate:

a. Spouse and lineal ascendants or descendants of a preliminary candidate;

c. One person designated each by a preliminary candidate or by the spouse thereof, from among persons accompanying a preliminary candidate or the spouse thereof.

Summary of the Decision

1. Judgment on Provision (a)

The Constitutional Court of Korea has already decided on Provision (a) on August 30, 2011 that it does not infringe on the freedom of election campaign or the right to equality. As no further constitutional clarification on the provision is necessary, the complaint on the provision lacks justiciable interest and thus is inadmissible.

2. Whether Provision (c) violates the principle of equality

A preliminary candidate who does not have a spouse is already in a disadvantageous position in election campaign because of Provision (a). Provision (c) exacerbates the discriminatory effect on the basis of

whether the person has a spouse by allowing the spouse to designate one person among people accompanying the him/her to hand out the candidate's name cards or appeal for support.

The fact that Provision (c) does not impose any restrictions on the scope of persons who may be designated by the spouse among those people accompanying the him/her is consistent with neither the essential function of the name cards nor the legislative purpose of Provision (a), which allows only the spouse or the ascendants or descendants to hand out the name cards. If the preliminary candidate is an incumbent member of the National Assembly or an influential person of great eminence, the imbalance among the preliminary candidates in scouting election campaigners would be intensified depending on their political and economic power. Such result is also against the intent of the preliminary candidate system which is to expand the opportunities for participation and publicity of new political figures.

Moreover, the fact that a preliminary candidate who does have a spouse, unlike one who does not, may enjoy the effect of designating one additional independent election campaigner violates the principle of equal opportunity in election campaign under Article 116(1) of the Constitution.

The provision above, while strengthening election campaign for preliminary candidates, violates the complainant's right to equality by its differential treatment between a preliminary candidate who has a spouse and one who does not without any justifiable reason, on the ground of the fortuitous circumstance whether or not the person has a spouse.

Dissenting Opinion of Two Justices

The decision of whether Provision (c) is unconstitutional should be made by focusing on the freedom of election campaign to ensure, to the

maximum extent possible, that people in principle freely participate in the election process and exercise their right to political suffrage.

According to the history of amendments of the Public Election Official Act, the above provision was introduced in the process of gradually expanding the freedom of election campaign in public official elections and was not intended to cause differential opportunities in election campaigns. And it is unclear if allowing one election campaign assistant to hand out name cards and appeal for support only in cases where he or she is accompanying the spouse of the preliminary candidate, would cause the harmful effect of the election campaign becoming overheated at an early stage or increase the use of paid campaigners.

The majority opinion merely supports fairness in the sense of formality, disregarding the meaning of the constitutional mandate that sets forth freedom of election campaign in principle and allows restriction as an exception on the ground of public interests. Such a downward standardization of freedom and rights does not comport with the essence of constitutional adjudication to advance the protection of fundamental rights.

Even if the situation becomes effectively disadvantageous in election campaigns for the preliminary candidates who do not have a spouse, the resolution to the problem should be to remedy the situation by legislation and cannot be the reason to decide that the provision above, which protects and confirms the freedom of election campaign, infringes on the complainant's right to equality.

29. Korea-U.S. FTA and the Right to National Referendum

[25-2(B) KCCR 559, 2012Hun-Ma166, November 28, 2013]

In this case, the Constitutional Court dismissed the complaint on the reason that the Free Trade Agreement between the Republic of Korea and the United States of America holds no possibility of violating the fundamental rights of the people including the right to national referendum or right to equality.

Background of the Case

(1) Complainant, who is a lawyer, filed this constitutional complaint on February 20, 2012, claiming that the 'Free Trade Agreement between the Republic of Korea and the United States of America' consented by the National Assembly on November 22, 2011 (hereinafter, the "FTA") which alters the scope of legislative power, the subject and scope of judicial power, and the meaning of the economic clause in the Constitution (Article 119 and 123), amounts to a substantial revision of the Constitution, and therefore an omission of national referendum infringed the complainant's right to national referendum. The complainant also challenged Chapter 11 Section B Article 11.16 of the FTA on dispute resolution procedure between investors and states, arguing that it infringes the right to property and right to equality by allowing U.S. investors preferential treatment.

(2) The FTA took effect on March 15, 2012, grounded on mutual agreement.

Provision at Issue

The subject matter of review is whether the FTA (Treaty No. 2081 on March 12, 2012) infringes the fundamental rights of the complainant. The specific part on which the complainant raises an issue is Chapter 11 Section B Article 11.16 of the FTA. The contents of the provisions at

issue are as follows (other parts are intentionally omitted):

Article 11.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (notice of intent). The notice shall specify:

(a) the name and address of the claimant and, where a claim is

submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under

this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Summary of the Decision

1. Prerequisites of a Constitutional Complaint

A constitutional complaint in not justiciable if a provision at issue does not affect the legal status of the complainant in any way because the possibility of violating the fundamental rights is not found.

2. Whether the Right to National Referendum in the Revision Process of the Constitution is Relevant

The Constitution may be revised by the submission of the revised bill of the Constitution. The revision rule of the Constitution does not allow the revision of the Constitution by the general legislative process, and also in a form of statute which is subordinate to the Constitution. A statute that is inconsistent with the Constitution is subject to be declared unconstitutional, but has no effect to revise the Constitution.

The Constitution presumes its supremacy over treaties, not allowing the so-called ‘constitutional treaty’ that is equivalent to the Constitution in terms of its effect. The FTA, one of treaties of friendship, commerce and navigation, needs the consent of the National Assembly and only hold the effect as statutes. Thus the FTA is not authorized to revise the Constitution.

As the FTA has no effect on the revision of the Constitution, there is no possibility that the signing of the FTA may infringe on the right to national referendum required for the revision of the Constitution.

3. Whether Other Fundamental Rights are relevant

Complainant does not present any specific circumstances in which the FTA infringes on his right to property or right to trial. In addition, the complainant fails to present any specific circumstances pertaining to his status as an investor or owner of an investment enterprise, or a possibility of his being in a dispute involving his investment with relation to the Republic of Korea. The record only shows that the complainant is a lawyer of the Republic of Korea. Therefore, the FTA does not discriminate the complainant against a U.S. investor nor is there any possibility the FTA may infringe on the fundamental right of the complainant.

30. Video Recording Statement of Child Victim of Sexual Assault

[25-2(B) KCCR 621, 2011Hun-Ba108, December 26, 2013]

In this case, the Constitutional Court of Korea held that Article 18-2(5) of the Act on the Protection of Children and Juveniles Against Sexual Abuse, which restricts the defendant's right to confrontation by allowing courts to admit into evidence video-recorded material containing the statements of the child victim of sexual assault without requiring the child to appear in court for a statement, does not infringe on the defendant's right to a fair trial.

Background of the Case

1. The complainant was accused of forcibly sexually assaulting the children victims who are aged 8 and 9. The court of first instance (Gongju Branch of Daejun District Court, 2010GoHap51) admitted into evidence and reviewed the video-recorded material containing the child victims' statements. There was, however, no direct examination of the child victim witnesses.

2. Upon conviction in the court of first instance, the complainant appealed (Daejun High Court 2010No573) and moved the High Court to request constitutional review of Article 18-2 (5) of the former Act on the Protection of Children and Juveniles Against Sexual Abuse. The complainant argued the provision restricts the defendant's right to confrontation by allowing courts to admit into evidence video-recorded material containing statements of the child victim of sexual assault without requiring the child to appear in court for a statement. When the High Court denied the motion, the complainant filed this constitutional complaint in accordance with Article 68(2) of the Constitutional Court Act.

Provision at Issue

The subject matter of review is the constitutionality of the part in Article 18-2 (5) of the former Act on Sexual Protection of Children and Youth (amended as Act No. 10260 on April 15, 2010, but before revised as Act No. 11287 on February 1, 2012) that allows courts to admit into evidence the statement of victim contained in video-recorded material when the credibility is established by the statement of someone who is in fiduciary relationship and has sat in company with the victim at the time of investigation (hereinafter the "Provision"). The contents are as follows.

Former Act on the Protection of Children and Juveniles against Sexual Abuse (amended as Act No. 10260 on April 15, 2010, but before revised as Act No. 11287 on February 1, 2012)

Article 18-2(Recording, Keeping, etc. of Images) (5) The statement of a victim contained in the images recorded in accordance with the procedures provided for in paragraphs (1) through (3) may be used as evidence when the credibility is established on the date of preparation of a trial or on the date of a trial, by the statement of the victim or a person who is in fiduciary relationship and has sat in company with the victim at the time of investigation.

Summary of the Decision

1. The right to confrontation and the right to a fair trial

The Provision restricts the right of the defendant to cross-examination by authorizing that video-recorded material containing a child victim's statement be admitted into evidence without requiring the child victim to appear in court for a statement. The Criminal Procedure Act limits the admissibility of hearsay evidence in order to realize the right to a fair trial under Article 27 of the Constitution by meaningfully guaranteeing

the right to confrontation. The issue is, therefore, whether the Provision infringes on the complainant's right to a fair trial by exceeding the constitutionally permitted level of restriction.

2. Whether the principle against excessive restriction is violated

The Provision restricts the right of a defendant to cross-examination, which is intended to prevent secondary victimization that could affect the child victim of sexual assault when the child has to appear in court and testify. The legislative purpose is legitimate and the means adopted to achieve the purpose is proper.

The Provision does not intend to forbid the defendant from exercising his or her right to cross-examination; rather, it only aims to harmonize between the requests to guarantee the defendant's rights in criminal procedure and to protect the child victim of sexual assault from harm, by preventing a situation in which every child victims are invariably forced to appear in court. A court, after it considers all the circumstances including the need to discover the substantive truth and to safeguard the child victim from any harm, may question a child victim as a witness, in which case the defendant's rights to participation and to confrontation would be guaranteed.

Children's statements are distinctive in character in that they are easily affected by implication and are highly likely to be distorted due to their limited cognitive intelligence and memory. It is more effective in discovering the substantive truth when the courts use a scientific, professional approach to analyze the video-recorded material, which preserves the lively statements at an early stage of the case, rather than a harsh cross-examination. The video-recorded material also reveals the process of obtaining the statements and thereby offers sufficient information to determine the credibility of the child's statements. It is for this reason why the video-recorded material would not necessarily work

disadvantageously toward the defendant.

Additionally, because the video-recorded material mechanically reproduces the actual scenes of making the statements, it reduces the need to verify them through cross-examination compared to other forms of evidence.

Other means such as conducting cross-examination through video transmission would not be an alternative to replace the Provision, because such system cannot protect the child from being repeatedly required to remember the horrible incident in which the child was victimized.

As such, the Provision does not infringe on the defendant's right to fair trial in violation of the principle against excessive restriction.

Dissenting Opinion of Three Justices

Allowing the defendant to be convicted based on the victim's unilateral statements, without giving the defendant the opportunity to impeach, falls short of the minimum level of fairness and procedural justice required by the right to a fair trial and the principle of due process guaranteed under the Constitution, and thus in principle cannot be permitted.

Because children are prone to suggestions in making statements and are highly likely to fail to correctly remember the source of the memory, there is a strong necessity to have the statements tested by cross-examination. The Provision nevertheless completely restricts the defendant's right to cross-examination for the protection of the child victim.

The Provision allows the courts to render a conviction against the defendant solely based on the victim's unilateral statements while restricting the defendant's right to cross-examination. Even if the legislative purpose bears great importance, there exist no unavoidable circumstances that justify such restriction, nor does it make a reasonable

and appropriate means to achieve the legislative purpose. The significance of the right to cross-examination lies in the fact that it allows the courts to obtain ‘worthy evidence’ to discover the substantive truth and to secure procedural legitimacy that would make the defendant concede the result of the trial. Protection afforded to one party which eliminates the above mentioned aspects may threat the discovery of substantive truth, which ultimately would not serve for the benefit of the victim nor would make the defendant be convinced to accept the trial result.

In addition, other provisions in the law offer various means to prevent secondary victimization of child victims without totally depriving the defendant of the right to cross-examination. These include conducting witness examination using video transmission, preventing disclosure of the proceedings, and allowing a person in fiduciary relationship to sit in company. Further, the legislative purpose of the Provision can be achieved by actively using, from the early stages of the proceedings, the evidence preservation procedure set out under the Criminal Procedure Act, which ensures the defendant's right to participation.

In the end, the special provision on admissibility of evidence deprives the defendant of the right to cross-examination, which is the most important right in criminal procedure derived from the right to a fair trial, by solely focusing on the protection of the child victim. Thereby it fails to achieve procedural justice mandated by the right to a fair trial.

31. Restriction on Duration of Lease

[25-2(B) KCCR 649, 2011Hun-Ba234, December 26, 2013]

In this case, the Constitutional Court of Korea held that Article 651(1) of the Civil Act, which restricts the duration of lease to 20 years, infringes on the freedom of contract in violation of the Constitution.

Background of the Case

1. The complainant, when it contracted out to OO Engineering & Construction (OO) a construction project for renewal of the privately invested Shinchon train station, assigned to OO the right to enter into a lease contract on the train station. OO subsequently entered into a lease contract with OO F & D Co. on a portion of the station building for a period of 30 years in exchange of the lease payment of 75 billion Won.

2. OO F & D, however, filed a lawsuit against the complainant, arguing that part of the contract in excess of twenty-year term is void because it violates Article 651(1) of the Civil Act, and claimed for a restitution of unjust enrichment for the overrun period. The complainant moved the court to request constitutional review of Article 651(1) of the Civil Act to the Constitutional Court. When the motion was denied, the complainant brought this constitutional complaint to the Constitutional Court.

Provision at Issue

The subject matter of review is the constitutionality of Article 651(1) of the Civil Act (enacted as Act No.471 on February 22, 1958; hereinafter the “Provision”), which states as follows.

Civil Act (enacted as Act No.471 on February 22, 1958)
Article 651 (Duration of Lease Contract) (1) The duration of the lease

except in cases of land lease the purpose of which is to own a solid building or structure made of stone, limestone, brick and the like, or is to plant trees or collect salt, shall not exceed twenty years. If the period agreed upon by the parties exceeds twenty years, the period shall be shortened to twenty years.

Summary of the Decision

The legislative intent of the part of the Provision that does not restrict the lease period of land lease for purposes of owning a solid building or structure, or planting trees or collecting salt, is found to be for the benefit of the land leasor. In contrast, the legislative intent of the part mandatorily limiting the duration of the lease period of leases on land or building the purpose of which is to own a non-solid building or structure is unclear, whether it is for the benefit of the leasor or the leasee, or in consideration of any socio-economic benefit related to the lease contract. The Supreme Court stated that the legislative purpose of the Provision is to prevent potential socio-economic loss that could arise when the lease object is under the use of the leasee for such a long time that the management is loosened and the improvement of the lease object fails to be properly made.

However, a reasonable and effective management and improvement of the lease object may be made possible through the lease contract. If so, such compulsory restriction on the duration of lease contract cannot be the least restrictive means to achieve the purpose of management and improvement of the lease object.

The Provision not only fails to reflect the contemporary socio-economic conditions that are significantly different from the time when it was enacted but also, by forcing the parties to use circumvention measures, distorts the formation of a free exchange relationship under the principle of private autonomy.

In cases of lease contract on buildings, the leasee may grant tacit approval for a lease contract for a period of more than twenty years to continue the lease, or argue to void the part of the contract on the period exceeding twenty years and claim for a restitution of unjust enrichment in an amount equivalent to the rental cost, depending on the business prospects of the leased store and its surrounding area. Conversely, the leasor may argue to void the contract for the period in excess of twenty years or ask for a substantial increase in the rental fee, when the business prospects are positive. As such, compulsory restriction on the duration of lease contract which actually gives the parties room to misuse the twenty-year limitation according to socio-economic conditions indicates that the restriction under the Provision exceeds the extent necessary for achievement of the legislative purpose.

In cases of lease contract on land, disputes may occur as to whether the concerned building is 'solid' for the purpose of the Provision, because the Provision may or may not apply depending on its determination. In fact, the question of whether the building is solid can no longer make a proper standard to determine the application of the limitation on the lease period when the contemporary construction techniques are so advanced. Moreover, in cases of land lease the purpose of which is to install underground facilities or to own so-called non-solid buildings such as a wooden building, the Provision would cause socio-economic losses because they have to be removed or demolished after twenty years unless the lease period is renewed.

Because the Provision lacks a clear legislative purpose and, even if there is a legitimate legislative purpose in terms of socio-economic benefit as the Supreme Court interpreted, it infringes on the freedom of contract in violation of the principle against excessive restriction.

Dissenting Opinion of Three Justices

The Provision intends to prevent socio-economic loss that could arise when the management and improvement of the property are not adequate and offers the parties the opportunity to rethink the renewal of the contract in consideration of the change in conditions. Thus the Provision has a legitimate legislative purpose and the means adopted to achieve the purpose is proper.

When the State decides to constrain the period of lease contract for the purpose of ensuring preservation and improvement of the items in the ambit and thus preventing socio-economic loss, the decision of where to set the upper limit should be within the scope of the legislative formation.

Although the parties may experience the inconvenience of using circumvent measures if they want to enter into a long-term lease contract, this reason alone is insufficient to declare the Provision unconstitutional. In addition, because the parties may renew the lease contract up to ten years for unlimited times, the principles of the least restrictiveness and the balance of legal interests are not violated.

Therefore, the Provision does not infringe on the leasor's freedom of contract in violation of the principle against excessive restriction.

32. Case on Defamation against the President

[25-2(B) KCCR 745, 2009Hun-Ma747, December 26, 2013]

In this case, the Constitutional Court of Korea held that the respondent's non-institution of prosecution against the complainant shall be voided for its violation of the complainant's rights to equality and to the pursuit of happiness. The respondent arbitrarily exercised his prosecutorial power when it put an allegation on the complainant for committing statutory defamation under the former Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.

Background of the Case

1. On October 19, 2009, the respondent exempted prosecution against the complainant on the charge of a violation of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.(defamation) (Seoul Central District Prosecutors' Office, 2009 HyungJe26869; hereinafter the "Non-institution of prosecution"). The summary of the facts of the allegation is as follows.

"The complainant defamed the victim, the President of the Republic of Korea, when he publicly announced a false statement by posting a video on his internet blog that included a false statement about the victim, purposely to disparage the reputation of the victim."

2. The respondent decided Non-institution of prosecution in considering that 'although the facts support the allegation, the complainant is a first-timer who did not himself produce the video but posted the video on his personal blog visited by only a small acquaintance, which is currently shut down.'

3. According to the investigation records, the complainant was questioned limitedly about (1) the part stating that 'the victim is a criminal who has

30 prior convictions' (hereinafter the "Prior Conviction Statement") and (2) the part stating that 'the victim purchased large-scale land in a district where development is expected' (hereinafter the "Land Purchase Statement"). This indicates that the respondent decided Non-institution of prosecution based on the conclusion that the two Statements above were false.

4. The complainant filed this constitutional complaint on December 23, 2009, seeking to lift the Non-institution of prosecution based on the argument that it violated the complainant's rights to equality and to the pursuit of happiness.

Statutory Basis

The provision, which was applied to the facts of the allegation in this case and used as the statutory basis for the Non-institution of prosecution, is Article 70(2) of the former Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (amended as Act No. 8778 on December 21, 2007, but before revise as Act No. 9119 on June 13, 2008; the provision took in effect on December 14, 2008), which states as follows.

Former Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (amended by Act No. 8778 on December 21, 2007, before amended by Act No. 9119 on June 13, 2008)

Article 70 (Penalty) (2) A person who commits defamation of another person by publicly announcing a false statement using an information and communications network for the purpose of disparaging the reputation of the other shall be punished by imprisonment with prison labor for not more than seven years, by suspension of qualification for not more than ten years, or by fine not exceeding 50 million won.

Summary of the Decision

1. Standard of review on the freedom of expression and the protection of reputation in matters concerning public figure and public interest

The freedom of expression and the protection of reputation are fundamental rights that provide the basis for human dignity and the pursuit of happiness, and also the foundation for democracy. Discerning which one between the two fundamental rights should be given more weight, therefore, falls within the boundary of constitutional review. Depending on the whether the victim of the defamatory statement is a public or a private figure and whether the statement is a matter of public concern or a matter in a purely private area, there should be a difference in constitutional standard of review. Restrictions on defamatory statement against a public figure concerning his/her public activities should be relatively more relaxed. This does not mean that a statement about a public figure or a matter of public concern should enjoy unlimited freedom. An attack against an individual that is malicious or substantially lacks reasonableness, both based on a clearly false statement exceeding the acceptable level of exaggeration in the ordinary sense, may be subject to restriction.

2. Statement on public official's qualifications, ethics and integrity

Some matters concerning a public official's private personal life, even if they have no direct connections to the public official's public activities, may fall within the scope of public concern in certain cases. Matters relating to a public official’s qualifications, ethics and integrity would hardly be considered to stay within the sphere of purely private life, even when the contents concern his or her personal private life. These matters can offer information necessary for the public to criticize and evaluate social activities of the public official and, depending on the contents, might have relevance to his or her official duties. Therefore,

questions and criticisms on such matters should be allowed.

3. Responsibility for defamation by an act of posting the statement of a third person

There should be a legal assessment on the act of posting under the constitutional principle of self-responsibility, if we are to recognize the responsibility for defamation in the act of posting the statement of a third person. The types and forms of the act of posting the statement of a third person are very diverse and may arise from various circumstances. If such act, viewed from the totality of the circumstances, is merely referring to or introducing the material, the responsibility for defamation should be denied. On the contrary, if the circumstances show that the person who posted it has actually used and controlled the material to the extent that it is akin to an act of making a statement of the same contents as that of the third person, then the responsibility for defamation should be found.

4. Conclusion on this case

The facts about prior convictions and possessions of land property of the victim, who was the President of the Republic of Korea, fall within the scope of public concerns about a public figure. Applying the principle that criticisms on matters of public concern should be broadly allowed to protect the freedom of expression, and considering the totality of the circumstances, we cannot conclude that the complainant in this case acted purposely to defame the victim when he posted the video that mainly contains criticisms against the victim's policies. Moreover, the complainant had no interest to know whether the statement was true or false and seems to have believed that the important part of the statements reflects objective truth. We thus cannot conclude that he had knowledge about falsehood of the statement. The Non-institution of prosecution against the complainant was decided based on a serious error

in fact and law, constituting an arbitrary exercise of the prosecutorial power. Therefore it infringes on the complainant's rights to equality and to the pursuit of happiness.

Appendix

THE CONSTITUTION OF THE REPUBLIC OF KOREA ····· 213

THE CONSTITUTION OF THE REPUBLIC OF KOREA

Enacted	Jul. 17, 1948
Amended	Jul. 7, 1952
	Nov. 29, 1954
	Jun. 15, 1960
	Nov. 29, 1960
	Dec. 26, 1962
	Oct. 21, 1969
	Dec. 27, 1972
	Oct. 27, 1980
	Oct. 29, 1987

PREAMBLE

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and

To destroy all social vices and injustice, and

To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and

To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and

To elevate the quality of life for all citizens and contribute to lasting

world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.

Oct. 29, 1987

CHAPTER I GENERAL PROVISIONS

Article 1

(1) The Republic of Korea shall be a democratic republic.
(2) The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.

Article 2

(1) Nationality in the Republic of Korea shall be prescribed by Act.
(2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Article 5

(1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.
(2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

Article 6

(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.
(2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 7

(1) All public officials shall be servants of the entire people and shall be responsible for the people.
(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8

(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.
(2) Political parties shall be democratic in their objectives, organization and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.
(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.
(4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 9

The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

CHAPTER II RIGHTS AND DUTIES OF CITIZENS

Article 10

All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Article 11

(1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.

(2) No privileged caste shall be recognized or ever established in any form.

(3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue there- from.

Article 12

(1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.

(2) No citizens shall be tortured or be compelled to testify against himself in criminal cases.

(3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: *Provided*, That in a case where a criminal suspect is an apprehended *flagrante delicto*, or where there is danger that a person suspected of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an *ex post facto* warrant.

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.

(5) No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained shall be notified without delay of the reason for and the time and place of the arrest or detention.

(6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.

(7) In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Article 13

(1) No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be placed in double jeopardy.

(2) No restrictions shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation.

(3) No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.

Article 14

All citizens shall enjoy freedom of residence and the right to move at will.

Article 15

All citizens shall enjoy freedom of occupation.

Article 16

All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented.

Article 17

The privacy of no citizen shall be infringed.

Article 18

The privacy of correspondence of no citizen shall be infringed.

Article 19

All citizens shall enjoy freedom of conscience.

Article 20

(1) All citizens shall enjoy freedom of religion.
(2) No state religion shall be recognized, and religion and state shall be separated.

Article 21

(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted.
(3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act.
(4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

Article 22

(1) All citizens shall enjoy freedom of learning and the arts.
(2) The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.

Article 23

(1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.

(2) The exercise of property rights shall conform to the public welfare.

(3) Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by Act: *Provided*, That in such a case, just compensation shall be paid.

Article 24

All citizens shall have the right to vote under the conditions as prescribed by Act.

Article 25

All citizens shall have the right to hold public office under the conditions as prescribed by Act.

Article 26

(1) All citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by Act.

(2) The State shall be obligated to examine all such petitions.

Article 27

(1) All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act.

(2) Citizens who are not on active military service or employees of the military forces shall not be tried by a court martial within the territory of the Republic of Korea, except in case of crimes as prescribed by Act involving important classified military information, sentinels, sentry posts, the supply of harmful food and beverages, prisoners of war and military articles and facilities and in the case of the proclamation of extraordinary martial law.

(3) All citizens shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary.

(4) The accused shall be presumed innocent until a judgment of guilt has been pronounced.

(5) A victim of a crime shall be entitled to make a statement during the proceedings of the trial of the case involved as under the conditions prescribed by Act.

Article 28

In a case where a criminal suspect or an accused person who has been placed under detention is not indicted as provided by Act or is acquitted by a court, he shall be entitled to claim just compensation from the State under the conditions as prescribed by Act.

Article 29

(1) In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by Act. In this case, the public official concerned shall not be immune from liabilities.

(2) In case a person on active military service or an employee of the military forces, a police official or others as prescribed by Act sustains damages in connection with the performance of official duties such as combat action, drill and so forth, he shall not be entitled to a claim against the State or public organization on the grounds of unlawful acts committed by public officials in the course of official duties, but shall be entitled only to compensations as prescribed by Act.

Article 30

Citizens who have suffered bodily injury or death due to criminal acts of others may receive aid from the State under the conditions as prescribed by Act.

Article 31

(1) All citizens shall have an equal right to an education corresponding to their abilities.

(2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.
(3) Compulsory education shall be free of charge.
(4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by Act.
(5) The State shall promote lifelong education.
(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.

Article 32

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act.
(2) All citizens shall have the duty to work. The State shall prescribe by Act the extent and conditions of the duty to work in conformity with democratic principles.
(3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.
(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.
(5) Special protection shall be accorded to working children.
(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

Article 33

(1) To enhance working conditions, workers shall have the right to

independent association, collective bargaining and collective action.

(2) Only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action.

(3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act.

Article 34

(1) All citizens shall be entitled to a life worthy of human beings.

(2) The State shall have the duty to endeavor to promote social security and welfare.

(3) The State shall endeavor to promote the welfare and rights of women.

(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.

(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.

(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

Article 35

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Article 36

(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect motherhood.
(3) The health of all citizens shall be protected by the State.

Article 37

(1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.
(2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Article 38

All citizens shall have the duty to pay taxes under the conditions as prescribed by Act.

Article 39

(1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.
(2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

CHAPTER III THE NATIONAL ASSEMBLY

Article 40

The legislative power shall be vested in the National Assembly.

Article 41

(1) The National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens.
(2) The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200.
(3) The constituencies of members of the National Assembly, proportional representation and other matters pertaining to

National Assembly elections shall be determined by Act.

Article 42

The term of office of members of the National Assembly shall be four years.

Article 43

Members of the National Assembly shall not concurrently hold any other office prescribed by Act.

Article 44

(1) During the sessions of the National Assembly, no member of the National Assembly shall be arrested or detained without the consent of the National Assembly except in case of *flagrante delicto*.

(2) In case of apprehension or detention of a member of the National Assembly prior to the opening of a session, such member shall be released during the session upon the request of the National Assembly, except in case of *flagrante delicto*.

Article 45

No member of the National Assembly shall be held responsible outside the National Assembly for opinions officially expressed or votes cast in the Assembly.

Article 46

(1) Members of the National Assembly shall have the duty to maintain high standards of integrity.

(2) Members of the National Assembly shall give preference to national interests and shall perform their duties in accordance with conscience.

(3) Members of the National Assembly shall not acquire, through abuse of their positions, rights and interests in property or positions, or assist other persons to acquire the same, by means of contracts with or dispositions by the State, public organizations or industries.

Article 47

(1) A regular session of the National Assembly shall be convened once every year under the conditions as prescribed by Act, and extraordinary sessions of the National Assembly shall be convened upon the request of the President or one fourth or more of the total members.

(2) The period of regular sessions shall not exceed a hundred days, and that of extraordinary sessions, thirty days.

(3) If the President requests the convening of an extraordinary session, the period of the session and the reasons for the request shall be clearly specified.

Article 48

The National Assembly shall elect one Speaker and two Vice-Speakers.

Article 49

Except as otherwise provided for in the Constitution or in Act, the attendance of a majority of the total members, and the concurrent vote of a majority of the members present, shall be necessary for decisions of the National Assembly. In case of a tie vote, the matter shall be regarded as rejected.

Article 50

(1) Sessions of the National Assembly shall be open to the public: *Provided*, That when it is decided so by a majority of the members present, or when the Speaker deems it necessary to do so for the sake of national security, they may be closed to the public.

(2) The public disclosure of the proceedings of sessions which were not open to the public shall be determined by Act.

Article 51

Bills and other matters submitted to the National Assembly for deliberation shall not be abandoned on the ground that they were not

acted upon during the session in which they were introduced, except in a case where the term of the members of the National Assembly has expired.

Article 52

Bills may be introduced by members of the National Assembly or by the Executive.

Article 53

(1) Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days.

(2) In case of objection to the bill, the President may, within the period referred to in paragraph (1), return it to the National Assembly with written explanation of his objection, and request it be reconsidered. The President may do the same during adjournment of the National Assembly.

(3) The President shall not request the National Assembly to reconsider the bill in part, or with proposed amendments.

(4) In case there is a request for reconsideration of a bill, the National Assembly shall reconsider it, and if the National Assembly repasses the bill in the original form with the attendance of more than one half of the total members, and with a concurrent vote of two thirds or more of the members present, it shall become Act.

(5) If the President does not promulgate the bill, or does not request the National Assembly to reconsider it within the period referred to in paragraph (1), it shall become Act.

(6) The President shall promulgate without delay the Act as finalized under paragraphs (4) and (5). If the President does not promulgate an Act within five days after it has become Act under paragraph (5), or after it has been returned to the Executive under paragraph (4), the Speaker shall promulgate it.

(7) Except as provided otherwise, an Act shall take effect twenty days after the date of promulgation.

Article 54

(1) The National Assembly shall deliberate and decide upon the national budget bill.

(2) The Executive shall formulate the budget bill for each fiscal year and submit it to the National Assembly within ninety days before the beginning of a fiscal year. The National Assembly shall decide upon it within thirty days before the beginning of the fiscal year.

(3) If the budget bill is not passed by the beginning of the fiscal year, the Executive may, in conformity with the budget of the previous fiscal year, disburse funds for the following purposes until the budget bill is passed by the National Assembly:

1. The maintenance and operation of agencies and facilities established by the Constitution or Act;
2. Execution of the obligatory expenditures as prescribed by Act; and
3. Continuation of projects previously approved in the budget.

Article 55

(1) In a case where it is necessary to make continuing disbursements for a period longer than one fiscal year, the Executive shall obtain the approval of the National Assembly for a specified period of time.

(2) A reserve fund shall be approved by the National Assembly in total. The disbursement of the reserve fund shall be approved during the next session of the National Assembly.

Article 56

When it is necessary to amend the budget, the Executive may formulate a supplementary revised budget bill and submit it to the National Assembly.

Article 57

The National Assembly shall, without the consent of the Executive, neither increase the sum of any item of expenditure nor create any new items of expenditure in the budget submitted by the Executive.

Article 58

When the Executive plans to issue national bonds or to conclude contracts which may incur financial obligations on the State outside the budget, it shall have the prior concurrence of the National Assembly.

Article 59

Types and rates of taxes shall be determined by Act.

Article 60

(1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

(2) The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.

Article 61

(1) The National Assembly may inspect affairs of state or investigate specific matters of state affairs, and may demand the production of documents directly related thereto, the appearance of a witness in person and the furnishing of testimony or statements of opinion.

(2) The procedures and other necessary matters concerning the inspection and investigation of state administration shall be determined by Act.

Article 62

(1) The Prime Minister, members of the State Council or government

delegates may attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer questions.

(2) When requested by the National Assembly or its committees, the Prime Minister, members of the State Council or government delegates shall attend any meeting of the National Assembly and answer questions. If the Prime Minister or State Council members are requested to attend, the Prime Minister or State Council members may have State Council members or government delegates attend any meeting of the National Assembly and answer questions.

Article 63

(1) The National Assembly may pass a recommendation for the removal of the Prime Minister or a State Council member from office.

(2) A recommendation for removal as referred to in paragraph (1) may be introduced by one third or more of the total members of the National Assembly, and shall be passed with the concurrent vote of a majority of the total members of the National Assembly.

Article 64

(1) The National Assembly may establish the rules of its proceedings and internal regulations: *Provided*, That they are not in conflict with Act.

(2) The National Assembly may review the qualifications of its members and may take disciplinary actions against its members.

(3) The concurrent vote of two thirds or more of the total members of the National Assembly shall be required for the expulsion of any member.

(4) No action shall be brought to court with regard to decisions taken under paragraphs (2) and (3).

Article 65

(1) In case the President, the Prime Minister, members of the State

Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: *Provided*, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: *Provided*, That it shall not exempt the person impeached from civil or criminal liability.

CHAPTER IV THE EXECUTIVE

SECTION 1 The President

Article 66

(1) The President shall be the Head of State and represent the State vis-a-vis foreign states.

(2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.

(3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.
(4) Executive power shall be vested in the Executive Branch headed by the President.

Article 67

(1) The President shall be elected by universal, equal, direct and secret ballot by the people.
(2) In case two or more persons receive the same largest number of votes in the election as referred to in paragraph (1), the person who receives the largest number of votes in an open session of the National Assembly attended by a majority of the total members of the National Assembly shall be elected.
(3) If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one third of the total eligible votes.
(4) Citizens who are eligible for election to the National Assembly, and who have reached the age of forty years or more on the date of the presidential election, shall be eligible to be elected to the presidency.
(5) Matters pertaining to presidential elections shall be determined by Act.

Article 68

(1) The successor to the incumbent President shall be elected seventy to forty days before his term expires.
(2) In case a vacancy occurs in the office of the President or the President-elect dies, or is disqualified by a court ruling or for any other reason, a successor shall be elected within sixty days.

Article 69

The President, at the time of his inauguration, shall take the following oath: "I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland,

promoting the freedom and welfare of the people and endeavoring to develop national culture."

Article 70

The term of office of the President shall be five years, and the President shall not be reelected.

Article 71

If the office of the presidency is vacant or the President is unable to perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for him.

Article 72

The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

Article 73

The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 74

(1) The President shall be Commander - in - Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.

(2) The organization and formation of the Armed Forces shall be determined by Act.

Article 75

The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts.

Article 76

(1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in

respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the President shall promptly notify it to the National Assembly and obtain its approval.

(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).

Article 77

(1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law

with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply.

Article 78

The President shall appoint and dismiss public officials under the conditions as prescribed by the Constitution and Act.

Article 79

(1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by Act.
(2) The President shall receive the consent of the National Assembly in granting a general amnesty.
(3) Matters pertaining to amnesty, commutation and restoration of rights shall be determined by Act.

Article 80

The President shall award decorations and other honors under the conditions as prescribed by Act.

Article 81

The President may attend and address the National Assembly or express his views by written message.

Article 82

The acts of the President under law shall be executed in writing, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83

The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, nor other public or private posts as prescribed by Act.

Article 84

The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85

Matters pertaining to the status and courteous treatment of former Presidents shall be determined by Act.

SECTION 2 The Executive Branch

Sub-Section 1 The Prime Minister and Members of the State Council

Article 86

(1) The Prime Minister shall be appointed by the President with the consent of the National Assembly.
(2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President.
(3) No member of the military shall be appointed Prime Minister unless he is retired from active duty.

Article 87

(1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.
(2) The members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.
(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.
(4) No member of the military shall be appointed a member of the State Council unless he is retired from active duty.

Sub-Section 2 The State Council

Article 88

(1) The State Council shall deliberate on important policies that fall within the power of the Executive.
(2) The State Council shall be composed of the President, the Prime Minister, and other members whose number shall be no more than

thirty and no less than fifteen.

(3) The President shall be the chairman of the State Council, and the Prime Minister shall be the Vice-Chairman.

Article 89

The following matters shall be referred to the State Council for deliberation:

1. Basic plans for state affairs, and general policies of the Executive;
2. Declaration of war, conclusion of peace and other important matters pertaining to foreign policy;
3. Draft amendments to the Constitution, proposals for national referendums, pro-posed treaties, legislative bills, and proposed presidential decrees;
4. Budgets, settlement of accounts, basic plans for disposal of state properties, contracts incurring financial obligation on the State, and other important financial matters;
5. Emergency orders and emergency financial and economic actions or orders by the President, and declaration and termination of martial law;
6. Important military affairs;
7. Requests for convening an extraordinary session of the National Assembly;
8. Awarding of honors;
9. Granting of amnesty, commutation and restoration of rights;
10. Demarcation of jurisdiction between Executive Ministries;
11. Basic plans concerning delegation or allocation of powers within the Executive;
12. Evaluation and analysis of the administration of State affairs;
13. Formulation and coordination of important policies of each Executive Ministry;
14. Action for the dissolution of a political party;
15. Examination of petitions pertaining to executive policies

submitted or referred to the Executive;

16. Appointment of the Prosecutor General, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each armed service, the presidents of national universities, ambassadors, and such other public officials and managers of important State-run enterprises as designated by Act; and
17. Other matters presented by the President, the Prime Minister or a member of the State Council.

Article 90

(1) An Advisory Council of Elder Statesmen, composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the Advisory Council of Elder Statesmen: *Provided*, That if there is no immediate former President, the President shall appoint the Chairman.

(3) The organization, function and other necessary matters pertaining to the Advisory Council of Elder Statesmen shall be determined by Act.

Article 91

(1) A National Security Council shall be established to advise the President on the formulation of foreign, military and domestic policies related to national security prior to their deliberation by the State Council.

(2) The meetings of the National Security Council shall be presided over by the President.

(3) The organization, function and other necessary matters pertaining to the National Security Council shall be determined by Act.

Article 92

(1) An Advisory Council on Democratic and Peaceful Unification may be established to advise the President on the formulation of peaceful unification policy.

(2) The organization, function and other necessary matters pertaining to the Advisory Council on Democratic and Peaceful Unification shall be determined by Act.

Article 93

(1) A National Economic Advisory Council may be established to advise the President on the formulation of important policies for developing the national economy.
(2) The organization, function and other necessary matters pertaining to the National Economic Advisory Council shall be determined by Act.

Sub-Section 3 The Executive Ministries

Article 94

Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.

Article 95

The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Act or Presidential Decree, or *ex officio*, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

Article 96

The establishment, organization and function of each Executive Ministry shall be determined by Act.

Sub-Section 4 The Board of Audit and Inspection

Article 97

The Board of Audit and Inspection shall be established under the direct jurisdiction of the President to inspect and examine the settlement of the revenues and expenditures of the State, the accounts of the State and other organizations specified by Act and the job

performances of the executive agencies and public officials.

Article 98

(1) The Board of Audit and Inspection shall be composed of no less than five and no more than eleven members, including the Chairman.

(2) The Chairman of the Board shall be appointed by the President with the consent of the National Assembly. The term of office of the Chairman shall be four years, and he may be reappointed only once.

(3) The members of the Board shall be appointed by the President on the recommendation of the Chairman. The term of office of the members shall be four years, and they may be reappointed only once.

Article 99

The Board of Audit and Inspection shall inspect the closing of accounts of revenues and expenditures each year, and report the results to the President and the National Assembly in the following year.

Article 100

The organization and function of the Board of Audit and Inspection, the qualifications of its members, the range of the public officials subject to inspection and other necessary matters shall be determined by Act.

CHAPTER V THE COURTS

Article 101

(1) Judicial power shall be vested in courts composed of judges.

(2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

(3) Qualifications for judges shall be determined by Act.

Article 102

(1) Departments may be established in the Supreme Court.

(2) There shall be Supreme Court Justices at the Supreme Court: *Provided*, That judges other than Supreme Court Justices may be assigned to the Supreme Court under the conditions as prescribed by Act.

(3) The organization of the Supreme Court and lower courts shall be determined by Act.

Article 103

Judges shall rule independently according to their conscience and in conformity with the Constitution and Act.

Article 104

(1) The Chief Justice of the Supreme Court shall be appointed by the President with the consent of the National Assembly.

(2) The Supreme Court Justices shall be appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly.

(3) Judges other than the Chief Justice and the Supreme Court Justices shall be appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices.

Article 105

(1) The term of office of the Chief Justice shall be six years and he shall not be reappointed.

(2) The term of office of the Justices of the Supreme Court shall be six years and they may be reappointed as prescribed by Act.

(3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court shall be ten years, and they may be reappointed under the conditions as prescribed by Act.

(4) The retirement age of judges shall be determined by Act.

Article 106

(1) No judge shall be removed from office except by impeachment or

a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.

(2) In the event a judge is unable to discharge his official duties because of serious mental or physical impairment, he may be retired from office under the conditions as prescribed by Act.

Article 107

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

(3) Administrative appeals may be conducted as a procedure prior to a judicial trial. The procedure of administrative appeals shall be determined by Act and shall be in conformity with the principles of judicial procedures.

Article 108

The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court.

Article 109

Trials and decisions of the courts shall be open to the public: *Provided*, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision.

Article 110

(1) Courts-martial may be established as special courts to exercise jurisdiction over military trials.

(2) The Supreme Court shall have the final appellate jurisdiction over courts-martial.
(3) The organization and authority of courtsmartial, and the qualifications of their judges shall be determined by Act.
(4) Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.

CHAPTER VI THE CONSTITUTIONAL COURT

Article 111

(1) The Constitutional Court shall have jurisdiction over the following matters:
1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President.
(3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.
(4) The president of the Constitutional Court shall be appointed by

the President from among the Justices with the consent of the National Assembly.

Article 112

(1) The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act.

(2) The Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities.

(3) No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

Article 113

(1) When the Constitutional Court makes a decision of the unconstitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required.

(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act.

(3) The organization, function and other necessary matters of the Constitutional Court shall be determined by Act.

CHAPTER VII ELECTION MANAGEMENT

Article 114

(1) Election commissions shall be established for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties.

(2) The National Election Commission shall be composed of three members appointed by the President, three members selected by

the National Assembly, and three members designated by the Chief Justice of the Supreme Court. The Chairman of the Commission shall be elected from among the members.

(3) The term of office of the members of the Commission shall be six years.

(4) The members of the Commission shall not join political parties, nor shall they participate in political activities.

(5) No member of the Commission shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

(6) The National Election Commission may establish, within the limit of Acts and decrees, regulations relating to the management of elections, national referenda, and administrative affairs concerning political parties and may also establish regulations relating to internal discipline that are compatible with Act.

(7) The organization, function and other necessary matters of the election commissions at each level shall be determined by Act.

Article 115

(1) Election commissions at each level may issue necessary instructions to administrative agencies concerned with respect to administrative affairs pertaining to elections and national referenda such as the preparation of the pollbooks.

(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116

(1) Election campaigns shall be conducted under the management of the election commissions at each level within the limit set by Act. Equal opportunity shall be guaranteed.

(2) Except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates.

CHAPTER VIII LOCAL AUTONOMY

Article 117

(1) Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.

(2) The types of local governments shall be determined by Act.

Article 118

(1) A local government shall have a council.

(2) The organization and powers of local councils, and the election of members; election procedures for heads of local governments; and other matters pertaining to the organization and operation of local governments shall be determined by Act.

CHAPTER IX THE ECONOMY

Article 119

(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

Article 120

(1) Licenses to exploit, develop or utilize minerals and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for

a period of time under the conditions as prescribed by Act.

(2) The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.

Article 121

(1) The State shall endeavor to realize the land-to-the-tillers principle with respect to agricultural land. Tenant farming shall be prohibited.

(2) The leasing of agricultural land and the consignment management of agricultural land to increase agricultural productivity and to ensure the rational utilization of agricultural land or due to unavoidable circumstances, shall be recognized under the conditions as prescribed by Act.

Article 122

The State may impose, under the conditions as prescribed by Act, restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of the land of the nation that is the basis for the productive activities and daily lives of all citizens.

Article 123

(1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.

(2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.

(3) The State shall protect and foster small and medium enterprises.

(4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.

(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in

small and medium industry and shall guarantee their independent activities and development.

Article 124

The State shall guarantee the consumer protection move ment intended to encourage sound consumption activities and improvement in the quality of products under the conditions as prescribed by Act.

Article 125

The State shall foster foreign trade, and may regulate and coordinate it.

Article 126

Private enterprises shall not be nationalized nor transferred to ownership by a local government, nor shall their management be controlled or administered by the State, except in cases as prescribed by Act to meet urgent necessities of national defense or the national economy.

Article 127

(1) The State shall strive to develop the national economy by developing science and technology, information and human resources and encouraging innovation.
(2) The State shall establish a system of national standards.
(3) The President may establish advisory organizations necessary to achieve the purpose referred to in paragraph (1).

CHAPTER X AMENDMENTS TO THE CONSTITUTION

Article 128

(1) A proposal to amend the Constitution shall be introduced either by a majority of the total members of the National Assembly or by the President.
(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection

of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

Article 129

Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130

(1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

ADDENDA

Article 1

This Constitution shall enter into force on the twenty-fifth day of February, anno Domini Nineteen hundred and eightyeight: *Provided*, That the enactment or amendment of Acts necessary to implement this Constitution, the elections of the President and the National Assembly under this Constitution and other preparations to implement this

Constitution may be carried out prior to the entry into force of this Constitution.

Article 2

(1) The first presidential election under this Constitution shall be held not later than forty days before this Constitution enters into force.

(2) The term of office of the first President under this Constitution shall commence on the date of its enforcement.

Article 3

(1) The first elections of the National Assembly under this Constitution shall be held within six months from the promulgation of this Constitution. The term of office of the members of the first National Assembly elected under this Constitution shall commence on the date of the first convening of the National Assembly under this Constitution.

(2) The term of office of the members of the National Assembly incumbent at the time this Constitution is promulgated shall terminate the day prior to the first convening of the National Assembly under paragraph (1).

Article 4

(1) Public officials and officers of enterprises appointed by the Government, who are in office at the time of the enforcement of this Constitution, shall be considered as having been appointed under this Constitution: *Provided*, That public officials whose election procedures or appointing authorities are changed under this Constitution, the Chief Justice of the Supreme Court and the Chairman of the Board of Audit and Inspection shall remain in office until such time as their successors are chosen under this Constitution, and their terms of office shall terminate the day before the installation of their successors.

(2) Judges attached to the Supreme Court who are not the Chief Justice or Justices of the Supreme Court and who are in office at the time of the enforcement of this Constitution shall be

considered as having been appointed under this Constitution notwithstanding the proviso of paragraph (1).

(3) Those provisions of this Constitution which prescribe the terms of office of public officials or which restrict the number of terms that public officials may serve, shall take effect upon the dates of the first elections or the first appointments of such public officials under this Constitution.

Article 5

Acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution.

Article 6

Those organizations existing at the time of the enforcement of this Constitution which have been performing the functions falling within the authority of new organizations to be created under this Constitution, shall continue to exist and perform such functions until such time as the new organizations are created under this Constitution.

Notes on Translation

※ Y.S.Y. : Constitution Researcher Ye Seung-Yeon
C.S.H. : Constitution Researcher Cho Soo-Hye
K.J.H. : Constitution Researcher Kim Ji-Hye
C.J.E. : Researcher Choi Ji-Eun

□ Full Opinions

	Title	Translator
1	Punishment of Insult as a Criminal Offense	C.J.E.
2	Aggravated Punishment on Parricide	C.S.H.
3	Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers	Y.S.Y.

□ Summaries of Opinions

	Title	Translator
1	Case on Presidential Emergency Decree No. 1, 2 and 9	C.S.H.
2	Punishment of Insult as a Criminal Offense	C.J.E.
3	Public Health Promotion Act Designating Internet Café as Non-smoking Zone	Y.S.Y.
4	National Health Insurance Act	C.J.E.
5	Aggravated Punishment on Parricide	C.S.H.

	Title	Translator
6	Punishing Violation of Permissible Temporary Worker Agency	C.J.E.
7	Imposing criminal punishment on financial company staffs who received money or valuables	Y.S.Y.
8	Intrusion upon Habitation and Indecent Act by Compulsion	C.J.E.
9	Consolidation of Mobile Service Provider Identification Numbers	Y.S.Y.
10	Fee on Inspection and Issuance of Resident Registration Record Cards	C.J.E.
11	Limit of Voting Age	K.J.H.
12	Restriction of Balloting Hours	C.S.H.
13	Reduction of Public Officials' Pension and Retroactive Application	Y.S.Y.
14	Duty Suspension of the President of Agricultural Cooperatives	C.J.E.
15	Attorney Visitation Prohibiting Physical Contact	K.J.H.
16	Delay in Lending Books at Prison Library	C.S.H.
17	Requirement for Full Adoption	C.J.E.
18	Worker's Injury Inflicted during Commuting	Y.S.Y.
19	Audio Recording and Documenting Inmate-Attorney Meeting	K.J.H.
20	Restriction on Bar Exam Application regarding an Offender Sentenced to Suspended Execution of Imprisonment	C.J.E.

	Title	Translator
21	Accomplice's Statement in Report of Trial	K.J.H.
22	Disclosure of Personal Information	C.J.E.
23	Time Limit of Filing for Formal Trial	C.J.E.
24	Constitutionality of Article 4 of the Act on the Protection, etc. of Fixed Term and Part Time Workers	Y.S.Y.
25	Compensation Benefit for Grandchild of the Persons of Distinguished Services to National Independence	K.J.H.
26	Right to Criminal Trial of a Civilian who Damaged Facility for Military Use and Combat	K.J.H.
27	Open Board Director of the Private School Act	C.S.H.
28	Election Campaign by Spouse of Preliminary Candidate	K.J.H.
29	Korea-U.S. FTA and the Right to National Referendum	C.S.H.
30	Video Recording Statement of Child Victim of Sexual Assault	K.J.H.
31	Restriction on Duration of Lease	K.J.H.
32	Case on Defamation against the President	K.J.H.