CONSTITUTIONAL COURT DECISIONS

2014

CONSTITUTIONAL
COURT OF KOREA

CONSTITUTIONAL COURT
DECISIONS

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Homepage http://www.ccourt.go.kr

Government Publication Registration Number
33-9750000-000045-10

Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2014 to December 31, 2014 by the Constitutional Court of Korea.

This volume contains four full texts and 36 summaries of the Court's decisions in 36 cases.

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

December 24, 2015

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.

TABLE OF CONTENTS

I. Full Opinions

1. Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence

[26-1(A) KCCR 136, 2012Hun-Ma409 · 510, 2013Hun-Ma167 (consolidated), January 28, 2014] ····· 1

2. Case on Prohibition of Using the Name of a Political Party whose Registration has been cancelled

[26-1(A) KCCR 155, 2012Hun-Ma431, 2012Hun-Ka19 (consolidated), January 28, 2014] ····· 24

3. Case on Prohibition of Nighttime Access to Online Games by Juveniles

[26-1(B) KCCR 176, 2011Hun-Ma659 · 683 (Consolidated), April 24, 2014] ····· 40

4. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union

[26-2(A) KCCR 242, 2011Hun-Ba32, 2011Hun-Ka18, 2012Hun-Ba185 (consolidated), August 28, 2014] ····· 74

II. Summaries of Opinions

1. Case on the prior notice of outdoor assembly or demonstration

[26-1(A) KCCR 34, 2011Hun-Ba174 · 282 · 285, 2012Hun-Ba39 · 64 · 240 (consolidated), January 28, 2014] ····· 108

2. Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence

[26-1(A) KCCR 136, 2012Hun-Ma409 · 510, 2013Hun-Ma167 (consolidated), January 28, 2014] ····· 113

3. ***Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled***
[26-1(A) KCCR 155, 2012Hun-Ma431, 2012Hun-Ka19 (consolidated), January 28, 2014] ····· 118
4. ***Restriction on Contribution under the Public Official Election Act***
[26-1(A) KCCR 272, 2013Hun-Ba106, February 27, 2014] ····· 122
5. ***Case on Mutates Mutandis Application of the Statutes and Regulations relating to the Civil Procedure in the Process of Dissolving a Political Party***
[26-1(A) KCCR 310, 2014Hun-Ma7, February 27, 2014] ····· 129
6. ***Case on the Prohibition of Nighttime Demonstration***
[26-1(A) KCCR 324, 2010Hun-Ka2, 2012Hun-Ka13 (consolidated), March 27, 2014] ····· 134
7. ***Case on the Provision Forbidding Public Officials from Joining a Political Party and Regulating Political Activities***
[26-1(A) KCCR 375, 2011Hun-Ba42, March 27, 2014] ····· 140
8. ***Case on the Protection Application of North Korean Refugee Involved in Drug Trafficking***
[26-1(A) KCCR 468, 2012Hun-Ba192, March 27, 2014] ····· 145
9. ***Case on the Mandatory Receipt of Credit Cards and the Prohibition of Multiple Pricing***
[26-1(A) KCCR 514, 2011Hun-Ma744, March 27, 2014] ····· 148
10. ***Case on the Permission of Photographing a Suspect under Investigation***
[26-1(A) KCCR 534, 2012Hun-Ma652, March 27, 2014] ····· 151
11. ***Unlawful Distribution or Posting of Documents and Printed Materials Case***
[26-1(A) KCCR 628, 2011Hun-Ba17, 2012Hun-Ba391 (consolidated), April 24, 2014] ····· 156

12. Discrimination of Second-Generation Patients of Defoliant Exposure Case
[26-1(B) KCCR 16, 2011Hun-Ba228, April 24, 2014] ····· 163
13. Overseas Electors' Presentation of Passports Case
[26-1(B) KCCR 135, 2011Hun-Ma567, April 24, 2014] ····· 169
14. Prohibition of Adolescents' Nighttime Access to Online Games Case
[26-1(B) KCCR 176, 2011Hun-Ma659 · 683 (consolidated), April 24, 2014] ····· 174
15. Age Restriction for Voting, Electoral Eligibility, Election Campaigning and Political Party Activities Case
[26-1(B) KCCR 223, 2012Hun-Ma287, April 24, 2014] ····· 180
16. Case on Prohibition of Remunerating Full Time Trade Union Official and Time Off
[26-1(B) KCCR 354, 2010Hun-Ma606, May 29, 2014] ····· 193
17. Case on the constitutionality of provisions of the Single－Parent Family Support Act prohibiting adoption agency from operating 'unmarried mother and child family welfare facility for supporting basic needs'
[26-1(B) KCCR 378, 2011Hun-Ma363, May 29, 2014] ····· 201
18. Case on Children 18 years old or over Requesting Survivors' Benefit under the Public Officials Pension Act
[26-1(B) KCCR 423, 2012Hun-Ma515, May 29, 2014] ····· 207
19. Braille-Type Election Campaign Bulletins Case
[26-1(B) KCCR 448, 2012Hun-Ma913, May 29, 2014] ····· 213
20. Case on the General Prohibition of Multiple Nationalities
[26-1(B) KCCR 578, 2011Hun-Ma502, June 26, 2014] ····· 217
21. Case on the Constitutionality of Using Water Cannon
[26-1(B) KCCR 588, 2011Hun-Ma815, June 26, 2014] ····· 221

22. Case on the Property Registration and Employment Restriction on Employees of Grade IV or Higher of the Financial Supervisory Service
[26-1(B) KCCR 609, 2012Hun-Ma331, June 26, 2014] ····· 224

23. Case on the Restriction on Religious Assemblies of Pretrial Detainees and Unassigned Inmates
[26-1(B) KCCR 670, 2012Hun-Ma782, June 26, 2014] ····· 230

24. Interim Injunction Case on Refugee's Right to Counsel
[26-1(B) KCCR 680, 2014Hun-Sa592, June 5, 2014] ····· 233

25. Case on restricting voting right of overseas electors
[26-2(A) KCCR 173, 2009Hun-Ma256, 2010Hun-Ma394 (consolidated), July 24, 2014] ····· 236

26. Case on Registration of Personal Information of Sexual Offenders
[26-2(A) KCCR 226, 2013Hun-Ma423 · 426 (consolidated), July 24, 2014] ····· 246

27. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union
[26-2(A) KCCR 242, 2011Hun-Ba32, 2011Hun-Ka18, 2012Hun-Ba 185 (consolidated), August 28, 2014] ····· 250

28. Case on the Inheritance of De Facto Marriage Spouse
[26-2(A) KCCR 311, 2013Hun-Ba119, August 28, 2014] ····· 256

29. Case on the Act on Use and Protection of DNA Identification Information
[26-2(A) KCCR 337, 2011Hun-Ma28 · 106 · 141 · 156 · 326, 2013Hun-Ma 215 · 360 (Consolidated), August 28, 2014] ····· 260

30. Case on the Allotment of Youth Employment
[26-2(A) KCCR 429, 2013Hun-Ma553, August 28, 2014] ····· 271

31. Removal of Posts Containing Unlawful Information Case
[26-2(A) KCCR 466, 2012Hun-Ba325, September 25, 2014] ····· 275

32. Case on Constitutionality of Concurrent Sentence for Separate Charges including an Election Crime
[26-2(A) KCCR 505, 2013Hun-Ba208, September 25, 2014] ····· 279

33. Declaration of Area as Non-Smoking Case

[26-2(A) KCCR 609, 2013Hun-Ma411 · 546 (consolidated), September 25, 2014] ····· 283

34. Case on Standard for Population Disparity allowed in Division of Electoral District

[26-2(A) KCCR 668, 2012Hun-Ma190 · 192 · 211 · 262 · 325, 2013Hun-Ma 781, 2014Hun-Ma53 (consolidated), October 30, 2014] ····· 289

35. Case on the Act on the Aggravated Punishment, Etc. of Specific Crimes

[26-2(A) KCCR 703, 2014Hun-Ba224, 2014Hun-Ka11 (consolidated), Novermber 27, 2014] ····· 297

36. Dissolution of Unified Progressive Party Case

[26-2(B) KCCR 1, 2013Hun-Da1, December 19, 2014] ····· 300

Appendix

THE CONSTITUTION OF THE REPUBLIC OF KOREA ····· 319

I. Full Opinions

1. Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence

[26-1(A) KCCR 136, 2012Hun-Ma409 · 510, 2013Hun-Ma167 (consolidated)]

Complainants:

1. Gu ○-Hyun (2012Hun-Ma409)
2. Hong ○-Seok (2012Hun-Ma510)
3. Jeon ○-Soo (2012Hun-Ma167)
   Represented by Attorney Nam Seung-Han
4. Seo ○-Hoon (2012Hun-Ma510)
   Represented by Court Appointed Attorney Yoon Jung-Dae
5. Kwak ○-Chul (2013Hun-Ma167)
   Represented by Court Appointed Attorney Kim Sang-Hoon

Decided: January 28, 2014

Holding

1. The part relating to ‘a person who is sentenced to imprisonment for a limited term or without prison labor for a limited term and the execution of his/her sentence is suspended’ in Article 18 Section 1 Item 2 of the Public Official Election Act (amended by Act No. 7681, August 4, 2005) and the part relating to ‘the right to vote under the public Acts’ of a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term and his/her sentence is suspended in Article 43 Section 2 of the Criminal Code (enacted by Act No. 293, September 18, 1953) violate the Constitution.

2. The part relating to ‘a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term, but whose sentence execution has not been terminated’ of Article 18

1. Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence

Section 1 Item 2 of Public Official Election Act (amended by Act No. 7681, August 4, 2005) and the part relating to 'the right to vote under the public Acts' of a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term but whose sentence execution has not been terminated in Article 43 Section 2 of the Criminal Code (enacted by Act No. 293, September 18, 1953) do not conform to the Constitution.

Each part of the statutory provisions will remain effective until the legislature amends them within the time limit of December 31, 2015.

Reasoning

I. Introduction of the Case

A. 2012Hun-Ma409

Complainant Gu ○-Hyun was sentenced to imprisonment for four months and suspension of the sentence for two years after the Seoul Eastern District Court found him guilty of obstruction of business, etc. and the judgment was finally confirmed on December 2, 2011. Complainant Hong ○-Seok was sentenced to imprisonment for one and a half year for violation of the Military Service Act by the Seoul Central District Court on December 22 and the judgment was confirmed on December 30, 2011. Complainant Jeon ○-Soo was also sentenced to imprisonment for one and a half year for violation of the Military Service Act by the Bucheon Branch of Inchon District Court on February 15, 2012 and the judgment was confirmed on February 23, 2012. The complainants were prevented from exercising their right to vote in the election for the 19th National Assembly held on April 11, 2012 on the ground that they fell under the category of disfranchised people stipulated in Article 18 Section 1 Item 2 of the Public Official Election Act. Upon this, the complainants filed this constitutional complaint on April 25, 2012, arguing that Article 18 Section 1 Item 2 of

the Public Official Election Act violates their fundamental rights including the right to vote.

B. 2012Hun-Ma510

Complainant Seo ○-Hoon was sentenced to 13 years imprisonment on May 12, 2010 after the Busan High Court found him guilty of crime under the Act on the Punishment of Sexual Crimes and the Protection of Victims and now is serving his prison term. The complainant was prevented from exercising the right to vote in the election for the 19th National Assembly held on April 11, 2012 on the ground that they fell under the category of disfranchised people stipulated in Article 18 Section 1 Item 2 of the Public Official Election Act. Upon this, the complainant filed this constitutional complaint on May 31, 2012, arguing that Article 18 Section 1 Item 2 of the Public Official Election Act violates his fundamental rights including the right to vote.

C. 2013Hun-Ma167

Complainant Kwak ○-Chul was sentenced to one and a half year imprisonment for the violation of the Act on the Protection of Children and Juveniles against Sexual Abuse (rape, etc.) by the Haenam Branch of Kwangju District Court on May 24, 2012 and the judgment was finally confirmed on August 3, 2012. The complainant was prevented from exercising the right to vote in the election for the 18th National Assembly held on December 19, 2012 pursuant to Article 43 Section 2 and Section 1 Item 2 of the Criminal Code. Upon this, the complainant filed this constitutional complaint on March 19, 2013, arguing that Article 43 Section 2 and Section 1 Item 2 of the Criminal Code infringe upon his right to equality and the right to vote.

II. Subject Matter of Review

As complainant Gu ○-Hyun's right to vote was restricted due to the suspension of the sentence and other complainants' right to vote was restricted due to the sentence of imprisonment with fixed term, the subject matters of review should be limited to the part relating to the complainants. Therefore, the subject matters of review in this case are (1) whether the part relating to 'a person who is sentenced to imprisonment for a limited term or without prison labor for a limited term and the execution of his/her sentence is suspended' (hereinafter, for the sake of convenience, we will use the term 'prisoner'; the prisoner here includes a person whose sentence of imprisonment for a fixed term or sentence of imprisonment without prison labor for a fixed term is under execution and a person who was released on parole but his/her prison term has yet to be terminated) and the part relating to 'a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term and his/her sentence is suspended' (hereinafter, for the sake of convenience, we will use the term 'probationer with suspended sentence' excluding those whose right to vote is restricted pursuant to Article 18 Section 1 Item 3 in Article 18 Section 1 Item 2 of the Public Official Election Act (amended by Act No. 7681, August 4, 2005) and (2) whether the part relating to 'the right to vote under the public Acts' of probationer with suspended sentence or prisoners in Article 43 Section 2 of the Criminal Code (enacted by Act No. 293, September 18, 1953) infringe upon the complainants' fundamental rights. The Provisions at Issue and Related Provisions in this case are as follows:

Provisions at Issue

Public Official Election Act (amended by Act No. 7681, August 4, 2005)

Article 18 (Disfranchised Persons) (1) A person falling under any of the following Items, as of the election day, shall be disfranchised:

2. A person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted

Criminal Code (enacted by Act No. 293, September 18, 1953)

Article 43 (Imposition of Sentence, Deprivation of Qualifications and Suspension of Qualifications) (2) A person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications as mentioned in subparagraphs 1 through 3 of the preceding paragraph until the execution of punishment is completed or remitted.

Related provisions

Criminal Code (enacted by Act No. 293, September 18, 1953)

Article 43 (Imposition of Sentence, Deprivation of Qualifications and Suspension of Qualifications) (1) A person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, shall be deprived of the qualifications prescribed as follows:

1. Qualifications to become public officials;
2. Suffrage and eligibility under public Act;
3. Qualifications concerning business under public Act, for which necessary conditions have been prescribed by Acts; and
4. Qualifications to become a director, auditor or manager of a juristic person or an inspector or custodian concerning the business of a juristic person.

Public Official Election Act (amended by Act No. 7683, August 4, 2005)

Article 18 (Disfranchised Persons) (1) A person falling under any of the following Items, as of the election day, shall be disfranchised:

1. A person who is declared incompetent;
3. A person who commits an election crime, who commits the crimes provided for in the provisions of Articles 45 and 49 of the Political

Fund Act or who commits the crimes in connection with the duties while in office as the President, member of the National Assembly, member of local council, and head of local government, which are referred to in Articles 129 through 132 of the Criminal Act (including the case subject to an aggravated punishment pursuant to Article 2 of the Act on the Aggravated Punishment, etc. of Specific Crimes) and Article 3 of the Act on the Aggravated Punishment, etc. of Specific Crimes, and for whom five years have not passed since a fine exceeding one million won is sentenced and the sentence becomes final or ten years have not passed since the suspended sentence becomes final, or for whom ten years have not passed since imprisonment was sentenced and the decision not to execute the sentence became final or since the execution of the sentence was terminated or exempted (including a person whose punishment becomes invalidated); and

4. A person whose voting franchise is suspended or forfeited according to a decision by court or pursuant to other Acts

(2) For the purpose of paragraph (1) 3, the term “person who commits an election crime” means a person who commits a crime provided in CHAPTER XVI Penal Provisions or a crime in violation of the National Referendum Act.

III. Argument of the Complainants

The Provisions at Issue monolithically restrict the right to vote of probationers with suspended sentences and prisoners: considering the legislative purposes of the Public Official Election Act and the Act on Administration and Treatment of Correctional Institution Inmate and the principle of sovereignty of the people, the Provisions at Issue fail to meet the requirements of legitimacy of legislative purposes and reasonableness of means to achieve the legislative purposes. Further, the Provisions at Issue also do not satisfy the least restrictive means test as they impose blanket limitation on the right to vote of criminals including negligent offenders, parolees, probationer with suspended sentence or

those who are sentenced to short term imprisonment, without any serious consideration of possible causal relationship between restriction on the right to vote and the types and elements of each crime or degree of culpability and illegality. Also, as the public interests to be achieved by the Provisions at Issue are smaller than the private and public interestes to be infringed by the Provisions at Issue, they fail to strike the balance between legal interests. Therefore, the Provisions at Issue infringe upon the complainants' right to vote, right to equality and right to pursue happiness.

IV. Review on Merits

A. Restriction on the Right to Vote of Probationers with Suspended Sentence and Prisoners

1. Overview of Legislative History

Article 2 Section 3 of the National Assembly Election Act was firstly enacted on March 17, 1948 (Military Administration Act and Regulation No. 175), stipulating that a person "who is sentenced to imprisonment and whose sentence is under execution or the decision not to execute the sentence has yet to be final" was not entitled to the right to vote. The content of the provision was also similarly codified in other related Acts and has not undergone major changes except for some modifications of wording, being maintained in the Article 18 Section 1 Item 2 of the current Public Official Election Act. Article 43 of the Criminal Code had not been amended since it was enacted by Act No. 293 on October 3, 1953.

2. Legislative Examples of Foreign Countries

It seems that other foreign countries do not have laws that restrict probationers' right to vote. Examples of foreign legislation also show that each country being investigated has different levels and methods of

restricting prisoners' right to vote. For example, in Japan, a person 'who is sentenced to imprisonment without prison labor or heavier punishment and whose sentence execution has not terminated' is prevented from exercising the right to vote. In the U.S.A., the state governments are explicitly empowered to restrict the right to vote in specific cases and the Supreme Court held that the right to vote of people who were found guilty of felonies can be restricted while it can be unconstitutional to restrict the right to vote of people guilty of misdemeanors. In Germany, judges are allowed to order restriction on the right to vote of convicted criminals for a specific time period as a supplementary sanction based on specific statutory provisions. Meanwhile, Canada, South Africa, Israel and Sweden allow prisoners to exercise the right to vote.

The countries which limit prisoners' right to vote, however, have been extensively reconsidering such restriction. In Canada, which had long limited the right to vote of prisoners, all prisoners now enjoy the right to vote after its Supreme Court held the restriction unconstitutional in 1993 and 2002. The Supreme Court of South Africa also rendered the decision of unconstitutionality against a provision that deprives all prisoners of their right to vote in 2004. Under the England laws, all kinds of prisoners cannot exercise their right to vote, but the European Court of Human Rights, in 2005, declared that monolithic and blanket restriction on the right to vote, which is the core right under the European Convention on Human Rights, was in violation of Article 3 of the Protocol 1 to the European Convention on Human Rights. The Australian Supreme Court held unconstitutional a provision restricting the right to vote of all kinds of prisoners in 2007, and the French Constitutional Council in 2010 decided that a provision that prevented a person who was found guilty of specific crimes such as illegal collection and acceptance of bribe from exercising the voting right violated the Constitution.

B. Precedents of the Constitutional Court

On March 25, 2004, the Constitutional Court, in an opinion of 8 : 1, held constitutional the former part of Article 18 Section 1 Item 2 (a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day) of the Public Official Election and Prevention of Election Irregularities Act (enacted by Act No. 4739, March 16, 1994 and before being amended by Act No. 7681, August 4, 2005) in 2002Hun-Ma411 case. After then, in 2007Hun-Ma1462 case decided on October 29, 2009, the Court reviewed the constitutionality of the former part of Article 18 Section 1 Item 2 (a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day) and denied the constitutional complaint in an opinion of 5 (unconstitutionality): 3 (denial): 1 (dismissal), since the opinion of unconstitutionality, although it was the majority opinion, failed to reach the quorum required for rendering a decision of unconstitutionality.

C. Limitation of the Restriction Imposed on the Right to Vote

1. Meaning of the Right to Vote and Limitation of the Restriction on the Right to Vote

Article 1 Section 2 of the Constitution, by stipulating that “the sovereignty of the Republic of Korea shall reside in the people and all state authority shall emanate from the people,” affirms the principle of people’s sovereignty. The principle of people’s sovereignty in a democratic state can be realized by elections to select representatives of the people and national referendum in which the people can directly decide national policies. Election is the most important way to exercise the people’s right to vote in today’s representative democracy. The people’s exercising voting right in election provides democratic legitimacy

with state institutions elected through election and the exercise of state power.

Democracy calls for possible unity between those who have suffrage and those under the control of state powers. The result of such demand is the principle of universal suffrage. The principles of universal suffrage and equal election that requires all citizens to equally participate in election are the essential elements to realize a democratic state based on the principle of the sovereignty of the people (98Hun-Ma214, May 27, 1999).

Article 24 of the Constitution takes on the form of statutory reservation as it provides that "all citizens shall have the right to vote under the conditions as prescribed by statute." But it does not signify a reservation to comprehensive legislation that acknowledges 'the people's suffrage is recognized only as prescribed by statutes'. This means that the fundamental rights of the people should be materialized through laws and specifically, the right to vote should be actualized through the law. Therefore, even when stipulating the contents and process regarding the right to vote, such stipulation must conform to the purposes and intents of Article 1 of the Constitution which declares the popular sovereignty, Article 11 of the Constitution which speaks of the right to equality and Article 41 and Article 67 of the Constitution which guarantee universal, equal, direct and secret elections for presidential and national assembly elections. Pertaining to the importance the right to vote holds in a democratic nation as the apparatus for realizing the popular sovereignty and democracy through representation, the legislative branch, on the one hand, should enact laws that guarantee the right to vote to its fullest and, on the other hand, the Constitutional Court should apply strict scrutiny in reviewing the constitutionality of laws that restrict the voting right.

Therefore, any legislation restrictive of the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases where such restriction is necessary for national security, maintenance of law and order or for public welfare. Even then, the essential aspects of the right to vote cannot be violated.

Moreover, as the principle of universal suffrage disregards all actual factors such as competence, wealth, or social status of the voters and demands that anyone of age is given the right to vote, the requirements and limits laid out in Article 37 Section 2 of the Constitution should be abided by even more strictly when enacting legislation that restricts the right to vote in violation of the principle of universal election (2004Hun-Ma644, etc., June 28, 2007).

2. Restriction on Criminal's Right to Vote and Its Limitation

Disenfranchisement which excludes criminals from voting can be tracked to ancient Greek and Roman tradition imposing the punishment on those convicted of crimes as a part of their 'civil death'. At that time, the franchise was only given to some selected citizens based on competence, wealth, social status, sex or race and endowing the right was a matter of protecting purity of the community.

But after the concept of universal suffrage was firmly entrenched, the ancient doctrine of 'civil death' or deprivation of the rights and privileges as a citizen upon conviction of a serious crime did not harmonize with the modern concept of civil rights. The premise on which the doctrine of 'civil death' is based, that some people are not eligible for exercising the right to vote, cannot be admitted by the principle of universal suffrage and pluralism recognized under our Constitution.

Any legislation restrictive of the right to vote should be enacted with caution because the legislators who are elected by the people through election limit by themselves the scope of people who can elect them. When criminal's right to vote is restricted as a punishment against crime, the questions as to whether the right to vote is restricted and whether the scope of application is legitimate should be scrutinized under the strict proportionality test pursuant to Article 37 Section 2 of the Constitution, from the perspective of protection of the right to vote and its restriction based on the principle of universal suffrage (2007Hun-Ma1462, October

29, 2009, Dissenting Opinion).

D. Review on Constitutionality of the Provisions at Issue

1. Legitimacy of legislative purposes and appropriateness of means

The Provisions at Issue are premised on the basic perception that it is undesirable to allow those individuals who have deserted the basic obligations that must be observed by the members of the community and harmed the maintenance of the community to directly and indirectly participate in constituting the governing structure that leads the operation of the community. The Provisions at Issue also work as social sanction against such anti-social behavior. The deprivation of the right to vote by the Provisions at Issue functions as retribution against crimes, as an extension of criminal sanction against criminals. Further, the deprivation of the right to vote imposed on prisoners and probationers with suspended sentence by the Provisions at Issue, on top of the deprivation of liberty to which the prisoner is sentenced, can contribute to heightening the responsibility of general citizens including prisoners or probationers with suspended sentence as citizens and reinforce their respect toward the rule of law. Such legislative purposes of the Provisions at Issue are legitimate and the restriction on prisoners or probationers with suspended sentence's voting right is one of the effective and proper measures to achieve the legislative purposes. Therefore, the Provisions at Issue can be said to pass the tests of both the legitimacy of legislative purpose and the appropriateness of means (2007Hun-Ma1462, October 29, 2009, Dissenting Opinion).

2. Least restrictive means test

The principle of universal suffrage and the right to vote based on it should be restricted to the minimum extent only when it is necessary. As the restriction on the right to vote does not naturally derive from the

essence of imprisonment sentenced to criminals, criminal's right to vote should be restricted to the minimum necessary extent based on the principle of universal suffrage (2007Hun-Ma1462, October 29, 2009, Dissenting Opinion).

The Provisions at Issue, however, fully and uniformly restrict the right to vote of prisoners and probationers with suspended sentence. The scope of application of the Provisions at Issue is very broad, spanning from those who are guilty of relatively minor crimes to those who are guilty of felonies. The Provisions at Issue consider neither the type of crimes such as whether it is a criminal negligence or intentional offence nor the type of legal interests infringed by the crimes such as whether it is state interest, social interest or personal interest.

In light of the legislative purposes of the Provisions at Issue, it is hard to come up with any reason for the uniform and extensive restriction on the right to vote regardless of the type, elements or degree of culpability of a specific crime. Considering the importance of the principle of popular suffrage and the right to vote, the right to vote should be restricted to the minimum extent only when it is necessary. Even though it is necessary to restrict criminal's right to vote, blanket restriction on both prisoners and probationer with suspended sentences, without considering the gravity of illegality of crimes committed by each of them, is contrary to the least restrictive requirement.

Specifically, probationers with suspended sentences are people who are sentenced to imprisonment or imprisonment without prison labor for less than three years and the execution of their sentences is suspended for from more than 1 year to less than 5 years in extenuation of many factors such as age, personality, behavior, intelligence, environment, relation with victims, motive of crime, method and result, and circumstance after committing crime, etc., and they living in our society as members of community. Unless the execution of sentences is invalidated or cancelled, they will not be incarcerated in correctional institutions, leading the same life as other ordinary citizens. Therefore, the necessity to restrict their right to vote does not seem evident.

Also, for probationers with suspended sentence, the restriction on the right to vote may not be proportional to the liability of their crimes, as the execution of their sentences can be suspended for more than 1 year and less than 5 years. For example, complainant Gu ○-Hyun who was sentenced to imprisonment for four months and suspension of the sentence for two years is prevented from exercising his right to vote longer than Hong ○-Seok or Jeon ○-Soo who were sentenced to imprisonment for one and a half year.

3. Balance of interests test

As reviewed earlier, the restriction on prisoner's right to vote by the Provisions at Issue, is too broad and in some sense, not directly related to the specific characteristics of a crime involved. Therefore, the public interests expected to be achieved by 'the restriction including sanction against criminals who commit grave crimes or the reinforcement of citizens' respect to the rule of law' is less valuable than 'the private interests of prisoners and probationers with suspended sentence or the public value of democratic election system' expected to be infringed by the Provisions at Issue.

4. Sub-Conclusion

As such, the Provisions at Issue fail to meet the least restrictive requirement and the balance of interests test while satisfying the legitimacy of legislative purpose and the appropriateness of means. Therefore, the Provisions at Issue infringe upon the complainants' right to vote in violation of Article 37 Section 2 of the Constitution. The Provisions at Issue also violate the principle of equality as they discriminate probationers with suspended sentences from prisoners in violation of the principle of universal suffrage stipulated in Article 41 Section 1 and Article 67 Section 1 of the Constitution.

E. Decision of Non-Conformity to the Constitution and the Order of Temporary Application

The Provisions at Issue violate the Constitution, infringing upon the right to vote of probationers with suspended sentence and prisoners. Among the Provisions at Issue, the part relating to probationers with suspended sentence can regain its constitutionality by declaring it unconstitutional, which instantly removes the infringement on the right to vote.

On the contrary, regarding the part relating to prisoners, its unconstitutionality results from the blanket and uniform restriction on the right to vote. But it is within the scope of legislative discretion to remove such unconstitutionality and to constitutionally grant prisoners the right to vote. It is practically impossible to provide a general standard for the scope of prisoners whose right to vote should be limited on the basis of types of crime or legal interests infringed by the crime. As the Public Official Election Act, in case of election crime, provides for specific and segmentalized levels of restriction on the right to vote, it would be more practical that restriction on the right to vote according to different types and category of crimes is legislated within each relevant law.

In deciding the scope of crimes in which the right to vote of a perpetrator of the relevant crime is to be restricted, a sentence rendered by court can be a reasonable standard for deciding as to whether a crime is felony or not. Sentence is rendered in consideration of sentencing conditions such as criminal's age, personality, behavior, intelligence, environment, relation with victims, motive of crime, method and result and circumstance after committing crime. Also, if a person who is sentenced to short term imprisonment is excluded from the scope within which the voting right is restricted, people who committed misdemeanor with relatively low culpability can exercise the right to vote. Therefore, the legislators can determine the sentences that serve as the standard for restricting the voting right after comprehensively considering many

factors such as relation between gravity of crime and sentence and electoral cycles, and it would be desirable to legislate that the restriction on the voting right should be imposed limitedly on prisoners who are sentenced to imprisonment for a certain prison term and the sentence is under execution. As such, the details of granting the right to vote to prisoners can be decided by the legislature exercising its discretion.

Therefore, the part relating to prisoners among the Provisions at Issue is hereby declared not to be compatible with the Constitution, but it is to be temporarily enforced until the legislature revises it. The legislators must make the proper revision at the latest by December 31, 2015, and if no such revision is made by then, the part relating to prisoners among the Provisions at Issue will become null and void starting on January 1, 2016.

V. Conclusion

Therefore, among the Provisions at Issue, the part relating to probationers with suspended sentence violates the Constitution, and the part relating to prisoners is not compatible with the Constitution but is to temporarily remain effective until the legislature makes a proper revision, which is to be made at the latest by December 31, 2015.

Also, the Constitutional Court's decision of 2002Hun-Ma411 held on March 25, 2004, which decided, unlike this decision, that the former part of Article 18 Section 1 Item 2 of the former Public Office Election Act (enacted by Act No. 4739 March 16, 1004 and before being revised by Act No. 7681 on August 4, 2005) did not violate the Constitution and the Constitutional Court's decision of 2007Hun-Ma1462 held on October 29, 2009, which decided, unlike this decision, that the former part of Article 18 Section 1 Item 2 of the Public Office Election Act (revised by Act No. 7681 on August 4, 2005) are altered within the scope that conflicts with this decision.

This decision is a unanimous one except Justice Lee Jin-Sung who expressed a concurring opinion on the part relating to probationers with

suspended sentence and a dissenting opinion on the part relating to prisoner as stated below under paragraph VI., and Justice Ahn Chang-Ho who expressed a dissenting opinion as stated below under paragraph VII.

VI. Concurring Opinion on the part of probationer with suspended sentence and Dissenting Opinion on the part of Prisoner by Justice Lee Jin-Sung

I agree with the majority opinion in that the part relating to probationers with suspended sentence is unconstitutional but based on different reasons. And I believe the part relating to prisoners is also unconstitutional.

A. The legislative purpose of the Provisions at Issue, the deprivation of the right to vote in order to impose a social sanction on those who are convicted of crimes, is not legitimate.

I do not deny the need to impose a certain social sanction on prisoners as retribution against crimes, but such a sanction does not need to be manifested by a way of restricting the right to vote as the most basic right among the suffrage rights. The Provisions at Issue are applicable to prisoners who are sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term or probationers with suspended sentence, and prisoners and probationers with suspended sentence are people who are scheduled to return or have already returned to the society. The State's correctional administration should aim at prisoners' successful return to normal and free social life after being discharged from correctional institutions and the restriction on prisoners' fundamental rights can only be justified to the extent that such restriction corresponds to the purpose of social rehabilitation. Restricting fundamental rights of prisoners only because they are sentenced to imprisonment cannot be constitutionally allowed as it does not conform to the purpose to help prisoners to successfully return to normal and free social life.

1. Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence

Committing crimes and doing harm to society therefrom cannot be a logical and necessary reason that gives justification to restrict the suffrage for participating in the formation of state. The punishment of depriving liberty which restricts freedom of body is a limitation pursuant to the liability of one's crime, but the deprivation of the voting right automatically accompanied with the deprivation of liberty is incompatible with such liability. The right to vote, as an inherently fundamental right and as a constituting principle of democracy, is the right on which people's exercising the sovereignty is based. Therefore, restricting the right to vote, as a punishment added to the sentence of imprisonment, goes beyond the scope of liability because exercising the sovereignty and criminal liability are totally different issues. The deprivation of the right to vote as an extension of criminal sanction goes beyond the level necessary to fulfill the retributive function against the criminals.

Moreover, it seems unnecessary to impose the social sanction of restricting the right to vote against probationers with suspended sentence as they are not confined in prison but already living in our society as components of community. Therefore, it seems the legislative purpose of the Provisions at Issue, which restrict the right to vote of prisoners and probationers with suspended sentence for conducting social sanction against anti-social behaviors, is not legitimate.

B. As reviewed before, aside from the criminal and social sanctions against criminals, there is another legislative purpose of reinforcing people's respect toward the rule of law. But restricting the right to vote of prisoners and probationers with suspended sentence tends to damage the respect to law and democracy, not to consolidate the values of law and democracy. As the legitimacy of law and the duty to abide by law directly derive from the exercise of the voting right by citizens, restricting the right to vote of prisoners and probationers with suspended sentence does not seem to strengthen the law abiding spirit.

It is unclear as to how the means of 'depriving the right to vote of prisoners and probationers with suspended sentence' appropriately

functions in order to achieve the purpose of strengthening the 'law abiding spirit,' and expectation to meet the appropriateness of the means test seems a vague hope. It is also disturbing that the maladaptive feelings the prisoners may experience after returning to society and participating in the election process can be expressed as guilty conscience, feeling of helplessness or indifference and even repugnance for politics, which is in contradiction to the criminal policy of prisoner's rehabilitation pursued by the government. Rather, granting prisoners or probationers with suspended sentence a chance to exercise their voting right may help them to develop robust political awareness, which is more accordant with the purposes of rehabilitating criminals and reinforcing the law abiding spirit.

C. Hence, the Provisions at Issue violate the Constitution as infringing upon the right to vote of prisoners and probationers with suspended sentence. The unconstitutionality of the Provisions at Issue can be cured by the Court's decision of simple unconstitutionality, which removes the infringement of the right to vote of prisoners and probationers with suspended sentence. Therefore, the whole Provisions at Issue should be declared unconstitutional.

VII. Dissenting Opinion on the part of Prisoner by Justice Ahn Chang-Ho

I agree with the majority opinion in that the part relating to probationers with suspended sentence is unconstitutional. But I think the part relating to prisoners is not contrary to the Constitution.

A. Standard of Review for the Restriction on the Right to Vote

Like other fundamental rights, the right to vote can be restricted by law only within the scope of not going beyond the rule against excessive restriction, as long as essential aspects of the right to vote are not violated. But, the right to vote is an expression of people's sovereignty

and participating in the process of election should be protected as much as possible while restricted as minimally as possible because it is highly possible that an infringement on people's suffrage can be a direct infringement on the democratic values protected under the Constitution to realize freedom, equality and justice based on people's sovereignty (93Hun-Ka4, etc., July 29, 1994; 91Hun-Ma67, March 25, 1995).

Meanwhile, as the right to vote is not a natural right inherent to all human beings but a positive or stipulated right under conditions as prescribed by law pursuant to Article 24 of the Constitution, the issue of choosing measures to achieve the legislative purposes is a matter of legislative discretion within the boundary of constitutional principles relating to election system, unless it is found to be clearly unjust or unreasonable (see 96Hun-Ma89, June 26, 1997). Also, we cannot ignore the fact that from the perspective that the right to vote is a principle of making decision by citizens in a state where the representative democracy is upheld, the legislative deprivation imposed against felonies of a chance to directly and indirectly participate in the formation and management of community and society can be justified given the fact that they abandoned their obligation as members of society. Therefore, when reviewing the constitutionality of a provision restricting the right to vote of prisoners, we have to take into consideration of such peculiarity of the right to vote.

B. Whether the Provisions at Issue infringe on prisoners' right to vote

1. I agree with the majority opinion that the legislative purposes of the Provisions at Issue are legitimate in that the restriction on the right to vote of prisoners functions as a social sanction against people who neglected their social obligation as members of community and as retribution against crime as an extension of criminal sanction; and such restriction can contribute to heightening the responsibility of general citizens and reinforce their respect toward the rule of law. I also agree that the restriction on the right to vote of prisoners, etc. is a reasonable

means to achieve the legislative purposes.

2. Different from probationers with suspended sentence who are decided not to be confined in prison in extenuation of many circumstantial factors and therefore living in our society as members of community, prisoners are felons whose sentence execution has yet to be terminated after being sentenced to imprisonment without prison labor or more by judges. Given the fact that judges in criminal cases choose the types and length of sentence after considering many factors such as criminals' personality, behavior, environment, motive of crime, method and result and circumstance after committing crime, etc., prisoners who are sentenced to imprisonment, not to penalty, probation or suspension of sentence, can be said to be socially and legally more blamable. As such, in case of prisoners who are isolated from the society as retribution against their abandoning obligation as members of community, it seems that the suspension of the right to vote 'for the period of isolation' does not exceed the necessary level to achieve the legislative purpose.

3. The blanket and uniform deprivation of the right to vote of prisoners and probationers with suspended sentence, without considering the type, elements or culpability of crime, may confront a question that it contradicts the principle of criminal liability. Of course, this question would be appropriate if the restriction on the right to vote is imposed, without considering the type, elements or culpability of crime, on probationer with suspended sentence whose culpability is relatively low. But if the restriction is confined to prisoners whose criminal liability reaches a certain level, the criticism would become less persuasive.

First, I am doubtful that the types and elements of crimes, aside from their culpability, should be regarded as critical factors in deciding the scope of limitation on the right to vote, except when stipulated in statutory provisions. Simply by narrowing down the scope of restriction on the right to vote to the prisoners who are sentenced to a certain level of grave punishment based on the culpability of crime itself, regardless of the type or elements of crime, the restriction can be relatively free from the blame that such a law is excessive legislation imposing uniform

and blanket restriction. Further, it is more likely so, if the period of restriction of the right to vote is limited to the period of imprisonment sentenced in proportionality of the criminal liability.

In case of criminally negligent offenders or short term prisoners, judges rendered a decision of imprisonment, which is a relatively graver punishment, after considering the level of culpability or implication of each case. Therefore, I do not see any reason to treat them differently from other prisoners in terms of limitation of the right to vote. Of course, the criminal culpability of the criminally negligent offenders or the short term prisoners are relatively lower than that of long term prisoners or criminals of intentional offense. But such difference seems to be reflected in the prison term during which the voting right is restricted, proportionate to the level of criminal liability. Therefore, it is hard to conclude that the Provisions at Issue violate the principle of criminal liability.

Also, if we adopt a stance that the restriction on the right to vote should only be applicable to probationers with suspended sentence, not to prisoners, the criticism raised by the majority opinion that probationers with suspended sentence are prevented from exercising their right to vote longer than prisoners who were sentenced to short term imprisonment, which can bring about possible imbalance between restriction and liability, would become meaningless.

4. Review on the examples of foreign legislation also reveals that the restriction on the right to vote of prisoners, different from probationers with suspended sentence, have been effectively maintained up to now in many countries where the representative democracy is well developed, with some modifications based on national tradition or specific conditions. Meanwhile, the scope and methods of restriction are different from country to country: for example, Japan restricts the right to vote of all prisoners like Korea; Australia and Italy impose such restriction only on the prisoners who are sentenced to imprisonment for more than three years; the US has accumulated precedents that prisoners who are guilty of felonies can be prevented from exercising the right to vote; Germany

restricts the right to vote of people who were found guilty by judges only pursuant to statutory provisions stipulating so as a supplementary sanction; and Canada allows prisoners to exercise their voting right without limit. As these examples show, many advanced countries where the principle of universal suffrage is firmly entrenched restrict the right to vote of prisoners, considering the specific and detailed circumstances such as their national criminal law system; the management of criminal justice system including the type and elements of crime and the relation between level of culpability; people's prevailing legal sentiment on crime and criminal sanction; historical experience; and political atmosphere. Given the examples of foreign legislation, the restriction of the right to vote of prisoners who are isolated from the community seems neither contrary to the principle of universal suffrage nor distinctively unreasonable or unfair far beyond the legislative discretion.

5. Prisoners' being unable to exercise their right to vote during the imprisonment is due to their crimes, and such restriction on the fundamental right is based on their criminal liability. Therefore, the part relating to prisoners does not violate either the principle of universal suffrage or the least restrictive means requirement. Also, we cannot conclude that the public interests to be achieved by the Provisions at Issue does not exceed prisoners' private disadvantage caused by the restriction on the right to vote (see 2002Hun-Ma411, March 25, 2004).

6. Therefore, the part relating to prisoners among the Provisions at Issue neither infringe upon the complainants' right to vote in violation of the rule against excessive restriction nor violate the principle of equality in violation of the principle of universal suffrage.

Justices 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 and Cho Yong-Ho

2. Case on Prohibition of Using the Name of a Political Party whose Registration has been cancelled

[26-1(A) KCCR 155, 2012Hun-Ma431, 2012Hun-Ka19 (consolidated)]

Complainants and Requesting Petitioners: Appendix 1

Representatives: Attorney in charge Kim Jung-Jin and two others
Changjo Law Firm
Attorney in charge Lee Deok-Woo
WooriHanaro Law Firm
Attorney in charge Sung Sang-Hee

Requesting Court: Seoul Administrative Court

Underlying Case: Seoul Administrative Court 2012Guhap14255 Revocation of Public Notice of Cancelling Registration of Central Party

Decided: January 28, 2014

Holding

The part related to Article 44 Section 1 Item 3 in Article 41 Section 3 and Article 44 Section 1 Item 3 of the Political Parties Act (amended by Act No. 7683, August 4, 2005) violates the Constitution.

Reasoning

I. Introduction of the Case

All of the complainants of 2012Hun-Ma431 are also requesting petitioners of 2012Hun-Ka19. Complainant and requesting petitioner (hereinafter, the 'complainant') New Progressive Party had registered with the National Election Commission on March 17, 2008, complainant Green Party on March 15, 2012 and complainant Youth Party on March 19, 2012 but their registrations were cancelled on April 12, 2012. Complainant Hong ○-Wha used to be the representative of the New

progressive party, complainant Lee ○-Joo used to be the representative of the Green Party and complainant Kang ○-Hee used to be the co-representative of the Youth Party.

The complainants, the New Progressive Party, the Green Party and the Youth Party, failed to obtain more than 2/100 of total number of effective votes in the 19th National Election held on April 11, 2012 (New Progressive party 1.13%, Green Party 0.48% and Youth Party 0.34%), and the National Election Commission, pursuant to Article 44 Section 1 of the Political Parties Act, cancelled their registrations and published a public notice regarding the cancellation on April 12, 2012. Also, due to Article 41 Section 4 of the Political Parties Act which prohibits use of the name of a political party whose registration has been cancelled for a certain period of time, the complainants became unable to use their names, such as the New Progressive Party, the Green Party and the Youth Party.

Upon this, the complainants filed a constitutional complaint for the review of constitutionality of Article 41 Section 4 of the Political Parties Act on May 3, 2012 (2012Hun-Ma431) and filed a suit in Seoul Administrative Court for the revocation of the cancellation of political party's registration against the National Election Commission on the same day (2012Guhap14255). While the case was pending, the complainants filed a motion to request a constitutional review of Article 44 Section 1 Item 3 of the Political Parties Act (2012Ah1493). The aforementioned court granted the motion and submitted the request of adjudication on the constitutionality of the statutory provision on November 19, 2012 (2012Hun-Ka19).

II. Subject Matter of Review

The subject matter of this case is whether the part related to Article 44 Section 1 Item 3 in Article 41 Section 3 (hereinafter, the 'Prohibition Provision') of the Political Parties Act (amended by Act No. 7683, August 4, 2005) (2012Hun-Ma432) and Article 44 Section 1 Item 3

(hereinafter the 'Cancellation Provision') of the Political Parties Act (amended by Act No. 7683, August 4, 2005) (2012Hun-Ka19) violate the Constitution. The provisions at issue are as follows:

Provisions at Issue

Political Parties Act (amended by Act No. 7683, August 4, 2005)

Article 41 (Prohibition of Use of Similar Denomination, etc.) (4) Any title identical with that of a political party whose registration has been cancelled under Article 44 Section 1, shall not be used as the title of a political party from the date of such cancellation of registration until the date of election of National Assembly members first held due to the expiration of their term.

Article 44 (Cancellation of Registration) (1) When a political party falls under any of the following subparagraphs, the relevant election commission shall revoke its registration:

3. When failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, and failing to obtain more than 2/100 of total number of effective votes.

III. Argument of the Complainants and Reasons for the Request of Adjudication on Constitutionality by the Requesting Court

A. Argument of the Complainants

The legislative purpose of the Prohibition Provision is unclear, and even if we assume that the legislative purpose is to guarantee the right to vote through checking the random establishment of small and minor parties, the Prohibition Provision is not a proper means to achieve the legislative purpose as it simply prohibits the use of an identical, not similar, name of a political party whose registration is cancelled. Also, although the requirements for registration and cancellation of registration are sufficient enough to achieve the legislative purpose of curving the random

establishment of small and minor political parties, the aforementioned provision prohibits use of the name of a political party whose registration is cancelled: this prohibition causes fatal damage to the existence of the relevant political party and therefore, violates the least restrictive means requirement and the requirement to strike balance between legal interests. The Prohibition Provision hampers the development of party politics by forcing the political party whose registration has been cancelled to change its name and as a result, making it difficult for the people to recognize the relevant political party. Therefore, the Prohibition Provision infringes upon the complainants' freedom to form a political party.

B. Reasons for the Request of Adjudication on Constitutionality by the Requesting Court

The Cancellation Provision eliminates a political party simply based on a coincidence such as a successful result in the election for the National Assembly members and consolidates the existing political party system by removing new and minor parties from the political structure and preventing their political unity, which clearly runs afoul of the purpose of Article 8 Section 4 of the Constitution which allows restriction on the freedom to form a political party only in very limited cases under strict requirements.

In addition, based on what is stipulated in Article 44 Section 1 Item 3 of the Political Parties Act, it is highly possible that the Cancellation Provision would induce small and minor political parties to only participate in elections for local assembly members due to the termination of the term of membership or those for the heads of local governments, and therefore infringes on political party's freedom of activity by practically preventing small and minor parties from participating in the election for the National Assembly members.

IV. Review on Merits

A. Fundamental Rights Limited by the Provisions at Issue

Freedom to form a political party is stipulated in the former part of Article 8 Section1 of the Constitution, but it is a 'fundamental right' recognized to individual citizens, political parties and political parties as 'unincorporated associations' whose registrations are cancelled. The fundamental right limited by the Provisions at Issue in this case is the 'freedom to form a political party' stipulated in the former part of Article 8 Section1 of the Constitution as a special provision of the 'freedom of association' under Article 21 Section 1 of the Constitution (see 2004Hun-Ma264, March 30, 2006).

Even though the former part of Article 8 Section1 of the Constitution explicitly guarantees the freedom to form a political party only, the freedom to form a political party also encompasses freedom to maintain a political party and political party's freedom of activity: if the freedom to form a political party is regarded as the only freedom to be protected by the constitutional provision and any political party, after being formed, can be dissolved at any time or can be arbitrarily prohibited from conducting political activities, the freedom to form a political party becomes nominal, without any practical meaning.

Meanwhile, as a name of political party is the typical indication that shows the political party's policy and political creed, the freedom to form a political party also includes freedom to form a political party with a name of its choice and freedom to conduct political activities under the name.

In this case, the Cancellation Provision restricts the complainants' freedom to form a political party including the freedom to maintain the political party and freedom to conduct political activities, since it cancels the registrations of the New Progressive Party, the Green Party and the Youth Party that failed to attain seats in the National Assembly after participating in elections or to achieve a certain level of votes. The

Prohibition Provision restricts the freedom to form a political party by preventing the New Progressive Party, the Green Party and the Youth Party whose registrations have been cancelled from using the same names as those of the cancelled political parties.

B. Constitutional Function of Political Party and Limits on the Restriction of Fundamental Rights

1. Article 8 Section 2 of the Constitution stipulates that "political parties shall be democratic in their objectives, organizations and activities and shall have the necessary organizational arrangements for the people to participate in the formation of political will," and Article 2 of the Political Parties Act prescribes that "for the purposes of this Act, the term "political party" means a national voluntary organization that aims to promote responsible political assertions or policies and to take part in the formation of the political will of the people in national interests by recommending or supporting candidates for public positions."

A political party, as a mediator of the people and the state, works actively and independently as a political conduit through which people's multiple political opinions are gathered and combined, thereby forming a sizable cluster of political opinions that can directly exert influence on the state's decisions relating to national policies. As a political party is a main actor, a mediator and an indispensable element of democracy, the freedom to establish a political party and to conduct political activities is the prerequisite for the realization of democracy (see 2001Hun-Ma710, March 25, 2004).

2. Taking into account the meaning and function of a political party in today's representative democracy, the Constitution, apart from the general freedom of association, provides an independent guarantee for the freedom to form a political party in Article 8 Section 1, highlighting its special importance. By stipulating that "the establishment of political parties shall be free and the plural party system shall be guaranteed" in Article 8 Section 1, the Constitution assures everyone to enjoy the right

to form a political party without any interference from the State as a fundamental right, and it also guarantees the plural party system as a natural result of the protection of the freedom to form a political party (see 99Hun-Ma135, December 23, 1999).

Given the constitutional provisions relating to political parties and the importance of political party, the legislature, on the one hand, should make laws that guarantee maximum protection of the freedom to form a political party and, on the other hand, the Constitutional Court should apply strict scrutiny in reviewing the constitutionality of laws that restrict the freedom to form a political party pursuant to Article 37 Section 2 of the Constitution. Therefore, any restriction on the freedom to form a political party can be rationalized only when it is necessary for national security, maintenance of law and order or public welfare, and even when such restriction is imposed, no essential aspect of the freedom to form a political party should not be violated.

C. Review on the Cancellation Provision

1. Legitimacy of Legislative Purpose and Appropriateness of Means

The Cancellation Provision, with the Prohibition Provision, was firstly introduced in the Political Parties Act amended by Act No. 3263 on November 25, 1980 by the Legislative Council for National Security. However, any of the record or minutes made when the Cancellation Provision had been first introduced or the minutes of the subsequent sessions of the National Assembly in the process of amendments to the Political Parties Act do not reveal the legislative purposes of the Cancellation Provision.

Article 8 Section 1 of the Constitution, by explicitly guaranteeing the freedom to form a political party and the plural party system, induces competition among political parties and assures political diversity and openness in political process. And Article 8 Section 4 of the Constitution robustly protects the freedom to form a political party, stipulating that

even a political party which denies and further tries to attack the free democratic basic order should be regarded as a political party eligible for the protection of the freedom to form a political party as long as it is engaged in the process of forming political opinion by the people, and only the Constitutional Court's decision which confirms the unconstitutionality of a political party can remove the party from the domain of politics. Considering the freedom to form a political party guaranteed by Article 8 Section 1 of the Constitution and the legislative purpose of Article 8 Section 4 of the Constitution, the State's interference or infringement on the freedom to form a political party is not allowed in principle except when the legislature restricts as well as concretely accords the freedom to form a political party by prescribing procedural and structural requirements necessary for conducting constitutional role as a political party (99Hun-Ma135, December 23, 1999). In this regard, any legislation excluding a political party from the process of forming political opinion by the people simply because it is a small or minor party that fails to achieve a certain level of political support should not be allowed under our Constitution.

Meanwhile, as the essential meaning of political party's existence is to participate in the process of 'forming political opinion by the people,' the legislative purpose of the Cancellation Provision can be considered legitimate to the extent that a political party that practically does not have any ability or will to participate in the process of people's forming political opinions can be excluded from such a process in order to foster the development of party democracy. And as a political party's obtaining seats in the National Assembly or attaining a certain amount of votes in election can be an indicator that shows whether the political party has a sincere intention and ability to participate in the process of forming political opinion by the people, cancelling the registration of a political party that has no members of the National Assembly or fails to obtain certain number of votes is an effective means to achieve the legislative purpose. In this sense, the Cancellation Provision serves a legitimate legislative purpose and provides appropriate means to achieve the

legislative purpose.

2. Least Restrictive Means Test and Balancing of Interests Test

a. Given the importance of political party in the representative democracy, any statutory restriction on the freedom to form a political party should be as minimal as possible. Particularly, any provision that stipulates the revocation of political party's registration should be legislated on a strict standard within the necessary minimum scope because it deprives a political party of its existence itself, making it impossible for the political party to conduct any kind of political activities at all.

Different from the dissolution of a political party by a ruling of the Constitutional Court, when a political party's registration is revoked pursuant to the Cancellation Provision, a substitute political party can be established upon the same or similar platform as the revoked political party and the name of the revoked political party can be used after a lapse of time as stipulated in the statutory provision (see Article 40, Article 41 Section 4 of the Political Parties Act). Even so, the legislature should choose less restrictive means, if any, to achieve the legislative purpose. In this case, we can find less restrictive measures than those provided by the Cancellation Provision while faithfully achieving the legislative purpose. For example, the cancellation of registration, not based on the result of a single National Assembly election, can be decided depending on the result of election after providing such a political party with several chances to participate in elections for a certain period of time. Also, since it is hard for newly established political parties to attain high level of political support from the beginning, the cancellation of registration may be decided in combination of the number and distribution of constituencies from which candidates were recommended and the rate of votes earned in the constituencies.

As such, the legislature's choice, in spite of the existence of alternative measures that can encourage political parties to develop policies worthy

of people's support and trust while excluding political parties without ability or will to participate in the process for people's forming political opinions, to cancel the registration of a political party simply because it fails to earn any seats in the National Assembly or obtain a certain number of votes does not satisfy the least restrictive means requirement.

b. Article 44 Section 1 of the Political Parties Act makes it possible to exclude a political party that does not have practical ability or sincere will to participate in the process of forming political opinions by the people, by stipulating that when a political party becomes incapable of satisfying the requirements under Article 17 (statutory number of City/Do parties) and Article 18 (statutory number of City/Do party members) of the Political Parties Act (Item 1) and when failing to participate during the past four years in an election of National Assembly members due to an expiration of term of office or the election of the head of local governments due to the expiration of term of office or that of the members of City/Do council (Item 2), the registration of such parties can be revoked. Also, Article 27 of the Political Fund Act does not provide a political party that fails to achieve a certain level of political support with financial support of state subsidies by differentiating the amount of ordinary and election subsidies according to the ratio of number of votes obtained by the relevant political party.

As such, under the current legislation, it seems there are sufficient measures, aside from the Cancellation Provision, to consequentially eliminate a political party with no ability or intention to participate in the process of forming political opinions by the people. Also, the examples of other countries' legislation such as the U.S.A., Germany and Japan show that obtaining seats in the National Assembly or the ratio of number of votes obtained by the relevant political party is simply one of the factors that decide whether the political party is entitled to state subsidies, not functioning as the very factor that decides the elimination of such a political party.

c. The Cancellation Provision prescribes an instant cancellation of

registration based on the one time failure to achieve required level of support in an election of the National Assembly members, which results in an unreasonable consequence that the registration is cancelled no matter how a political party has been successful in the Presidential Election or local government elections. Also, newly established or small parties, frustrated by the Cancellation Provision, would not even venture into elections from the beginning and thereby lose chances to objectively express their intention of continuous participation in the process of forming political opinion by the people and to effectively advertise their existence and policies to the public. As a result, the Cancellation Provision deprives the newly established or small parties of the chance to attain people's support and to become major parties while continuously conducting their political activities with sincere intention to participate in the process of forming political opinion by the people. Consequently, it can also impair political diversity and openness in political process.

d. The public interests intended to be achieved by the legislation should be balanced by the level of restrictions imposed on the fundamental rights. Although we can assume that the public interest to be achieved by Cancellation Provision is to develop the party democracy by excluding a political party without any practical ability or sincere intention to participate in the process of forming political opinions by the people, it is still unclear whether the legislative purpose really serves the public interest. But the public value of the freedom to form a political party infringed by the Cancellation Provision is significant. Therefore, the balance between public interests achieved by the Cancellation Provision and the negative effect resulting from the provision seems distinctively broken.

e. Therefore, the Cancellation Provision which cancels the registration of a political party that fails to obtain a seat in the National Assembly and to receive a designated level of votes after participating in just one election of National Assembly members, meets neither the least restrictive means test nor the balancing of interests test.

3. Sub-Conclusion

As reviewed above, the Cancellation Provision, although it serves a legitimate legislative purpose and provides appropriate means, neither satisfies the least restrictive means requirement nor strikes the balance between legal interests. Therefore, the Cancellation Provision, in violation of the rule against excessive restriction, infringes upon the complainants' freedom to form a political party.

D. Review on the Prohibition Provision

The Prohibition Provision prevents the name of a political party whose registration has been cancelled under the Cancellation Provision from being used as the title of a political party from the date of such cancellation of registration until the date of election of the National Assembly members first held due to the expiration of their terms. As the Prohibition Provision is premised on the Cancellation Provision, it also infringes upon the freedom to form a political party for the same reasons as reviewed above in the constitutionality of the Cancellation Provision.

VI. Conclusion

For the stated reasons, it is so ordered that the Cancellation Provision and the Prohibition Provision violate the Constitution. This decision is based on the unanimous opinion of the participating Justices.

Justices 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 and Cho Yong-Ho

[Appendix 1]

List of complainants (2012Hun-Ma431) and requesting petitioners (2012Hun-Ka19)

1. New Progressive Party
   Representative Hong ○-Wha
2. Hong ○-Wha
3. Green Party
   Reprenstatives Lee ○-Joo, Ha ○-Soo
4. Lee ○-Joo
5. Youth Party
   Representatives Kang ○-Hee, Kwon ○-Soo
6. Kang ○-Hee

[Appendix 2]

Related Provisions

Political Parties Act (amended by Act No. 7683, August 4, 2005)

Article 40 (Prohibition of Substitute Political Parties)

When a political party has been dissolved by a ruling of the Constitutional Court, no political party shall be established upon the same or similar platform (or basic policies) as the dissolved political party.

Article 41 (Prohibition of Use of Similar Denomination, etc.)

(1) Unless it is a political party that is registered under this Act, no letters indicating that it is a political party shall be used in its title.

(2) Any title, which is the same as that of a political party dissolved by a ruling of the Constitutional Court, shall not be used again as the title of a political party.

(3) The title (including its abbreviation) of the Preparatory Committee for Political Party Formation and the political party shall be clearly distinct from the title used by an already-reported preparatory committee

for political party formation and the registered political party.

Article 44 (Revocation of Registration)

(1) When a political party falls under any of the following subparagraphs, the relevant election commission shall revoke its registration:

1. When it becomes incapable of satisfying the requirements under Articles 17 and 18: Provided, That such revocation shall be postponed until after the election day when a failure to satisfy such requirements has occurred three months before the general election day, and in other cases until three months from the failure to satisfy such requirements;

2. When failing to participate during the past four years in an election of National Assembly members due to an expiration of term of office or the election of the head of local governments due to the expiration of term of office or that of the members of City/Do council; and

3. When failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, and failing to obtain more than 2/100 of total number of effective votes.

(2) When the registration has been revoked under paragraph (1), the relevant election commission shall publicly give notice to that effect without delay.

Political Fund Act (amended by Act No. 7682, August 4, 2005)

Article 27 (Distribution of Subsidies)

(1) 50/100 of the ordinary subsidies and the election subsidies shall be evenly distributed and paid to political parties that form negotiating groups made up of legislators who belong to such political parties by political party according to the provisions of the main sentence of Article 33 (1) of the National Assembly Act at the time of distributing and paying them.

(2) 5/100 of the ordinary subsidies and the election subsidies shall be each distributed and paid to political parties that each hold not less than five seats in the National Assembly and are not subject to the distribution and payment referred to in paragraph (1) at the time of distributing and paying them and 2/100 of the ordinary subsidies and the

election subsidies shall be distributed and paid to any political party falling under any of the following subparagaphs from among political parties that each hold either no single seat or less than five seats in the National Assembly:

1. In cases of any political party that participated in the most recently held election for National Assembly members at the expiration of terms of office, its ratio of the number of the votes obtained in the election for the National Assembly members is not less than 2/100;

2. In cases of any political party that does not fall under subparagraph 1 but holds its seats in the National Assembly from among the political parties that participated in the most recently held election for National Assembly members at the expiration of their terms of office, the ratio of the number of votes obtained by the relevant political party in the recently held nationwide elections for proportional representative City/Do council members, constituency City/Do council members, the Mayor/Do Governor or the head of autonomous Gu/Si/Gun, for which the relevant political party is permitted to field candidates, is not less than 0.5/100;

3. In cases of any political party that does not participate in the most recently held election for National Assembly members at the expiration of their terms of office, the ratio of the number of votes obtained by the relevant political party in the most recently held nationwide elections for proportional representative City/Do council members, constituency City/Docouncil members, the Mayor/Do Governor or the head of autonomous Gu/Si/Gun, for which the relevant political party is permitted to field candidates, is not less than 2/100.

(3) 50/100 of the residual amount with the exception of the amount that is distributed and paid pursuant to the provisions of paragraphs (1) and (2) shall be distributed and paid to political parties that hold their seats in the National Assembly at the time of distributing and paying the subsidies according to the ratio of the number of the seats. The remainder shall be distributed and paid to them according to the ratio of the number of votes obtained in an election for National Assembly members.

(4) The election subsidies shall not be distributed and paid to any political party that fails to field any candidate as at the deadline for the registration of candidates to run in the relevant election.

(5) The period and procedures for paying the subsidies and other necessary matters shall be determined by the Regulations of the National Election Commission.

3. Case on Prohibition of Nighttime Access to Online Games by Juveniles

[26-1(B) KCCR 176, 2011Hun-Ma659 · 683 (Consolidated)]

Complainants:

1. Case 2011Hun-Ma659
   Represented by: Jungjin Intellectual Property Law Firm
   Attorneys in Charge: Lee Sang-Yeop and Lee Byung-Chan
2. Case 2011Hun-Ma683
   Represented by: Han Sang-Ho and six others

Decided: April 24, 2014

Holding

1. The Court rejects the complaint challenging the constitutionality of Article 51 Section 6-2 of the former Juvenile Protection Act (amended by Act No. 10659, May 19, 2011 and later wholly amended by Act No. 11048, Sept. 15, 2011) and Article 59 Section 5 of the current Juvenile Protection Act (wholly amended by Act No. 11048, Sept. 15, 2011).

2. The remaining claims of the complainants are dismissed.

Reasoning

I. Introduction of the Case

A. 2011Hun-Ma659

Complainant Park ○-Jin is a juvenile under the age of 16 who likes to play Internet games, and complainants Kim ○-Jung and Jeong ○-Hee are parents of juveniles under 16. On October 28, 2011, the complainants

filed a constitutional complaint in this case, arguing that the provisions of the former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, Sept. 15, 2011) which prohibit access to Internet games by juveniles between midnight and 6 a.m. and impose criminal punishment for violation thereof infringe on the juveniles' general freedom of action and the parents' right to education.

B. 2011Hun-Ma683

The complainants of this case, ○○ Games, Inc. and 12 others, are developers and providers of Internet games. Claiming that their occupational freedom, etc. was violated by the provisions of the former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, Sept. 15, 2011) and the current Juvenile Protection Act (wholly amended by Act No. 11048, Sept. 15, 2011) which ban online game providers from offering juveniles under 16 the access to Internet games between midnight and 6 a.m. and impose criminal punishment for violation thereof, the complainants filed a constitutional complaint challenging the constitutionality of the said provisions on November 4, 2011.

II. Subject Matter of Review

The subject matter of review in this case is whether Article 23-3 Section 1 and Article 51 Section 6-2 of the former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, Sept. 15, 2011, hereinafter "the former Act") and Article 26 Section 1 and Article 59 paragraph 5 of the current Juvenile Protection Act (wholly amended by Act No. 11048, Sept. 15, 2011, hereinafter "the Act") (the provisions regulating Internet game access are hereinafter referred to as "the Restrictive Provisions"; provisions imposing punishment as "the Penal Provisions"; and all of the

aforementioned provisions as “the Provisions at Issue”) infringe on the constitutional rights of the complainants and thereby violate the Constitution.

In addition to the Provisions at Issue, the complainants also challenge the constitutionality of Article 23-3 Section 2 and 3 of the former Act and Article 26 Section 2 and 3 of the Act, which, however, do not describe the meaning and scope of Internet games subject to the Restrictive Provisions but instead mandates the Minister of Gender Equality and Family to, in consultation with the Minister of Culture, Sports and Tourism, evaluate the appropriateness of the applicable scope of the Restrictive Provisions on a regular basis and provide measures for improvement when necessary. As this has no direct relevance to the restriction of the complainants’ fundamental rights, Article 23-3 Section 2 and 3 of the former Act and Article 26 Section 2 and 3 of the Act will be excluded from review. The provisions under review in this case are as follows:

Provisions at Issue

Former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, September 15, 2011)

Article 23-3 (Restriction on Hours Provided for Internet Games in Late Night Time, etc)

(1) No provider of an Internet game (referring to a person who has reported him/herself as a value-added telecommunications business operator, as defined in Article 22 of the Telecommunications Business Act, including where a person is deemed to have reported him/herself as a value-added telecommunications business operator under the latter part of paragraph (1) or paragraph (4) of the aforesaid Article; the same shall apply hereinafter) that is provided in real time via an information and communications network, as defined in Article 2 (1) 1 of the Act on

Promotion of Information and Communications Network Utilization and Information Protection, etc., among game products defined in the Game Industry Promotion Act (hereinafter referred to as “Internet game”) shall provide the Internet game to juveniles under the age of 16 between midnight and 6 a.m.

Article 51 (Penal Provisions)

Any of the following persons shall be punished by imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won:

6-2. A person who provides an Internet game to juveniles under the age of 16 late at night, in violation of Article 23-3

Juvenile Protection Act (Wholly amended by Act No. 11048, Sept. 15, 2011)

Article 26 (Restriction on Hours Provided for Internet Games in Late Night Time)

(1) No provider of an Internet game shall provide the internet game to juveniles under the age of 16 between midnight and 6 a.m.

Article 59 (Penal Provisions)

Any of the following persons shall be punished by imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won:

5. A person who provides an Internet game to juveniles under the age of 16 late at night, in violation of Article 26

III. Argument of the Complainants

A. 2011Hun-Ma659

The Provisions at Issue aim to regulate highly addictive Internet games, but their definition and scope is not specified clearly, which is contrary to the void-for-vagueness doctrine.

In addition, the Provisions at Issue infringe on the general freedom of action of juveniles who wish to develop their talent and interest through Internet games, as well as the right to free personality development of juveniles desiring to fulfill their potential by becoming professional gamers. The Provisions also violate the parents' right to education since it is subject to blanket restriction, although the parents have a superior right to education outside schools and are therefore entitled to make autonomous decisions on the permission of Internet game access during nighttime considering various matters, such as their education philosophy and children's aptitude and career.

Even if protecting juveniles from Internet game addiction serves a legitimate legislative purpose, there is a limit as to how much juveniles can be prevented from playing games by using their parents' or others' names, and it is more appropriate to regulate the total amount of time spent for game use than to just restrict game use during a specific time frame in order to prevent addiction. Therefore, prohibiting nighttime access to games fails to provide an appropriate means to achieve the legislative purpose. Furthermore, as there are more relaxed forms of protecting juveniles from online game addiction, such as the "optional shutdown system" under the Game Industry Promotion Act (hereinafter the "Game Industry Act"), which is invoked at the voluntary request from the juveniles themselves or their legal representatives, enforcing a mandatory and blanket control over the use of Internet games during nighttime also fails the least restrictive means test.

The Provisions at Issue allow for unreasonable discrimination against juveniles trying to play Internet games compared to those who engage in other types of games or entertainment during nighttime and are free from restriction, and only domestic Internet game providers are subject to regulation, which also raises the issue of equality rights.

B. 2011Hun-Ma683

The Provisions at Issue impose excessive restriction on the occupational freedom of domestic Internet game providers and do not clearly define the applicable scope of Internet games, which eventually violates the freedom of expression through game products.

In addition, juveniles desiring to play Internet games have to undergo name and age verification provided by Internet game providers under the Game Industry Act. This constitutes a violation of the juveniles' right to anonymous speech, right to self-determination over personal information, etc. and also represents an excessive intervention and interference by the state over cultural autonomy and diversity. This, consequently, disrespects the concept of a cultural state specified in the Constitution.

IV. Review of Admissibility Requirements

In case the elements constituting the conditions of punishment are set forth in a provision other than the Penal Provisions, the directness requirement cannot be satisfied unless the complainants claim the unconstitutionality of the Penal Provisions themselves by arguing, for instance, that the statutory punishment is excessive or inconsistent with systematic justice (2007Hun-Ma1359, Oct. 29, 2009).

The complainants are not taking issue with the constitutionality of the Penal Provisions themselves, such as by arguing that the statutory punishment provided in Article 51 Section 6-2 of the former Act and

Article 59 paragraph 5 of the Act is excessive or inconsistent with systematic justice, but are instead arguing that the Penal Provisions become naturally unconstitutional because the Restrictive Provisions upon which they are premised are unconstitutional. In this case, the Penal Provisions that are established separately from the provision stipulating the elements of punishment do not fulfill the directness requirement of a fundamental rights violation.

For this reason, the Penal Provisions are inadmissible.

V. Review on Merits

A. Overview of Mandatory Shutdown System

1. Background of adoption

Internet games have become a part of entertainment activities with the widespread use of the Internet, and the increase in Internet use gave rise to serious Internet game addiction or excessive indulgence, which started to become a social problem as some juveniles with such symptoms even committed suicide or killed their mothers.

In response, a number of institutional measures to prevent and cure Internet game addiction were released, and one of them are the Restrictive Provisions that impose a blanket ban on the provision of Internet games to juveniles during a specific time frame, known as the "mandatory shutdown system." Meanwhile, a provision of the Game Industry Act which provides for the possibility of restricting the method and time of using game products upon the request of juveniles under 16 themselves or their legal representatives, which is referred to as "optional shutdown" as opposed to "mandatory shutdown."

Concrete talks to introduce the mandatory shutdown system started in

2010 but failed to reach an agreement among government departments on the age group and target of the system. Then, mandatory shutdown was first introduced by an amendment to the Juvenile Protection Act on May 19, 2011 (Act No. 10659) by agreeing to designate the age group as juveniles under the age of 16 and initially deferring the application of online games using mobile communication devices and portable digital assistants, whose risk of addiction was relatively uncertain. Later, as the Act was wholly amended on September 15, 2011, the location of the provision was altered but the key substance remained unchanged.

2. About the system

The Restrictive Provisions prohibit Internet game providers from providing Internet games to juveniles under 16 between midnight and 6 a.m. (hereinafter referred to as "late nighttime"), which is enforced by criminal punishment under the Penal Provisions. Therefore, Internet game providers have the obligation to take technical measures to block, starting from midnight, the access of juveniles under 16 who had accessed Internet games before midnight and to bar new access by juveniles from midnight to 6 a.m., and, as a direct consequence, the juveniles under 16 are prevented from using Internet games during the said time slot.

Of all kinds of games, only the "Internet games" that require access to the Internet and other information and communication networks are subject to regulation. As the Internet games can be activated only by real-time provision of game contents through information and communications networks, they are mostly network games that involve multiple users, one-on-one games or multiplayer combat games.

On the other hand, application of the regulation is deferred for Internet games using mobile communication devices or portable digital assistant that are deemed less addictive than those using personal computers

(hereinafter "PCs") pursuant to the Addendum of the Juvenile Protection Act.

B. The Restrictive Provisions' Conformity with Void-for-Vagueness Principle

1. Void-for-vagueness principle derived from nulla poena sine lege

Internet game providers are penalized by "imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won" for violating the Restrictive Provisions, so the Restrictive Provisions constitute the elements of punishment. In fact, the "nulla poena sine lege," or no punishment without law, laid out in Article 12 Section 1 of the Constitution requires crimes and punishment to be stipulated in the statutes enacted by the legislature and calls on the elements of crimes and punishment to be stated clearly so that anyone can predict which behaviors will be penalized by which punishment and decide how to act accordingly (2010Hun-Ba368, Dec. 29, 2011).

2. Judgment

a. Meaning of "Internet game"

The "Internet game" under the Act is defined as game products provided in real-time via an information and communications network as provided in Article 2 (1) 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (hereinafter the "Information Communications Network Act"), which refers to an information and communications system utilizing telecommunication equipments or computer technologies to collect, process, store, search, transmit and receive information, among those defined in the Game Industry Act (Article 23-3 Section 1 of the former Act, Article 24 Section 1 of the Act). Therefore, in principle, any game that requires access to an information and communications network such

as the Internet or a network for activation is classified as “Internet game” regardless of game devices or type of game products, whereas those that are not defined in the Game Industry Act such as “speculative games (games of chance)” and those that do not need access to an information and communications network for the start and activation of games are not considered “Internet game” subject to regulation under the Restrictive Provisions.

Specifically, games that are saved in the computer and not provided via an information and communications network, as well as portable games, console games, CD games and arcade games that are downloaded from separate storage devices without networking functions or Internet access, are not Internet games, whereas even the games that are separately downloaded or purchased are classified as “Internet games” if the program is activated by online access to enable multiple access on network. This distinction can be appreciated by anyone who is a user of an information and communications network.

Meanwhile, according to Section 1 of the Addendum of the Juvenile Protection Act (Act No. 10659, May 19, 2011) and Article 1 of the Addendum of the amended Act (Act No. 11048, Sept. 15, 2011) (hereinafter jointly referred to as “the Addenda Provisions”), as well as the Notification of the Ministry of Gender Equality and Family on the “Scope of Game Products Restricted during Late Nighttime” (No. 2013-9, hereinafter “Gender and Family Ministry Notification on Internet Games”), Internet games using mobile communications devices such as smart phones or portable digital assistants such as tablet computers (hereinafter “Internet games using mobile devices”) are considered to have lower risk of addiction compared to PC platform games and are therefore exempt from application until May 19, 2015. However, this exclusion from regulation for some Internet games using devices does not extend but reduce the applicable scope of the Restrictive Provisions, which is hardly a restriction on the complainants’ fundamental rights.

Furthermore, once the grace period ends, they could be subjected to application of the Restrictive Provisions, so the fact that some Internet games are excluded from application does not indicate that the meaning of "Internet game" defined in the Restrictive Provisions is unclear.

In addition, the Addenda Provisions refer to the Internet games exempt from application as "which are unlikely to cause serious addiction to Internet games by using a device specified by Presidential Decree," and "addiction to an Internet game" indicates a situation "where a user of an Internet game sustains an injury on any of his/her physical, mental, or social functions in daily life, from which he/she cannot recover easily, as a consequence of excessive use of an Internet game" (Article 27 of the Act). In this respect, the "likelihood of serious addiction" can be comprehended as having a high risk of addiction, and therefore an ordinary citizen can easily estimate the level of addiction referred to by "unlikely to cause serious addiction to Internet games." Moreover, as the types and forms of Internet games greatly vary from each other and new game products are continuously being developed, it is difficult to set in law in advance which Internet games have high risk of addiction, and there is a need to specify those exempt from application in subordinate law since it is more reasonable to leave this matter to the decision of the executive branch equipped with expertise in information collection and judgment. Therefore, there is good reason why those excluded from application are stipulated in the Addenda Provisions as mentioned above. For this reason, it is also difficult to conceive that those excluded from application are defined unclearly in the Addenda Provisions.

b. Meaning of "Internet game provider"

An "Internet game provider" is a person who has reported him/herself as a value-added telecommunications business operator pursuant to Article 22 of the Telecommunications Business Act, including where a person is deemed to have reported him/herself as a value-added telecommunications business operator under the latter part of paragraph (1) or paragraph (4)

of the aforesaid Article (Article 23-3 Section 1 of the former Act, Article 24 Section 1 of the Act). The "value-added telecommunications business operator" herein indicates telecommunications services other than common telecommunications services (see Article 2 and 22, Telecommunications Business Act). When all these relevant provisions are taken into consideration, an Internet game provider can either be a person who has reported him/herself as a value-added telecommunications business operator, a small-scale value-added telecommunications business operator exempt from the obligation to report him/herself as such or a common telecommunications business operator who intends to operate a value-added telecommunications business, and as there is no restriction on the method, purpose, place, etc. of Internet games in offering value-added telecommunications services, virtually all business operators running websites on the Internet fall under the category of Internet game providers. Accordingly, providers of game channeling services or temporary, promotional event games, as well as value-added telecommunications business operators which provide network service for PC package games, may also be considered Internet game providers, and any person who intends to provide Internet games via an information and communications network would easily understand the meaning of an "Internet game provider" as provided in the Restrictive Provisions.

c. Sub-conclusion

Consequently, the "Internet game" and "Internet game provider" as provided in the Restrictive Provisions cannot be considered vaguely defined, which means the Restrictive Provisions are not void for vagueness.

C. Fundamental Rights Limited by Restrictive Provisions

1. Juveniles' general freedom of action

The right to pursue happiness includes, in specific terms, the right to general freedom of action and free development of personality, and the protection of general freedom of action also involves the protection of one's lifestyle and hobbies (92Hun-Ma80, May 13, 1993, 2002Hun-Ma518, Oct. 30, 2003). The Restrictive Provisions limit the individual lifestyle and hobby of juveniles under 16 who desire to enjoy Internet games late at night, which constitutes a restriction on their general freedom of action, or one of the rights to pursue happiness.

2. Parents' right to education

Although the parents' right to educate their children is not specified in the Constitution, it is a fundamental right guaranteed by Article 36 Section 1 of the Constitution that protects marriage and family life, Article 10 of the Constitution that protects the right to pursue happiness and Article 37 Section 1 of the Constitution protecting freedoms and rights not enumerated in the Constitution. It refers to the right of parents to make overall plans for education and upbringing of their children and freely educate and raise their children according to their view of life, society and education (298Hun-Ka16, Apr. 27, 2000, 2008Hun-Ma635, Oct. 29, 2009). Since the Restrictive Provisions limit the right of parents to decide whether or not to allow their children under 16 to play Internet games during late nighttime, they are considered to restrict the parents' right to educate their children.

3. Occupational freedom of complainants who are Internet game providers

The freedom of occupation set forth in Article 15 of the Constitution encompasses the right to have an occupation of one's choice. The

Restrictive Provisions impose a time restriction on Internet game providers in order to prevent them from offering Internet games during late nighttime to juveniles under 16, and this limits the freedom of occupation of those who make a living by providing Internet games.

Meanwhile, the complainants who are Internet game providers also argue that their freedom of expression is regulated by the Restrictive Provisions. However, these provisions neither regulate the contents of Internet games nor impose a total ban on the provision of games itself; the provision of games is, in principle, permitted and only a certain time frame is subject to regulation. As the limitation on occupational freedom of Internet game providers is a more direct and immediate issue instead of their freedom of expression using game products, the focus will be on whether the occupational freedom has been restricted.

4. Right to equality

The Restrictive Provisions only regulate Internet games out of all kinds of different games, so it is at issue whether this differential treatment against Internet games compared to non-Internet games and online mobile games and singling out domestic game providers for regulation constitute an unreasonable discrimination, thereby violating the right to equality.

5. The complainants other than Internet game providers have to undergo identity verification when signing up for Internet games, and the fact that they are under the age of 16 is exposed to other game users. Thus they claim that their right to self-determination over personal information and their right to anonymous speech, namely the right to express one's thoughts or views without having their identity revealed either by writing anonymously or by using an alias, are violated. Yet, this is not a direct result from the Restrictive Provisions but only an indirect, secondary consequence of the Game Industry Act that mandates

game business operators to verify identity when new users sign up for their Internet games, so the claims for violation of their right to self-determination over personal information and anonymous speech will not be dealt with separately in this case, which should review the violation of fundamental rights by mandatory shutdown.

6. Sub-conclusion

Therefore, the fundamental rights limited by the Restrictive Provisions are: general freedom of action of juveniles under 16 who desire to play Internet games during late nighttime, right of parents who have juveniles under 16 to educate their children and the right of occupational freedom and equality of Internet game providers.

D. Whether Restrictive Provisions Violate Juveniles' General Freedom of Action, Parents' Right to Education and Internet Game Providers' Occupational Freedom

1. Constitutional duty to protect juveniles and rule against excessive restriction as limits on the restriction of fundamental rights

The Restrictive Provisions impose limits on the occupational freedom of Internet game providers, the juveniles' right to free choice of leisure or entertainment activities and time management and the right of parents to decide whether or not to permit their children to play Internet games, so the restriction of fundamental rights should be imposed to the least possible extent pursuant to the rule against excessive restriction under Article 37 Section 2 of the Constitution.

However, adolescence refers to a period during which juveniles are supposed to prepare for social life beyond the 20s and obtain general education and knowledge needed throughout life, and juveniles are human resources critical for future national development. Yet they are

immature compared to adults in terms of their ability to judge the individual, social implication of one's behaviors and to take responsibility for the consequences thereof. Therefore, special protection is required for the sound growth and development of juveniles, and the Constitution also mandates the state to implement policies aimed at enhancing the welfare of juveniles (Article 34 Section 4 of the Constitution). The introduction of the Restrictive Provisions, which was an institutional measure taken as part of the state's effort to fulfill its duty to protect juveniles, were prompted by the awareness that the emerging social problem of juveniles' excessive use of and addiction to Internet games cannot be adequately solved solely by the autonomous efforts of homes and schools. Therefore, these circumstances should also be considered in reviewing whether the Restrictive Provisions violate the rule against excessive restriction.

2. Conformity with rule against excessive restriction

a. Legitimacy of legislative purpose and appropriateness of means

The Restrictive Provisions limit the juveniles' use of Internet games during late nighttime in order to ensure adequate sleep time for them, who are in growing stages both mentally and physically, and prevent their excessive indulgence or addiction to Internet games, ultimately contributing to their sound growth and development. They even prevent social problems arising from juveniles' addiction to Internet games. In this sense, the Restrictive Provisions serve a legitimate legislative purpose.

As uniformly prohibiting Internet game providers from providing Internet games to juveniles under 16 during late nighttime can help achieve the abovementioned legislative purpose, it provides appropriate means.

b. Least restrictive means test

Internet game itself is a form of entertainment or leisure activities, and

it does not necessarily have a negative impact on juveniles. Still, excessive indulgence or addiction to games offsets the positive effects of games as one of entertainment activities or pastime; it may result in negative consequences on physical and mental conditions such as deterioration of health, destruction of daily life, depression and other changes in personality and confusion between reality and virtual reality; and it may lead to negative impact on the relationship between teachers and classmates, classes and school life.

In particular, it is not easy to quit Internet games as they mostly involve multiple players accessing simultaneously from different realities or are one-on-one, multiplayer combat games based on the Internet or network access. They can also be used continuously anywhere with access to information and communications networks regardless of time and place.

According to a number of surveys, South Korea has a very high rate of Internet users with widespread use of high-speed Internet, and most juveniles have access to the Internet. In fact, the main purpose of the juveniles' Internet use turned out to be playing Internet games instead of information search. In addition, it has been found that Internet games account for 80 percent of the entire game market; that out of all types of games, Internet games have the highest usage rate by juveniles; and that Internet games are mostly used by the group aged 9-14 years, followed by the age group of 15-19 years. At the same time, most children use the Internet at home, and a large number of them as well as a majority of parents reportedly believe that it is not easy for juveniles to control the time of Internet use on their own.

In this respect, it appears that excessive use of Internet games by juveniles require time restriction to a certain extent. However, the Restrictive Provisions do not stipulate a total ban, but in principle permit Internet use by juveniles and impose restriction limited to late nighttime

from midnight to 6 a.m., during which Internet use is not easily controlled even at homes and can last for long hours, and the target of application is also confined to the age group under 16 years who are elementary and middle school students. Hence, it would be difficult to consider that this level of time restriction is excessive in protecting and preventing juveniles from excessive use of and addiction to Internet games.

Additionally, the Minister of Gender Equality and Family is mandated to review the appropriateness of the scope of game products subject to restriction every two years in order to avoid excessive regulation and to take measures for improvement; Internet games using mobile devices other than PCs are considered less addictive and are excluded from application for the time being; and the Gender and Family Ministry Notification on Internet Games excludes from restriction some forms of Internet games such as pilot games, game contests or exhibition games and games for educational or public interest purposes, which is intended to minimize possible damage.

As for Internet game providers, they have to confirm and verify the real name and age of users who sign up for the game, and secure the consent of legal representatives such as persons with parental right when juveniles sign up as members under the Game Industry Act (Article 12-3 Section 1 of the Game Industry Act). Yet, adding a technical step that blocks the access of juveniles under 16 during late nighttime based on the above measures is hardly a big financial burden.

In the meantime, optional shutdown, which provides for restriction on the method and time of using games upon the request of the juvenile him/herself or his/her legal representative under the Game Industry Act, allows juveniles or their legal representatives to detect the risk of excessive use or addiction at a certain point and directly request Internet game providers to restrict Internet game use for certain types of games

and time frame they choose. As this system is conditioned on the autonomous effort of the juveniles themselves or their parents, it is reported that the rate of usage of optional shutdown by juveniles or parents remains very low. Such systems alone are insufficient to appropriately respond to the problems of Internet overuse and addiction. For this reason, it is hard to conclude that optional shutdown under the Game Industry Act is a less restrictive measure to achieve the same legislative purpose of the Restrictive Provisions.

Accordingly, the Restrictive Provisions represent a minimum measure needed to accomplish the legislative purpose, which satisfies the least restrictive means test.

c. Balancing of interests test

The Restrictive Provisions prohibit Internet game providers from offering Internet games to juveniles under 16 during late nighttime when people usually go to sleep, namely from midnight to 6 a.m., and the private interest limited by restricting children under 16 years old and their parents from using or permitting the use of Internet games does not result in a high level of damage, while major public interest lies with the social cost reduction possibly achieved by protecting juveniles under 16 from Internet game addiction and the sound growth of juveniles who are human resources vital for future national development. In this sense, the Restrictive Provisions also achieve the balance of interests.

3. Sub-conclusion

Therefore, the Restrictive Provisions are not contrary to the rule against excessive restriction.

E. Violation of Equality Rights by Restrictive Provisions

1. Discrimination compared to other game users

a. The Restrictive Provisions only regulate Internet games, and built-in computer games or games downloaded from separate devices not requiring network functions are not subject to time restriction when used by juveniles under 16 years of age.

As viewed earlier, Internet games can continue to be activated as they are mostly interactive games played by multiple users online and are not easily quit voluntarily, and they can be used anytime and anywhere as long as information and communications networks are available, which is likely to result in long hours of usage.

On the contrary, built-in PC games or games downloaded from mobile or separate devices, which lack network functions and do not utilize real-time information and communications networks unlike Internet games, do not involve interaction with other game users and thus may have lower risk of long hour usage or addiction. Moreover, imposing time restriction on the games not featured on the information and communications network is practically impossible. Meanwhile, there are no discriminatory elements in the treatment of arcade games, to which the entrance and use during late nighttime by juveniles are impossible in the first place (refer to Article 28, Game Industry Act).

Therefore, there is good reason in enforcing discriminatory regulation on the use of Internet games and non-Internet games. It cannot be said that equality rights of the complainants are violated.

b. Meanwhile, Internet games using mobile devices are not applicable under the Restrictive Provisions, so it becomes an issue whether the discrimination against PC Internet games constitutes a violation of

equality rights.

The penetration rate of online mobile devices was not high when the Restrictive Provisions were first introduced, and the type or use of games available on mobile devices were limited as the development and distribution of mobile applications were yet to be active. In this context, Internet games using mobile devices are temporarily excluded from the application of the Restrictive Provisions as they were considered to have a relatively low risk of addiction or require less restriction on late nighttime use. However, Internet games using mobile devices are still, in principle, also applicable under the Restrictive Provisions. Furthermore, as the changes of environment surrounding the game industry, such as increased penetration of smart devices and cross-platform play between PCs and smart devices, can affect the applicability of the Restrictive Provisions, exemption of some Internet games at the moment alone is not sufficient to rule that the complainants' right to equality has been violated.

2. Review on discrimination against domestic game providers

It will be reviewed here whether domestic game providers are unjustifiably discriminated against compared to foreign game providers under the Restrictive Provisions, which only regulate domestic providers of Internet games.

"Internet games" applicable under the Restrictive Provisions refer to game products specified in the Game Industry Act that are provided in real-time via an information and communications network, so they are, in principle, supposed to be rated for classification except for some that are deemed to have received a rating classification under the Game Industry Act (Article 21 of the Game Industry Act). In addition, an "Internet game provider" is defined as a person who operates a value-added telecommunications business as a common telecommunications operator or has reported

him/herself as a value-added telecommunications business operator pursuant to the Telecommunications Business Act (Article 24 Section 1 of the Act, Article 22 of the Telecommunications Business Act).

It should be noted here that the abovementioned conditions should be satisfied by any Internet game provider, domestic or foreign, that targets domestic users. Otherwise, its game products will be labeled illegal, and its distribution and provision of use will be prohibited (see Article 32 Section 1 paragraph 1 and Article 44 Section 1 paragraph 1 of the Game Industry Act).

As a consequence, foreign providers also report themselves as value-added telecommunications business operators by establishing an independent branch in Korea, etc. and receive rating classification for the Internet game they intend to provide as required by the Game Industry Act. Internet game providers which offer Internet games in a normal, legitimate way as aforementioned are equally subject to the Restrictive Provisions, regardless of whether they are domestic or foreign, and using Internet games provided by foreign providers on foreign servers without meeting the stated conditions is merely distributing or using illegal game products in violation of the Game Industry Act or the Telecommunications Business Act.

Therefore, the consequences above do not indicate that the Restrictive Provisions give rise to discriminatory results against domestic providers, and the equality rights of the complainants are not violated.

3. Sub-conclusion

For the reasons stated, the Restrictive Provisions are not in violation of the complainants' equality rights.

F. Review on Other Claims of Complainants

The complainants argue that the Restrictive Provisions are contrary to the concept of a cultural state, which prescribes the principle of impartiality that prevents any preference or favorable treatment for certain cultural phenomena.

Yet, it can be found in relevant provisions of the Game Industry Act and the Act on Promotion of Electronic Sports that the state encourages the Internet game industry and culture. In addition, since the Restrictive Provisions are not intended to restrict or ban the development or the provision of Internet games but merely impose restriction on the provision of games to juveniles under 16 limited to late nighttime for their health protection and sound growth, the Restrictive Provisions cannot be considered an unjust restriction by the state on the Internet game industry or culture. For this reason, the complainants' argument that the Restrictive Provisions are against the constitutional concept of a cultural state is ungrounded.

VI. Conclusion

Hence, it shall be decided, as stated in the holding, that the claim challenging the constitutionality of the Restrictive Provisions is inadmissible and thus rejected, while other claims of the complaint are unreasonable and dismissed. The Justices joined in this holding, except for Justices Kim Chang-jong and Cho Yong-ho, who issued a dissenting opinion as stated below.

VII. Dissenting Opinion of Justices Kim Chang-Jong and Cho Yong-Ho

A. Concept of a Cultural State and Principle of Self-Regulation

We are opposed to the majority opinion in that the mandatory

shutdown system is contrary to the guarantee of cultural autonomy and diversity and constitutes an excessive intervention and interference by the state, and that it disrespects the concept of a cultural state, which is adopted as one of the basic principles of the Founding Constitution (2003Hun-Ka1, May 27, 2004).

1. First, Internet game overuse and addiction are problems that should be solved by autonomous, self-help efforts of homes and Internet game providers. As the acts of juveniles under 16 playing Internet games during late nighttime, which are subject to regulation under the Restrictive Provisions, take place at homes, they fall under the domain where autonomous effort of each household should come first and respected before the state intervenes. In its previous decision, the Court had also explicitly upheld that the parents' right to education takes precedence over the state's right to education outside the area of school education (2008Hun-Ma635, Oct. 29, 2009). Since whether a parent will or will not permit his or her child to play Internet games during late nighttime is an issue outside the school, this should be left to guidance of individual households according to their educational views and conversation between parents and children. The state by no means should intervene before the said self-regulation and autonomous efforts are undertaken. The parents should not, thinking that control of Internet game use by juveniles is difficult, urge the state to intervene for the sake of momentary convenience and abandon their right to education. In fact, the primary responsibility and obligation to raise children properly and control their misdeeds lie with parents.

2. Unlike South Korea, it is very rare in other countries for the state to step up and regulate games. Even if the state is involved in regulation, the role remains at establishing an independent private body to classify game products according to their rating criteria, or communicate information about the levels of violence and sensationalism of game products to the public and thereby help the parents and

juveniles make rational choices. It is mostly just the promotion of the game industry that is pursued at the national level. Thailand experienced side effects of mandatory regulation of games and later changed their policy to self-regulation, and Vietnam is witnessing a balloon effect as juveniles banned from playing online games have all been pushed to play PC package games.

3. Although there is no clear interrelation between the purpose and means of regulation, such as the relevance between the excessive use and addiction to Internet games and the mandatory shutdown system, mandatory shutdown is a system born out of negative perception that games are harmful. Internet games and all other types of games are already being perceived as one of the entertainment or leisure activities of the public, and not only the Game Industry Act but also the Act on Promotion of Electronic Sports also define games as a kind of cultural activity or industry conducive to people's use of leisure time and the development of national economy. Therefore, instead of resolving the issue through cut off regulation such as mandatory shutdown, which imposes a total ban on the use of games that have become a part of people's leisure and cultural activities, it is more recommended to take a macro perspective and create the environment and system to allow juveniles to experience not just games but a more diverse culture at large.

4. At the same time, regulating or prohibiting cultural contents, including games as well as films, music, video, drama series, cartoons, animation and broadcasting, is mostly affected by the logic of protection of juveniles, but no cultural medium with huge merits can survive such a protectionist approach. It should always be reminded that excessive regulation of "cartoons" impoverished the domestic cartoon industry, which was eventually encroached on by the Japanese cartoons, and that the "Korean wave," or the worldwide popularity of the Korean culture, started to bud and grow when regulation and intervention of cultural

contents were abolished.

5. Under this premise, we believe that the portion of the Restrictive Provisions concerning the "Internet game" are void for vagueness and that the Restrictive Provisions violate the rule against excessive restriction, thereby infringing on the complainants' fundamental rights—general freedom of action and equality rights of juveniles, parents' right to education and the occupational freedom of Internet game providers—and the following is our opinion.

B. Conformity with void for vagueness principle

"Nulla poena sine lege," or no punishment without law, is a principle that a person can only be punished for a crime if the punishment is prescribed by law, and the void for vagueness principle derived from nulla poena sine lege dictates that elements of crime should be specified clearly and that anyone should be able to predict which acts are punished by law and decide his or her acts accordingly (2002Hun-Ka5, Nov. 28, 2002).

As those who provide Internet games to juveniles under 16 in violation of the Restrictive Provisions are punished by "imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won," the meaning and scope of "Internet game" subject to the Restrictive Provisions constitute the elements of crime applicable to the Penal Provisions from the view of Internet game providers.

As defined by law, the "Internet game" prescribed by the Restrictive Provisions are "game products provided in real-time via an information and communications network," so it is hard to say that the definition of the term is unclear. Yet, Article 23-3 Section 2 and 3 of the former Act and Article 26 Section 2 and 3 of the Act prescribe that the Minister of

Gender Equality and Family should review every two years whether the scope of game products subject to regulation under the Restrictive Provisions is appropriate, and the Addenda Provisions specify the exemption for those "which are unlikely to cause serious addiction to Internet games by using a device specified by Presidential Decree." In addition, the Minister of Gender Equality and Family has to notify the measures taken for improvement following its regular review on the appropriate scope of Internet game products, such as revising the defined scope of game products (Article 21 of the Enforcement Decree of the Act). However, the law does not specify the standard and method of distinguishing the products having "serious risk of Internet game addiction" from others that do not have such a risk, and the Restrictive Provisions and other provisions of the Act do not indicate what kind of improvement measures will take place following the evaluation by the Minister of Gender Equality and Family. Hence, it is difficult for an ordinary citizen to easily predict what will be defined by Presidential Decrees or Notifications.

As even the convicted Internet game providers are unable to identify the precise scope of Internet games subject to mandatory shutdown, the portion of the Restrictive Provisions concerning "Internet game" is unclear. Therefore, the Restrictive Provisions are void for vagueness.

C. Rule against Excessive Restriction

1. The legislative purpose of the Restrictive Provisions is to prevent juveniles' Internet game overuse and addiction and to guarantee their adequate sleep time and health, and the majority opinion states that it is an appropriate means to uniformly ban the excessive use of Internet games through institutional measures because there is a limit to the extent of self-regulation by schools, homes and juveniles themselves over the excessive use of Internet games.

However, it is difficult to conclude that the main cause of Internet overuse and addiction lies in the use of Internet games during late nighttime. Admittedly, the recreational aspect of Internet games may be part of the reason, but it is more reasonable to consider that a variety of factors play a part, including the temperamental factor of game users such as their self-control ability, psychological factors such as sense of social isolation or increased loneliness and environmental factors such as increase in nuclear families, severe study stress from college entrance exam-oriented classes and lack of recreation cultures. Given this complexity and diversity of the cause of Internet game overuse and addiction, it seems virtually impossible to solve the problem solely by imposing a total ban on Internet games at late night without fundamental preventive measures. It would rather be more effective and fundamental to reinforce childhood education to prevent excessive use of and addiction to Internet games, overhaul the consulting and treatment system and nurture professional workforce for consulting, as well as to improve the environment and develop policies to avoid Internet game overuse and addiction.

It is doubted whether the other legislative purpose of guaranteeing juveniles sufficient sleep time can justify the restriction of fundamental rights as set forth in Article 37 Section 2 of the Constitution, and even if the legislative purpose is considered legitimate, it is hard to decide that the Restrictive Provisions serve an appropriate means to achieve the legislative purpose for the following reasons:

Games originally have both recreational and physical elements, and the act of game playing is classified as private hobbies or recreational activities. In this reality where Internet use is commonplace due to widespread penetration and use of the Internet in all spectrums of life, from information search and sharing, exchange of views to purchase and payment of goods, it is a very natural cultural phenomenon that games based on Internet services account for most of the games.

Yet, the Restrictive Provisions appear to be grounded on the idea that games are worthless or harmful, not being conducive to the growth and development of juveniles in any way, and that prohibition of Internet games will immediately make juveniles take good sleep. However, it is questionable how beneficial the sole prohibition of Internet games will be when there still are a large number of environmental factors that may disturb the sleep time of juveniles (e.g. free access to television, music, Internet and PC games). Additionally, given that Internet games subject to mandatory shutdown are in fact permitted for use by juveniles as seen below, the Restrictive Provisions based on social contempt of Internet game itself hardly appear to serve as an appropriate means to accomplish the legislative purpose.

2. Even if the Restrictive Provisions may serve as an appropriate means that achieves the legislative purpose to a certain extent, the legislative measure is double standard and excessive in restricting the fundamental rights of complainants and also fails the least restrictive means test for the reasons below:

a. First, Internet game products that are rated as “not permitted for use by juveniles” under the Game Industry Act and determined as a media product harmful to juveniles under the Juvenile Protection Act are already restricted from being provided to juveniles under 16, so Internet games subjected to mandatory shutdown are in fact available for use by juveniles, either rated as “permitted for use by all,” “permitted for use by 12 year old” or “permitted for use by 15 year old.”

Under this circumstance where game contents are initially regulated, the Restrictive Provisions that impose a mandatory time regulation on game use could be focused on time regulation aimed at preventing addiction likely to be caused by excessive use of Internet games, rather than by the harmfulness of the Internet game itself. Therefore, exceptions should be granted in cases where there is no concern for harmful

consequences from long hour use of Internet games, such as allowing parents and other legal representatives of juveniles or professional gamers to request the removal of regulation.

Furthermore, Internet game overuse and addiction is a matter associated with "for how long and how excessively one plays games," not "whether one plays games during daytime or late nighttime." For this reason, in order to achieve the legislative purpose of securing juveniles' sufficient sleep time or preventing Internet game overuse and addiction, it would be more appropriate and effective to regulate the "total time of game playing," which means one cannot play games more than a certain number of hours per day, than to totally ban the use of Internet games during certain time frame.

In this respect, it should be considered that imposing a total ban on the use of Internet games for juveniles under 16 during late nighttime constitutes a more-than-necessary, excessive regulation.

b. Regulatory legislation aimed at youth protection should not excessively restrict the rights of parents to educate and raise their children, and their right to educate their children should take precedence particularly outside the area of school education. However, juveniles are prohibited from entering the so-called PC rooms after 10 p.m. (Article 28 paragraph 7 of the Game Industry Act, Article 16 of the Enforcement Decree of the same Act), so mandatory shutdown practically applies to juveniles who play Internet games at home. In this context, parents should be given a superior right to decide autonomously as to how long and until when they will permit the use of Internet games at homes, and if there exist other legal means to guarantee their autonomous decision, mandatory shutdown is hardly a means of minimizing the fundamental rights violation to achieve the legislative purpose.

At the same time, "optional shutdown," which allows for juveniles

themselves or legal representatives to request restriction on the time and method of game use to Internet game providers, has been implemented by the Game Industry Act since January 22, 2012. According to this system, parents and other legal representatives need not directly argue with their children over the time of Internet game use and, according to their autonomous decisions, can control the time and method of their children's Internet game use. As such, less restrictive alternatives such as optional shutdown are in place, but the Restrictive Provisions, on grounds that parents and juveniles lack the ability to self-regulate the time of Internet game use, control the use of Internet games during certain time frame and therefore fail the least restrictive means test.

c. If, as the majority opinion states, we allow the state to care and interfere with even the sleep time of juveniles under the pretext of youth protection (legitimacy of legislative purpose), it is very concerning that we may mistakenly accept the beginning of a new totalitarianism in this civilized 21st century.

Considering that mandatory shutdown is an almost unprecedented system in developed countries and that the international standard of game policies is self-regulation, the Restrictive Provisions are founded on the notion of anachronism, nationalism and administrative expediency. The Restrictive Provisions are a case in point of what H.L. Mencken said: "For every complex problem there is an answer that is clear, simple and wrong."

3. Not much public interest is served by the Restrictive Provisions due to their low effectiveness, since the rate of Internet game use by juveniles under 16 during late nighttime is not high in the first place and because there is no way to control those who access Internet games by using their parents' and others' names or play games provided by foreign game providers that do not require social security numbers for access. Yet, the Restrictive Provisions impose more-than-necessary

regulation and overly restrict the juveniles' right to use Internet games as well as the parents' right to educate their children and thus the right to permit game use. Furthermore, this kind of regulation may bring a huge loss to the overall domestic Internet game market, which is a globally competitive industry that accounts for 60 percent of the contents industry and whose sales volume amounts to 10 trillion Korean won, by intimidating the domestic market and forcing game providers to opt for overseas relocation. This also leads to the conclusion that the Restrictive Provisions hardly achieve the balancing of interests.

4. For this reason, the Restrictive Provisions violate the constitutional rule against excessive restriction and therefore infringe on the general freedom of action of the complainants who are juveniles, right to education of the complainants who are parents and occupational freedom of the complainants who are Internet game providers.

D. Violation of Right to Equality

1. Discrimination compared to providers and users of other type of games

As the mandatory shutdown system was introduced to prevent the game addiction of juveniles, in order for this system that singles out the Internet games to be a reasonable discrimination, there should either be essential difference in the level of addiction between Internet games and other types of games or particular circumstances to regulate the use of Internet games during late nighttime.

By allowing a large number of game users to access simultaneously and engage in mutual competition and cooperation, Internet games, compared to other types of games, can display more interesting recreational features. Nevertheless, other types of games also have many products that are very absorbing and, except for arcade games, can be

easily used wherever there are game devices, which indicates that Internet games and other kinds of games have few differences in terms of the risk of excessive use or addiction. In addition, Internet games that can be provided to juveniles under 16 pursuant to the ratings classification under the Game Industry Act are permitted for their use also during late nighttime, so there is no good reason to single out Internet games for regulation late at night. Rather, it only appears that the Restrictive Provisions are only regulating Internet games because the use of Internet games by juveniles can be, compared to other games, more easily regulated by controlling the servers of game providers.

The Restrictive Provisions therefore have no reasonable grounds to differentiate the regulation of Internet games from that of other games, thereby infringing on the complainants' constitutional right to equality.

2. Discrimination compared to foreign game providers

"Internet game" under the Act are game products provided in real-time via an information and communications network as provided in Article 2 (1) 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (Article 23-3 Section 1 of the former Act, Article 24 Section 1 of the Act), so it may initially be deemed that Internet games provided to domestic game users via an information and communications network are all subject to regulation regardless of whether or not their providers are foreign, whether they have foreign servers, etc. However, under Article 24 Section 1 of the Act, an "Internet game provider" is a person who has reported him/herself as a value-added telecommunications business operator pursuant to Article 22 of the Telecommunications Business Act (including where a person is deemed to have reported him/herself under the latter part of paragraph (1) or paragraph (4) of the aforesaid Article). Consequently, the providers will not be subject to the Restrictive Provisions unless they have reported themselves as value-added telecommunications

business operators or are legitimate common telecommunications operators which intend to operate a value-added telecommunications business. Accordingly, an overseas business operator who has not been authorized or has not reported him/herself as a telecommunications business operator by setting up a domestic branch office, etc. is not classified as an Internet game provider and thus not subjected to mandatory shutdown. Also, it is practically difficult to regulate Internet games provided by foreign game providers, which do not require access using personal information such as social security numbers.

Eventually, it will be mostly domestic game providers, specifically the Internet game providers who have reported themselves as value-added telecommunications business operators or have been authorized as common telecommunications business operators under the domestic law, that will be subjected to mandatory shutdown, so the Restrictive Provisions can be considered a discrimination without reasonable cause against the complainants who are Internet game providers.

E. Sub-Conclusion

For the reasons stated above, the portion of the Restrictive Provisions concerning "Internet game" is void for vagueness derived from nulla poena sine lege, and the Restrictive Provisions are in violation of the rule against excessive restriction, thereby infringing on the general freedom of action, equality rights, right to educate one's children and occupational freedom of the complainants. Therefore, the Restrictive Provisions are against the Constitution.

Justices 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 and Cho Yong-Ho

4. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union

[26-2(A) KCCR 242, 2011Hun-Ba32, 2011Hun-Ka18, 2012Hun-Ba185 (consolidated)]

Requesting Court: Seoul Administrative Court

Requesting Petitioner: Kim ○-Seo and two others (2011Hun-Ka18)

Petitioners:

1. Kim ○-Gon and 4 others (2011Hun-Ba32)
   Represented by Shimin Law Firm (Attorney in Charge: Kim Seon-Soo)
   Il-Hyeon Law Firm (Attorney in Charge: Kim Young-Joon)
   Ji-Hwang Law Firm (Attorney in Charge: Kim Jin)
   Yeo-Neun Law Firm (Attorneys in Charge: Kang Young-Koo, Shin Ihn-Soo)
2. Nam ○-Woo and one other (2012Hun-Ba185)
   Represented by Attorney Beon Young-Chul

Underlying Cases:

1. Seoul Administrative Court 2010Guhap26889 Cancellation of Disciplinary Action (2011Hun-Ka18)
2. Daegu District Court 2010Guhap2144 Cancellation of Dismissal, etc. (2011Hun-Ba32)
3. Busan High Court 2011Nu4275 Cancellation of Dismissal (2012Hun-Ba185)

Decided: August 28, 2014

Holding

The part of 'this Act' of Article 78 Section 1 Item 1 with regard to the part of 'collective activities other than public services' of the main text of Article 66 Section 1 of the State Public Officials Act (revised by Act No. 8996 on March 28, 2008) and the part of 'any political activity' of Article 3 of the former Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to the revision by Act No. 10132 on March 17, 2010) are not unconstitutional.

Reasoning

I. Introduction of the Case

A. 2011Hun-Ba32

Petitioners who worked for public elementary schools or secondary schools as teachers were executive members of the Korean Teachers and Education Workers Union (hereinafter referred to as 'KTU'). At the first declaration of the state of affairs by teachers affiliated to KTU on June 18, 2009, petitioners criticized the then government for the self-righteous operation of administration that allegedly caused the crisis of democracy, commenting the investigation of candle light protest, investigation of related people of PD Notebook, death of the former President Roh Moo-hyun, fire accident at Yongsan, issue of temporary workers, issue of four major rivers project, tight relationship between South Korea and North Korea, and crisis in education, and lead the issuance of the declaration of the state of affairs to demand the apology of the President, the renovation of administration operation, complete protection of freedom of press and assembly, human rights and freedom of conscience, consideration of the disadvantaged, resolution of suspicion of re-progression for grand canal and abandon of education policy toward

competition.

The then minister of Education, Science and Technology took disciplinary actions against the petitioners. Opposing these disciplinary actions, KTU issued the second declaration of the state of affairs on July 19, 2009.

The school superintendent of ○○-do dismissed Petitioner Kim ○-Gon and Kim ○-Joo and suspended Petitioner Kim ○-Ihl, Lee ○-Hyeong and Jang ○-Ihl for one month on November 26, 2009 for violating the State Public Officials Act (hereinafter, the "SPOA") and Act on the Establishment, Operation, etc. of Trade Unions for Teachers (hereinafter, the "TUT Act").

The petitioners initiated the lawsuit to annul the disciplinary actions against the school superintendent of ○○-do on June 16, 2010 (Daegu District Court 2010Guhap2144) and filed a motion to request a constitutional review of Article 66 Section 1 of the SPOA and Article 3 of the TUT Act on November 11, 2010, while the trial was pending. When the motion was denied (Daegu District Court 2010A402), the petitioners filed the constitutional complaint on the constitutionality of the part of 'collective activities' of Article 66 Section 1 of the SPOA and the part of 'any political activity' of Article 3 of the TUT Act.

B. 2011Hun-Ka18

Petitioners who worked in public elementary schools or secondary schools as teachers were executive members of the KTU.

The petitioners were suspended for three months by the school superintendent of ○○ for the participation in the first and second declaration of the state of affairs, violating the SPOA and TUT Act on December 10, 2009.

The petitioners initiated the lawsuit to annul the disciplinary action (Seoul Administrative Court 2010Guhap26889) and filed a motion to request a constitutional review of the part of 'collective activities' of Article 66 Section 1 of the SPOA, which was eventually denied, and a

motion to request a constitutional review of the part of 'any' of Article 3 of the TUT Act, which was sustained, while the trial was pending (2010A2924). According to the motion, Seoul Administrative Court requested a constitutional review of the part of 'any' of Article 3 of the TUT Act on February 25, 2011.

C. 2012Hun-Ba185

Petitioners, who worked as teachers of public schools, were also executive members of KTU.

The school superintendent of ○○ suspended the petitioners for two months due to the participation in the first and second declaration of the state of affairs, which were allegedly the violation of the SPOA and TUT Act, on December 21, 2009. The petitioners initiated the lawsuit to annul the disciplinary actions, after the review of Appeal Commission for Teachers, and filed a motion to request a constitutional review of Article 3 of the TUT Act (Busan High Court 2012A12) while the appellate procedure was pending (Busan High Court 2011Nu4275). When the motion was denied, the petitioners filed this constitutional complaint on May 25, 2012.

II. Subject Matter of Review

The subject matter of review is the constitutionality of the part of 'this Act' of Article 78 Section 1 Item 1 with regard to the part of 'collective activities other than public services' of the main text of Article 66 Section 1 of the State Public Officials Act (revised by Act No. 8996 on March 28, 2008) (hereinafter, referred to as "the instant provision of SPOA") and the part of 'any political activity' of Article 3 of the former Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to the revision by Act No. 10132 on March 17, 2010) (hereinafter, referred to as "the instant provision of TUT Act"). The provisions at issue are as follows:

4. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union

Provisions at Issue

State Public Officials Act (revised by Act No. 8996 on March 28, 2008)

Article 78 (Causes for Disciplinary Disposition) (1) If a public official falls under any of the following subparagraphs, a resolution on disciplinary action shall be requested, and a disciplinary disposition shall be taken according to the result of such disciplinary resolution:

1. Where he/she violates this Act or any order issued under this Act

The former Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to the revision by Act No. 10132 on March 17, 2010)

Article 3 (Prohibition of Political Activities) Trade unions for teachers (hereinafter referred to as "trade unions") shall not be allowed to participate in any political activity.

Related Provisions

State Public Officials Act (revised by Act No. 8996 on March 28, 2008)

Article 65 (Prohibition of Political Activities)

(1) No public official may participate in an organization of, or join in, any political party or other political organization.

(2) No public official shall engage in the following activities to support or oppose a specified political party or person in an election:

1. Soliciting any person to cast or not to cast a vote;
2. Attempting, superintending, or soliciting a signed petition campaign;
3. Putting up, or causing another person to put up, documents or books at public facilities, etc.;
4. Raising, or causing another person to raise, any contribution, or using, or causing another person to use, public funds;
5. Soliciting another person to join or not to join a political party or any other political organization.

(4) The scope of any political activity prohibited other than those

referred to in paragraph (3) shall be determined by the National Assembly Regulations, Supreme Court Regulations, Constitutional Court Regulations, National Election Commission Regulations, or Presidential Decree.

Article 66 (Prohibition of Collective Activities)

(1) No public official shall engage in any collective activity for any labor campaign, or activities other than public services. (the proviso is intentionally omitted)

Article 78 (Causes for Disciplinary Disposition)

(1) If a public official falls under any of the following subparagraphs, a resolution on disciplinary action shall be requested, and a disciplinary disposition shall be taken according to the result of such disciplinary resolution:

2. Where he/she violates obligations on duties (including that imposed on him/her by other Acts and subordinate statutes due to his/her status as a public official), or he/she neglects his/her duties;

3. Where he/she commits a conduct detrimental to his/her prestige or dignity, regardless of a connection with his/her duties.

The former Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to the revision by Act No. 10132 on March 17, 2010)

Article 1 (Purpose) The purpose of this Act is to stipulate matters concerning the organization of trade unions for teachers in conformity with the proviso of Article 5 of the Trade Union and Labor Relations Adjustment Act and to regulate special provisions necessary for the Trade Union and Labor Relations Adjustment Act to be applied to teachers, notwithstanding Article 66(1) of the State Public Officials Act and Article 55 of the Private School Act.

4. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union

Article 6 (Right to Bargain and Conclude Collective Agreements, etc.)

(1) The representative of a trade union shall have the authority to bargain and conclude collective agreements on matters concerning the improvement of the economic and social status of teachers, such as wages, working conditions and welfare, with the Minister of Education, the Superintendent of the Board of Education of the respective city and province, or the person who establishes and runs a private school. (the second sentence is intentionally omitted)

Article 14 (Relations with Other Laws)

(1) The Trade Union and Labor Relations Adjustment Act shall apply to trade unions and labor relations adjustments for teachers except for the matters stipulated in paragraph (2). (the second sentence is intentionally omitted)

Framework Act on Education (revised by Act No. 8705 on December 21, 2007)

Article 6 (Educational Neutrality)

(1) Education shall be administered to secure the purpose of education per se and it shall not be used as a tool for propagating any political, factional or individual biased views.

Article 14 (School Teachers)

(4) School teachers shall not guide or instigate students for the purpose of supporting or opposing any particular political party or faction.

The former Act on the Establishment, Operation, etc. of Public Officials' Trade Unions (enacted by Act No. 7380 on January 27, 2005, but prior to be revised by Act No. 10133 on March 17)

Article 4 (Prohibition of Political Activities) A trade union and its members shall not engage in political activities.

III. Arguments of Petitioners and Reasoning of Request of Constitutional Review of the Requesting Court

A. Arguments of Petitioners of Case 2011Hun-Ba32

(1) Argument regarding the instant provision of SPOA

(A) The Court and the Constitutional Court have interpreted the instant provision of SPOA as 'collective activities that would adversely affect the obligation of concentration on duties for the purpose against the public interests'. Nonetheless, the concept is so ambiguous and broad that it is unpredictable which behavior is permitted or prohibited, implying it is against the principle of clarity.

(B) Petitioners' declaration of state of affairs was the political expression regarding critical opinion against the policy and action of the government. It infringes the freedom of expression, freedom of demonstration, right to occupation, and right to pursue happiness for the instant provision of SPOA to prohibit such political expression, despite it is superior to other basic rights.

(C) It violates the principle of equality as unreasonable discrimination for position to restrict political expression for public officials or teachers.

(2) Argument regarding the instant provision of TUT Act

(A) The instant provision of TUT Act that bans 'any' political activity of TUT violates the principle of clarity in that it is excessively inclusive and broad.

(B) The instant provision of TUT Act that bans any political activity of TUT infringes the freedom of political expression that is the narrowest political right and violates the right to occupation and right to pursue happiness.

(C) It is unreasonable discrimination to ban political activities of TUT, contrary to other trade unions.

B. Reasoning of Requesting Court of Case 2011Hun-Ka18

(1) The instant provision of TUT Act that bans any political activity of TUT infringes the freedom of political expression of TUT in that it prohibits political expression to improve the economic and social status of teachers as well as expression of opinion regarding curriculum and management and operation of educational institutes.

(2) It is unreasonable discrimination for the instant provision of TUT Act to prohibit any political activity of TUT, contrary to other trade unions.

C. Arguments of Petitioners of Case 2012Hun-Ba185

The instant provision of TUT Act that bans any political activity of TUT violates the Constitution in that it substantially infringes the freedom of political expression under Article 21 Section 1 of the Constitution.

IV. Judgment

A. Constitutionality of the instant provision of the SPOA

(1) Issues

The instant provision of the SPOA prohibits 'collective activities other than public services', in restricting collective expressions of public officials, including political expressions. Therefore, the issue is whether the freedom of expression is infringed or not.

Petitioners alleged that the instant provision of the SPOA also infringed the freedom of occupation and right to pursue happiness. Nonetheless, the provision is not related to the freedom of occupation,

and the right to pursue happiness is the supplementary basic right for other specified basic rights (see 2001Hun-Ma718, February 26, 2004; 2011Hun-Ma150, June 26, 2014, etc.), concluding that these rights are not issues in this case.

In addition, the petitioners argued that it was unreasonable discrimination to restrict collective political expressions of public officials based on social status. Because this restriction connotes that public officials shall be distinguished from ordinary citizens, the issue of the principle of equality would not be considered.

Accordingly, we would review whether the restriction on freedom of expression under the instant provision of the SPOA infringed the principle of clarity and principle against excessive restriction thereinafter.

(2) Principle of Clarity

(A) All statutory provisions restricting basic rights shall observe the principle of clarity that is implied by the rule of law. If the substances of the provisions do not guide citizens to what is the prohibited or permitted, the legal stability and predictability are not secured, which may lead law enforcement to arbitrary application of law. Nonetheless, the level of such requirement for each provision cannot be the same so that it may vary depending on the nature of the individual statute or provision, uniqueness of each element, or backgrounds or circumstances of enactment (see 2010Hun-Ba272, October 25, 2011; 2008Hun-Ma500, February 23, 2012, etc.).

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 principle of clarity will depend on whether such interpretation method can provide a standard for reasonable interpretation of its meaning (2002Hun-Ba83, June 30, 2005; 2009Hun-Ba27,

November 25, 2010).

(B) Nonetheless, the Constitutional Court has held that "the ordinary court has decided that the term of 'collective activities other than public services' of the SPOA can be interpreted as 'collective activities of public officials that may impair the obligation of concentration on duties against the public interests', not any collective action of public officials for the purpose other than public services, with the comprehensive consideration of Article 21 Section 1 of the Constitution that protects the freedom of press, the legislative purpose of the SPOA, and the obligations of sincerity and concentration on duties of public officials under the SPOA (Supreme Court 90Do2310, February 14, 1992; Supreme Court 91Nu9145, March 27, 1992; Supreme Court 2004Do5035, October 15, 2004). The Constitutional Court determines that the aforementioned provision does not infringe the principle of clarity, respecting the above interpretation in reviewing its clarity (2008Hun-Ba51, etc., August 30, 2007)." This holding should be followed in this case.

(C) Nevertheless, the above precedent does not provide specific meaning of 'collective action', while focusing on the meaning of 'other than public services'.

The term of 'collective action' literally means group behaviors of more than two people. Under the purpose of ban on collective action of public officials under the SPOA, the 'collective action' of the SPOA should be interpreted as any collective action that may impair the obligations of concentration on duties of public officials and credibility of public services, considering its organization or activity under the purpose and substances, rather than a meaning of group behavior of some people.

This kind of collective action can include a collective expression at a place with creating an organization (type of assembly) and an expression that is participated by a group of people through, for instance, signature on the declaration (type of joint signature). A collective sabotage to decrease the efficiency of government actions, which could be mass

leave, mass walkout or refusal of overtime work, could be also included.

Therefore, the term of 'collective action' is determined to be clear.

(D) It was alleged that the term of 'public interests', that was derived from the interpretation of the meaning of the instant provision of the SPOA could not be objectively interpreted.

'Public interests' mean objective public interests that should be promoted under the legal orders, suggesting that it is the interests both of the entire or majority of the people who live in the community in the Republic of Korea and the nation or society which consists of the people. This literal meaning may be unclear from the perspective of predictability because the meaning could be interpreted differently from person to person.

Nonetheless, the subjects regulated by the instant provision of the SPOA are not ordinary citizens, but public officials who serve for the entire people, and the duties of public officials should accord to the public interests in their nature. Contrary to a case to prohibit any activity of the ordinary citizens against the public interests, the abstractness or polysemy of the meaning of 'public interests' cannot solely determine whether the principle of clarity is violated or not. The principle of clarity would not be violated if the comprehensive consideration of the nature of group, purpose of the prohibition of collective actions, and duties given to public officials can sharpen the type of prohibited act to some degree.

The instant provision of the SPOA bans 'collective activities other than public services' for the concentration on duties of public officials as servers for the entire people by prohibiting collective activities for the interests of public officials who should serve the people. It suggests that the term 'public interests' connotes the interests of majority people or social community, rather than ones of individual or certain group. Thus the meaning of prohibited activities can be reasonably interpreted.

In the specified process with regard to constituting elements of inclusive

meaning, such as the instant provision of the SPOA, the meaning could remain unclear if an abstract term, which includes 'public interests', is employed. Nonetheless, this unclearness could be compensated by general law interpretation of the ordinary court that considers Article 21 Section 1 of the Constitution that protects the freedom of expression, legislative purpose of the instant provision of the SPOA, and various obligations of public officials in individual case, rather than by specifying certain types of actions in statutes. If a regulation is stipulated too specifically, the rigidity would paradoxically cause unregulated situation.

(E) Therefore, the instant provision of the SPOA does not infringe the principle of clarity.

(3) Principle against Excessive Restriction

(A) Standard of Review

Article 21 Section 1 of the Constitution states that "[l]icensing or censorship of speech and the press, and licensing of assembly and association shall not be allowed." Freedom of speech is not only a means to recognize the personal value to develop the personality but also a means to recognize the self-governance that is a social value to participate in political decision making (see 97Hun-Ma265, June 24, 1999). Accordingly, freedom of speech should be guaranteed for public officials, implying that the restriction should observe the principle against excessive restriction under Article 37 Section 2 of the Constitution. In addition, freedom of political expression has a superior power over other basic rights as an element of liberal democratic order (2001Hun-Ma710, March 25, 2004). It suggests that the restriction should not be recklessly justified, because our Constitution confirms that public officials shall serve for entire people and requires political neutrality. Depending on the nature of status or rank of the public official, the public officials' freedom of expression would be restricted more.

(B) Review

1) In the case of 2003Hun-Ba51, etc. decided on August 30, 2007, the Constitutional Court held that "the instant provision of the SPOA prohibits 'collective actions other than public services' in that collective actions of public officials would represent the group interests of public officials, while impairing the interests of the entire people. It should be regarded as one of the duties implied by the nature of public officials. The term 'collective actions other than public services' can be interpreted as 'collective actions impairing the obligation of concentration on duties against public interests' in a limited way. Therefore, it would not excessively infringe the essential substance of freedom of expression and press and freedom of assembly and demonstration." This ruling shall be applied here.

2) The petitioners alleged that the instant provision of the SPOA that prohibits political expression that should be strongly protected infringed the principle against excessive restriction.

The instant provision of the SPOA prohibits collective political expression of public officials in that such expression would adversely affect the credibility of the people against public officials. The Constitution protects collective political expression through freedom of assembly because it is the essential basic right to promote democratic politics, being effective in political or social decision making process of the people. Nonetheless, collective actions by majority would lead to conflicts with public orders or legal peace due to its nature, compared to individual expression, and collective political expression of public officials would be regarded as the representation of group interests of public officials, impairing the fairness and objectiveness of public services due to the damaged political neutrality. Therefore, the instant provision of the SPOA that restricts collective actions of public officials, including political expression, would not be excessive restriction.

3) The instant provision of the SPOA also prohibits the political

expression of public officials that claim to support 'public interests'. Its reason is based on the obligation of political neutrality of public officials.

Political neutrality means equal treatment regardless of apolitical opinion, assuming there is an opposing opinion. It requires the attitude that is not biased for any side, and the attitude that is fair, with regard to politics. Nonetheless, the public interests are objective public interests that should be protected and promoted by legal orders. The Constitutional Court has held that "it is clear that political neutrality of public officials is the legitimate public interest under our Constitution, which is substantially significant. We cannot deny the practical necessity to recognize it when we reflect experiences in the past (see 99Hun-Ma135, December 23, 1999)." Especially in our political practices, the collective criticism or opposition against the government policy would be misunderstood, being regarded as intervention in politics or support for a particular political party, even if it does not express any support for a particular political party or political power. Despite the expression was for development of the nation and society, it is hardly successful to resolve the doubt of political bias. Because the request of political neutrality of public officials corresponds to significant 'public interest', the instant provision of the SPOA should still be applied, if the collective political expression of public officials, allegedly representing the public interest, does not conform to the demand for political neutrality of public officials.

4) Thus the instant provision of the SPOA does not infringe the principle against excessive restriction.

B. Constitutionality of the instant provision of the TUT Act

(1) Issues

The instant provision of the TUT Act that prohibits any political activity of trade unions for teachers (hereinafter, referred to as "TUT")

restricts freedom of political expression of TUT and its member teachers. The petitioners alleged that the instant provision of the TUT Act infringed the freedom of occupation and right to pursue happiness. Nonetheless, the aforementioned provision is hardly related to the freedom of occupation and the right to pursue happiness is the supplementary basic rights. Thus these issues would not be reviewed in this case.

Accordingly, the issue is whether the instant provision of the TUT Act violates the principle of clarity by regulating inclusively and broadly, whether it excessively restricts the freedom of political expression of TUT and its member teacher under the principle against excessive restriction, and whether the TUT is unfairly discriminated, compared to other trade unions.

(2) Principle of Clarity

(A) The instant provision of the TUT Act employees the term of 'any', implying that any political activity of TUT would be prohibited. This regulation format raises the question whether or not the regulation is excessively inclusive and broad.

As stated above, in determining the scope of regulation in a provision of a statute, the literal meaning, legislative purpose, legislative history, and the systematic structure of relevant provisions should be comprehensively considered. Especially, in these days, due to the active interaction of the nation and society, any issue of society relating to community, economics or culture, as well as an issue traditionally treated in politics, can be converted into political issues. Accordingly, if the interpretation of the instant provision of the TUT Act merely considers its literal meaning with regard to the prohibition of political activities, such interpretation may mislead its true meaning. If the comprehensive interpretation with the consideration of the Constitution that declares the political neutrality of education, provisions of the Framework Act on Education, legislative purpose of the TUT Act, introduction meaning of TUT Act, and relations with relevant provisions can bring limited

interpretation through the systematic and logical interpretation, the regulation could not be determined to be excessively inclusive legislation.

(B) Article 31 Section 4 of the Constitution declares the political neutrality of education. Accordingly, the Framework Act on Education prohibits the use of education for propagating any political, factional or individual biased view (see Article 6 Section 1; Article 14 Section 4). TUT Act states that the purpose of this Act is to stipulate matters concerning the organization of TUT and to regulate special provisions necessary for the 'Trade Union and Labor Relations Adjustment Act' to be applied to teachers (Article 1). It provides the right to bargain and conclude collective agreements to improve the economic and social status of teachers, such as wages, for TUT (Article 6). TUT exists for the improvement of basic labor rights of teachers and the instant provision of TUT Act attempts to secure the political neutrality in education and the right to education of the people. Because any expressed opinion or activity may be related to politics in modern society, regardless of its degree, the prohibited act by the instant provision of TUT Act may extend indefinitely if the scope of 'political activity' is not limited. Considering these circumstances, despite that the instant provision of TUT Act prohibits 'any' political activity, the instant provision of the TUT Act inherently allows the activities to promote the economic and social status of teachers, such as wages, working conditions and welfare, as union activities. It also allows political expression with regard to education policy of elementary or secondary schools as education experts who are in charge of elementary or secondary school education, as long as it does not impair the political neutrality and does not infringe the right to education of students. Nevertheless, an activity for exercising influencing powers over the government policy determination or enforcement, which is not related to education, using the position and organizational power of teachers would be regarded as the prohibited political activity because it could impair the political neutrality in education and its credibility.

(C) As described above, it is possible to interpret the meaning of the provision of the TUT Act in a limited way, suggesting the principle of clarity is not violated.

(3) Principle against Excessive Restriction

(A) Standard of Review

As stated above, freedom of political expression is a constituting element of liberal democratic basic orders, having superior effect to other basic rights. Teachers of elementary or secondary school also deserve this freedom, and their freedom can be restricted as long as it is conformable to the principle against excessive restriction under Article 37 Section 2 of the Constitution (see 2007Hun-Ma700, etc., January 17, 2008). Nonetheless, Article 31 Section 4 of the Constitution declares the political neutrality in education. Thus the freedom of expression of teachers who are in charge of education would be more restricted in areas of politics, compared to ordinary citizens.

(B) Review

1) Political neutrality in education includes ‘educational neutrality in politics’, which means education should not be intervened by governmental power or political power, as well as ‘political neutrality in education’, which means education should not intervene in politics beyond its own function. Since education is a base for the far-sighted national policy, educational methodology or substances should not be intervened or infringed by political bias for the stable development of the nation (see 89Hun-Ma88, November 12, 1992; 2011Hun-Ba42, March 27, 2014, etc.). For immature elementary or secondary school students to be an independent and responsible person within community, factional political values or interests should not affect education. The instant provision of the TUT Act prohibits political activities of TUT regarding teachers of elementary and secondary school for securing political neutrality of teachers and preventing any possible adverse effect in developing personality or values of immature students from political

bias of teachers. This legislative purpose of the instant provision of TUT Act is legitimate, and ban on political activities of TUT is an effective and appropriate means to achieve the purpose.

2) A personal expression of teachers, not along with TUT activities, would be permitted if it is not prohibited by SPOA. Accordingly, the instant provision of TUT Act does not excessively restrict freedom of political expression of TUT and its member teachers.

Activities of teachers may substantially affect character buildings of students who are in process to build sound character through education. Activities of teachers may have significant influencing power over character-building of students, even if the political expression was made somewhere other than an educational place, as the declaration of state of affairs of this case. Especially in case that a political expression of teachers is extensive and is brought under the name of TUT, its influencing power over educational place and society should be considered. It may bring biased values to students who are not mature in developing sound views toward the world and life based on diverse values. The allowance of teachers' political activities under the name of extensive protection of freedom to political expression could impair the substance of the right to education of students who deserve to be a responsible and sound person through education and even distort the genuine opinion-forming of individual teacher. Considering these circumstances, the ban on 'political activities' by TUT collectively (other than political expression to improve the economic and social status of teachers, such working conditions, or political activities with regard to the education policy as education experts), as limitedly interpreted above, would not be excessive restriction beyond the legislative purpose.

3) Considering the Constitutional request for political neutrality in education and influencing power of teachers over students, the partial restriction on political activities of TUT under the instant provision of TUT Act would not exceed the public interests that secure the political

neutrality in education and promote the right to education of students.

4) Accordingly, the instant provision of TUT Act does not infringe the principle against excessive restriction.

(4) Principle of Equality

(A) Article 11 Section 1 of the Constitution does not mean absolute equality that denies any discrimination. It is the relative equality that prohibits unreasonable discrimination in making and applying laws. Therefore, discrimination or inequality based on reasonable grounds would not violate the principle of equality (92Hun-Ba43, February 24, 1994).

(B) Petitioners alleged that it is unreasonable discrimination to restrict political activities of TUT, while permitting political activities of other trade unions. Nonetheless, other trade unions are not generally required to be neutral with regard to their business or activities, which should be distinguished from TUT which is required to be neutral in politics due to its duties and activities. Thus it is not unreasonable discrimination for TUT Act to restrict political activities.

(C) Act on the Establishment, Operation, etc. of Trade Unions for Public Officials (hereinafter, referred to as the 'TUPO Act') prohibits political activities of its trade union, while not employing the term of 'any', implying the allowance of political expression for the improvement of working conditions. On the other hand, TUT Act states that 'any' political activity is prohibited, implying a political activity to improve working conditions would be also banned. Nevertheless, considering the purpose of TUT and nature of trade unions, activities of TUT for improving the working conditions of teachers should be permitted as stated above. Therefore, it is not unreasonable discrimination even if TUT Act prohibits 'any' political activity, contrary to TUPO Act.

(D) Furthermore, the petitioners alleged that it is unreasonable

discrimination to restrict political activities of elementary or secondary school teachers, while not restricting political activities of university faculty group. However, while the education in elementary or secondary school focuses on the delivery of generally approved knowledge, education in university focuses on the development of academia and improvement of teaching quality for university students through the organic integration of research and teaching (see 2001Hun-Ma710, March 25, 2004; 2011Hun-Ba42, march 27, 2014). Whereas education in elementary or secondary school is for the elementary or secondary school students who would be substantially affected by teachers, education in university is for university students who is responsible for their own behaviors with sound judgment, implying significant differences between elementary or secondary school and university. For the differences in substances and subject of education, it is not unreasonable discrimination to restrict political activities of TUT of elementary or secondary school teachers who educate students who are sensitively affected by political tendency of teachers, while permitting political activities of university faculty organizations who educate university students who would not be affected by professors' political tendency without restraints.

(E) Therefore, the instant provision of TUT Act does not violate the principle of equality.

V. Conclusion

Therefore, the instant provision of SPOA and the instant provision of TUT Act do not violate the Constitution as set forth in the holdings. This decision was made with a unanimous opinion of participating Justices, except the partial dissenting opinion of Justice Park Han-Chul, Justice Kim Chang-Jong and Justice Kang Il-Won as set forth in VI and dissenting opinion of Justice Lee Jung-Mi and Justice Kim Yi-Su as set forth in VII.

VI. Dissenting Opinion with regard to the Instant Provision of the TUT Act by Justice Park Han-Chul, Justice Kim Chang-Jong, Justice Kang Il-Won

The Court opinion proceeded to the review of merits, assuming the instant provision of TUT Act is relevant to the underlying cases. Nonetheless, the constitutionality of the instant provision of TUT Act is not relevant to the ruling or reasoning of the underlying cases as stated below. Thus we are of opinion that this part should be dismissed for the lack of the relevance to the underlying cases.

The instant provision of TUT Act prohibits political activities of TUT, but not prohibiting political activities of its member teachers. It should be differentiated from TUPO Act that prohibits political activities of both TUPO and its member public officials. On the other hand, it were entire teachers who signed the declarations, not the TUT, who issued the declarations of the state of affairs of the underlying cases. In addition, the substances of the state of affairs did not regard the working conditions of teachers, implying it did not correspond to the activities of trade unions. Furthermore, a penal provision of the instant provision of the TUT Act is not stipulated.

The petitioners were submitted to disciplinary measures under Article 78 of SPOA by violating Article 56, 57, 63 and 66 of the SPOA and the instant provision of TUT Act. Nonetheless, ‘obligations on duties that imposed on him/her by other Acts’ of Article 78 Section 1 Item 2 of SPOA did not include the obligations under the TUT Act in that the instant provision of TUT Act did not regard individual teacher. Therefore, the instant provision of TUT was merely a related provision to explain the discipline grounds under Article 56 (Duty of Fidelity), Article 57 (Duty of Obedience), Article 63 (Duty to Maintain Dignity) and Article 66 (Prohibition of Collective Activities) of SPOA, implying that the violation of the instant provision of TUT Act did not correspond to the disciplinary ground under Article 78 of SPOA.

Therefore, the unconstitutionality of the instant provision of TUT Act

would not affect the cancellation of disciplinary measures against petitioners directly. Accordingly, the instant provision of TUT act is not relevant to the underlying cases.

VII. Dissenting Opinion of Justice Lee Jung-Mi, Justice Kim Yi-Su

We are of opinion that the instant provision of SPOA and the instant provision of TUT Act violated the freedom of political expression of petitioners as stated below.

A. Constitutionality of the instant provision of SPOA

(1) Political neutrality and political rights of public officials

Public officials have 'dual position' which is a position as public officials and a position as citizens. The basic rights of public officials could be more restricted compared to ordinary citizens. The core to justify the restriction on political rights of public officials resides in the request of political neutrality (Article 7 Section 2 of the Constitution). If the restriction on the political activities of public officials is aimed at the political neutrality of public officials, the scope and degree of restriction on political activities of public officials should be understood in correlation with political neutrality of public officials. It would be the harmonized protection of political rights of public officials as citizens and the request of political neutrality for public officials to regulate political activities, according to the possibility and degree to the adverse effect to political neutrality.

From this perspective, in the parteienstaat where the constituting elements of politics are political party and election, political neutrality means that public officials should be free from a particular political party or faction. The political activities for public officials are restricted only when related to political parties or election, in principle. Other political activities should be permitted if possible (see dissenting opinion of Justice Song Doo-Hwan, 2009Hun-Ma705, etc., May 31, 2012).

The scope of permissible political activities for public officials could be reviewed, depending on their political density. First, the right to election or the right to vote is exercised by personal decision. Second, personal political ideas are expressed through private conversation, outside working place at times other than working hours. Third, there are basic activities, including participation in political party and pay basic party expenditures as a party member. Fourth, there are active support and sponsorship, including contributing political funds to a particular political party or politician. The last degree is to permit participation in campaign for public officials. Each degree of activities should be determined under the consideration of the relevance to a position of public officials. The first activity, which is exercise of the right to election and right to vote, and the second activity, which is political expression in private, are not closely related to a political party or election, suggesting that they should be permitted in principle.

It should be allowed for public officials to express private opinions with regard to social issues, including support or opposition to a national policy. Even if the substances of political expression of public officials are on the side of a particular political party or politician, the political expression should not be regarded as the support or opposition to a particular political party or political power or activity to express political bias or partiality. For instance, even if a political party opposed the grand canal of Korea peninsula of the national policy, an opposite view for the protection of environment should not be regarded as the view to express its political bias or the view as the opposite side to the government. An opinion supporting the grand canal policy should neither be regarded as political bias or damage to political neutrality. Otherwise, public officials would not be allowed to express any opinion regarding social issues, thereby blocking opportunities of political thinking of public officials and infringing the freedom of political expression.

The instant provision of SPOA is interpreted as the prohibition of political expression regarding public issues, which are not closely related to a political party or election, such as the declaration of the state of

affairs in the underlying cases. It should be reviewed whether this restriction infringed the freedom of political expression of petitioners.

(2) Principle of clarity

Majority opinion determined that it is not against the principle of clarity by limitedly interpreting the meaning of 'collective activities other than public services' as 'collective activities that impair the obligations of concentration on duties for the purpose which is against the public interests'. Nonetheless, this interpretation only makes the abstract concept into more ambiguous concept.

The decision of whether an expression impairs the public interest depends on the values or ethical belief of a person, implying that the interpretation of law enforcement cannot determine the meaning of the expression from the objective perspective. Under the plural and value-relative social structure of modern society, the public interest of a certain circumstance cannot be converged on one interest and a problematic behavior could promote public interest, whereas it could impair another public interest at the same time. In order to decide the adverse purpose to impair public interests, the public interests should be weighed. Since the result of such weighing of public interests is not always clear and objective, the term of 'public interest' cannot be clear (2008Hun-Ba157, etc., December 28, 2010).

If public officials formed a collective expression for the interests of the entire nation, it would depend on a person to decide whether it corresponded to public interest or not. As a result, the instant provision of SPOA could not guide public officials as to what activities are prohibited. Because the meaning of public interests is unclear, the limited interpretation, which is 'collective actions that may bring negative effects to impair the obligation of concentration on duties against the public interests', would be also unclear.

In applying criminal defamation that is another restriction on freedom of expression, it harmonizes the protection of right to personality and the importance of expression with regard to public interests by eliminating

of wrongfulness if the press which defames someone with genuine facts for public interests (Article 310 of the Criminal Act). Contrary to this law, it has been criticized that the instant provision of SPOA impairs public interests despite that it would contribute to public interests for public officials to express their opinions regarding public issues. Collective expression for public interests demands protection under the Constitution in that it would promote public opinion for discovery of truth.

In the decision to determine whether the first and second declaration of state of affairs in the underlying case violates the instant provision of SPOA, the Supreme Court stated that collective expression of teachers who are also public officials "would not conform to the obligation of concentration on duties by impairing the discipline of duties as public officials or impairing the essence of public services, as an activity that is against the public interest, neglecting their duties as public school teachers, if it is deemed a direct danger to infringe on public neutrality of teachers who are also public officials." (see Supreme Court 2010Do6388, April 19, 2012) This decision did not consider the 'neglect of the obligation of concentration on duties' as a separate element, but punished public officials for the violation of the element of 'purpose against public interests' that is abstract, in interpreting the instant provision of SPOA. It could not remove the unconstitutional elements, which are ambiguous and broad, connoted in its text and did not conform to the majority opinion that limitedly interpreted the 'collective activities other than public services', suggesting it was not 'constitutional interpretation of law'. Thus the instant provision of SPOA violates the principle of clarity.

(3) Principle against excessive restriction

The ambiguity and broadness of the instant provision of SPOA excessively restricts the freedom of political expression of public officials. In historical reflection against manipulative election by the government, the Constitution emphasized political neutrality of public

officials. Now it causes the infringement of freedom of political expression of public officials.

(A) Broadness of Regulation

The restriction on freedom of political expression of public officials should be restricted to activities that may impair political neutrality. Nonetheless, the instant provision of SPOA prohibits all political expression, regardless of the above standard.

The Constitutional Court has held that Article 86 Section 1 Item 2 of the former Public Official Election Act that comprehensively prohibited personal planning of election campaign, besides planning of campaign 'using the position' of public officials is partially unconstitutional for the infringement of freedom of political expression (2006Hun-Ma1096, May 29, 2008). With regard to election campaign, the densest political activity, it attempts to harmonize the fairness of election, political neutrality and freedom of political expression by merely prohibiting the planning of campaign 'using the position' of public officials. Nevertheless, the instant provision of SPOA even bans political expression regarding public policy that is not closely related to political neutrality, distinguishable from campaign or political party activities. Because the instant provision of SPOA even prohibits collective activities that would not adversely affect political neutrality due to its non-relevance to political party or election, the freedom of political expression of public officials is excessively restricted.

(B) Scope of public officials and Relevance to business

The instant provision of SPOA applies to every public official, except public officials who offer de facto service. A collective expression against national policy that is not related to his/her duty would not adversely affect the discipline of public officials. It would achieve the purpose of the instant provision of SPOA to restrict collective expression of public officials whose duties are related to the national policy, public officials who have authority over personnel affairs, supervisory authority

or authority to determine significant policy, public officials higher than a particular rank or public officials who work for national security, judiciary, inspection or election (see dissenting opinion of Justice Mok Young-Joon and Justice Lee Jung-Mi of 2009Hun-Ma705, etc., May 31, 2012). It would be excessive restriction to prohibit political expression of all public officials with regard to political expression that is not related their duties, regardless of their duties or ranks.

(C) Consideration of business hours

The instant provision of SPOA restricts collective expression of public officials regardless of business hours. Since public officials are public employees as well as private persons, they should deserve the basic rights as a private person if it is not business hours or in a process of performance of their duties. Especially where a public official out of business hours does not use public facilities or exercise his/her authority, his/her behavior should be deemed action of a private person, rather than one of a public employee. It would violate the principle of the least restriction to restrict such action for the establishment of discipline of public officials or public neutrality.

(D) Sub-conclusion

Criticism of public officials against the national policy should be protected and promoted if it is a sound criticism for the public interests of the nation and it is not factional activity for private interests. The instant provision of SPOA violates the principle against excessive restriction in that it prohibits all collective political expressions, even if their purposes are protection of constitutional order, assuming their purpose does not conform to public interests, instead of limitedly regulating expression that is significantly factional, such as opposition or support of a particular political party.

In addition, political activities of public officials are prohibited by Article 65 of SPOA, apart from the instant provision of SPOA. The purpose of Article 66 Section 1 of SPOA intended the prohibition of

labor movement of public officials that are collective actions for creating trade union and industrial action, not the prohibition of 'political activities' of public officials. Article 3 Section 1 of the 'Act on the Establishment, Operation, etc., of Public Officials' Trade Unions' that was enacted on January 27, 2005 provides that the main text of Article 66 Section 1 of SPOA shall not apply to organizing and joining of a public officials' trade union and justifiable activities related to the trade union. Under the circumstances that labor movement of public officials, except industrial action, is allowed under separate legislation, the necessity to prohibit comprehensively 'collective actions' of public officials becomes questionable. Despite that Article 66 Section 1 of SPOA should be interpreted in this context, the courts of underlying cases applied Article 66 Section 1 that prohibits 'collective actions' instead of Article 65 that prohibits 'political activities'. If the instant provision of SPOA is manipulated for prohibiting collective political expression of public officials, it would not only impair the purpose of Article 65 of SPOA to prohibit activities that are closely related to a political party or election, but also inappropriately broaden the scope of prohibited political activities for public officials, resulting in violation of the Constitution.

B. Constitutionality of the instant provision of TUT Act

(1) Political rights of teachers and meaning of political neutrality

Political neutrality in education provided by Article 31 Section 4 of the Constitution is to promote the right to receive education, instead of prohibiting political activities of teachers. It is unquestionable that religious sect or political faction should not intervene in education methodology or substances, and that value-neutral education should be protected (89Hun-Ma88, November 12, 1992). Political neutrality in education means independence from the governmental power or political power; however, it does not prohibit the subjects of education from affecting decision-makings of community. As it is not allowed to restrict the freedom of religion of teachers or to prohibit the participation in

religious organizations of teachers, it would infringe the essence of freedom of political expression of teachers to excessively restrict the political rights in private life, such as a complete ban on political activities of teachers who are also public officials.

(2) Principle against excessive restriction

Majority opinion interprets the term of 'political activities' of the instant provision of TUT Act as activities that would highly impair the political neutrality in education, including activities that are directly related to a political party activity or election, or activities that are closely related to a particular political part or political power, in a limited way. While attempting constitutional interpretation of law, the majority opinion states that an activity for exercising influence on policy decision or enforcement of government by using the status and group power of teachers with regard to issues that are not related to education would be a political activity in that it may impair the political neutrality in education and its credibility. Nevertheless, any political expression would be an attempt to exercise influence on decision making or enforcement of the government by expressing opinions as a member of society, connoting it is the essential nature of political expression. It would be a de facto complete ban on any political activity regarding issues that are not related to education if it is deemed a political activity for the concern to impair political neutrality in education and its credibility. The result would just permit political expression to improve the economic and social status of teachers or political expression relating to educational policy as teaching profession. Since the instant provision of TUT Act may prohibit a political expression that would not adversely affect neutrality of teachers, we believe that the interpretation of majority opinion is not conformable to the constitutional interpretation of law.

Our legal system separately provides labor's three primary rights for general workers, public officials and teachers. 'Trade Union and Labor Relations Adjustment Act (hereinafter, referred to as 'Trade Union Act')' was enacted for general workers; 'Act on the Establishment and

Operation, etc. of Public Officials' Trade Unions (hereinafter, referred to as 'POTU Act')' was enacted for public officials; and TUT Act was enacted for teachers. When compared with the Trade Union Act and POTU Act under our legal system, it is confirmed that the instant provision of TUT Act attempts to prohibit 'any political activity' of teachers and TUT.

Article 12 Section 1 of the former Trade Union Act stated that "Trade Union shall not engage in activities to support a political party or a candidate in public official election", which was repealed on December 31, 1996. Article 87 of Public Official Election Act that prohibited election campaign of organizations was also revised to permit campaign of trade union on April 30, 1998. Accordingly, trade unions are partially allowed to engage in campaign or political activities. On the contrary, when TUT Act was enacted on January 29, 1999 by Act No. 5727, opposing opinions were prevalent concerned about the confusion of education by politicization of TUT in a process of its legalization. Whereas Article 12 Section 1 of the former Trade Union Act and Article 65 of the POTU Act regulated a certain political activity which is closely related to election or political parties, the then newly introduced instant provision of TUT Act completely banned political activities of TUT, stipulating the prohibition of "any political activity", regardless of relatedness to election or a political party.

Article 4 of the POTU Act that was enacted by Act No. 7380 on January 27, 2005 provides that "[a] trade union and its members shall not engage in political activities." According to the examination report on the legislative bill of Environment and Labor Committee of the National Assembly, the provision expressed the prohibition of political activities of public officials' trade union in order to prevent possible confusion in applying law after the establishment of public officials' trade union, considering that certain political activities are allowed for general trade unions, whereas public officials act and politics-related statutes prohibit political activities of public officials. On the contrary, the instant provision of TUT Act provides "[t]rade unions for teachers

shall not be allowed to participate in any political activities". With regard to this provision, the examination report on the legislative bill of Environment and Labor Committee of the National Assembly stated that it prohibits political activities for the distinct nature of teaching, right to learning and political neutrality in education. Thus it is obvious for the instant provision of TUT Act that prohibits "any political activity" to ban all political activities without exception, while the scope of prohibited political activities of public officials' trade union could be limitedly interpreted by the comprehensive interpretation of public officials act and politics-related statutes that regulate political activities of public officials.

In addition, ordinary courts have not interpreted the instant provision of TUT Act in limited way for the constitutional interpretation. Most judgments of lower courts have interpreted the instant provision of TUT Act as the prohibition of 'all political activities except the original activities as trade unions' as well as 'all political expression to affect the process of policy making'. (Jeonju District Court 2010No112, July 16, 2010; Seoul Central District Court 2010Gohap223, September 13, 2010; and others) In practice, the instant provision of TUT Act has been regarded as the complete ban on political activities, even activities that are not prohibited by SPOA or Public Official Election Act.

Despite that some political activities of teachers may be restricted for the political neutrality of education, the restriction on place, target, and contents of political activities should be limited to a partisan propaganda, political argument, or campaign toward students at schools, allowing other political activities of teachers under the political basic rights. It should be allowed for teachers to express their personal political opinions outside school property and none-working hours, in that they would not affect the political neutrality in education. As the scope of political activities of public officials should be restricted with the consideration of nature of activities, duties of public officials, business hours, use of position as public officials, or use of public facilities, the public activities of teachers should be also regulated, depending on

whether political neutrality in education would be adversely affected or not. The instant provision of TUT Act completely prohibits the freedom of political expression by rule, even though political expression of teachers that would not impair the political neutrality in education should be allowed. Therefore, it is against the principle against excessive restriction.

(3) Principle of equality

If the freedom of political activity improves the quality of research or education in university, it is reasonably assumed that the freedom of political activity for teachers would also improve the quality of education in elementary and secondary school. Despite the emphasis of university on research, compared to elementary or secondary school, the importance of research would not substantially exceed the importance of education that is also responsible for university professors. If political freedom causes partisan effects in education, education in university would be more affected because of its broader discretion in determining contents of education, compared to education in elementary or secondary school where the curriculum is standardized, focusing on the delivery of fundamental knowledge.

In addition, it would be not appropriate to assume that teachers would educate students with partisan biases even if they are provided the political freedom which should be provided for any citizen. The protection of freedom of religion for teachers would not lead to religiously biased education for students. It is not logical to assume for a teacher to conduct partisan education in classrooms if a teacher is given the freedom of political expression outside of classroom. Therefore, the political freedom of elementary and secondary school teachers should not be restricted more, compared to university faculty, even if elementary and secondary school teachers are engaged in longer school hours and more opportunities in instruction than university faculty (see the dissenting opinion of 2011Hun-Ba42, March 27, 2014).

It is unreasonable discrimination beyond the legislative discretion,

notwithstanding differences in substances of duty and working methodology, to prohibit political activities of elementary and secondary school teachers completely, while political activities of university faculty is generally permitted. Therefore, the instant provision of TUT Act violates the principle of equality.

C. Sub-conclusion

There are around 1,000,000 public officials and around 430,000 elementary or secondary school teachers in our nation. Most of public officials and teachers maintain their positions until retirement. It would be not desirable for the successful operation of democracy to prohibit political expression of a large number of people. Public officials and teachers have higher level of political awareness than any other group for their high educational level, personal qualification, concern for public interests and sense of duty for the nation and society. The participation in politics of these people with such awareness would mean not only the protection of political rights of individuals but also the harmonious operation of democracy, being a driving force of development of democracy. The instant provision of SPOA and the instant provision of TUT Act that de facto deprive public officials and teachers of their freedom of political expression infringe on the freedom of political expression of the petitioners.

Justices 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 and Cho Yong-Ho

II. Summaries of Opinions

1. Case on the prior notice of outdoor assembly or demonstration

[26-1(A) KCCR 34, 2011Hun-Ba174 · 282 · 285, 2012Hun-Ba39 · 64 · 240 (consolidated), January 28, 2014]

In this case, the Constitutional Court held that the part related to the main text of Article 6 Section 1 in Article 22 Section 2 of the Assembly and Demonstration Act (hereinafter, the 'Instant Provision') that punishes the organizers of outdoor assemblies and demonstrations who fail to report in advance does not violate the Constitution. This decision clarifies that anyone who intends to organize an urgent assembly that cannot be reported within the time limit set by the Assembly and Demonstration Act shall notify a competent agency as long as it is possible to file a notification, and any urgent assembly reported as immediately as possible will not be punished since the Instant Provision is not applied to such a case.

Background of the Case

Complainants Kim ○-Hui and Lee ○-Taek were indicted in the Seoul District Court for holding an unreported assembly at the Gwangwhamun square on May 10, 2010 from 12 : 10 p.m. to 12 : 40 p.m., as they picketed for "Freedom of Speech on the Internet", etc., standing at intervals of 6 to 7 meters (2010Go-Jung6515). While the case was pending, the complainants filed a motion to request a constitutional review of Article 22 Section 2 and Article 6 Section 1 of the Assembly and Demonstration Act (hereinafter, the 'Act'). As the motion was dismissed on July 28, 2011 (2011Choki2246), the complainants filed this constitutional complaint with the Constitutional Court on August 8, 2011 (2011Hun-Ba174).

Provisions at Issue

The subject matter of this case is whether the part related to the main text of Article 6 Section 1 in Article 22 Section 2 of the Act violates the Constitution. The provision at issue and related provisions in this case are as follows:

Assembly and Demonstration Act (revised by Act No. 8424 on May 11, 2007)

Article 22 (penal provision) (2) Any person who violates the provisions of Article 5 Section 1 or Article 6 Section 1 or who holds an assembly or stages a demonstration against which a notice of ban has been issued under Article 8 shall be punished by imprisonment for not more than two years or by a fine not exceeding two million won.

Article 6 (Report, etc. on Outdoor Assembly or Demonstration) (1) Any person who desires to hold an outdoor assembly or to stage a demonstration shall, from 720 to 48 hours before such assembly or demonstration is held, submit a report on the details in all the following subparagraphs to the chief of the competent police station: Provided, That if two or more police stations have jurisdiction over such assembly or demonstration, such report shall be submitted to the commissioner of the competent regional police agency, and if two or more regional police agencies have jurisdiction over it, such report shall be submitted to the commissioner of the competent regional police agency exercising jurisdiction over the place where it takes place.

Summary of the Decision

1. Whether the Instant Provision violates the rule of clarity under the principle of nulla poena sine lege

It is generally understood that the term ‘assembly’ refers to a temporary gathering of a group of people in a specific place with specific objectives, and the ‘formation of inner tie’ can be sufficient to be the common objectives. As a reasonable person with general legal awareness would infer the meaning of ‘assembly’ from the above mentioned explanation, the definition of ‘assembly’ is not unclear. Therefore, we find that the Instant Provision is not against the rule of clarity under the principle of nulla poena sine lege.

2. Whether the Instant Provision violates the principle of prohibition against prior permit under Article 21 Section 1 of the Constitution

The prior notice requirement under the Act is a report requirement as a duty to cooperate, in order to provide administrative agencies including police departments with some time to prepare necessary steps for the smooth and safe running of assemblies. Generally, the Act, in principle, guarantees outdoor assembly and demonstration as far as it is properly reported. Therefore, the prior notice requirement does not violate the principle of prohibition against prior permit under Article 21 Section 1 of the Constitution.

3. Whether the Instant Provision infringes on the freedom of assembly in violation of the principle against excessive restriction

The details to be reported under the Instant Provision are necessary and important information to prevent multiple assemblies or demonstrations from overlapping and to prepare relevant agencies to take appropriate measures in advance to keep public safety. The prior report requirement in which an assembly is needed to be reported at least 48 hours before the assembly takes places is stipulated in order to secure sufficient time for the necessary procedures, such as supplementing incomplete documentation after the prior report, sending notice of prohibition to applicants and filing objection to the prohibition notice in return, etc., to

run smoothly and therefore, the Instant Provision cannot be considered to be an excessive restriction.

Based on Article 21 Section 1 of the Constitution, the Instant Provision can be construed that so-called 'urgent assembly', an outdoor assembly that cannot be reported within the time limit stipulated in the Act although it has been planned in advance and an organizer exists, should be reported as promptly as possible once it becomes possible. Any urgent assembly reported as immediately as possible will not punished since the Instant Provision should not be applied to such a case. Therefore, the Instant Provision does not infringe on the freedom of assembly in violation of the principle against excessive restriction.

4. Whether the Instant Provision imposes excessive punishment

As it is highly possible that holding an unreported outdoor assembly can cause threat to the public safety and it goes against the administrative purpose of the report requirement, the Instant Provision, which imposes administrative penalty on such unreported outdoor assemblies, does not infringe on the freedom of assembly and the statutory sentence cannot be considered excessive, outside the scope of legislative discretion. Therefore, Instant Provision does not impose excessive punishment.

Summary of the Dissenting Opinion by Four Justices

1. Whether the part of 'urgent assembly' violates the principle against excessive restriction

The Act does not provide any measures for an urgent assembly, which is hard to satisfy the report requirement, to be properly and legally held such as making it possible to defer the report requirement or to notify an assembly on-site. The language of the Instant Provision is vague in that it does not clearly stipulate whether organizers are not allowed to report an urgent assembly under Article 6 Section 1 of the Act if less

than 48 hours are left from the planning to the beginning of such an assembly or, if the Instant Provision is considered to impose a duty to report an urgent assembly, when such a report should be made. And such vagueness causes confusion to those who are obliged to abide by the Instant Provision. Therefore, the Instant Provision's blanket imposition of the duty to file a prior report for all kinds of outdoor assemblies, without providing for exception to the case of urgent assembly, infringes the complainants' freedom of assembly, in violation of the principle against excessive restriction.

2. Whether the Instant Provision imposes excessive punishment

The duty to report an assembly in advance is not more than the duty to cooperate in administrative process, and administrative sanctions such as imposition of fine are enough for such cooperative duty to be properly carried out. But the Instant Provision, by imposing criminal penalty including imprisonment, can cause chilling effect on the freedom of assembly guaranteed by the Constitution, which in fact amounts to allowing the report system to function as the permit system, contrary to the original purpose of the report system. The Instant Provision which imposes the same punishment on the organizers of unreported outdoor assemblies as those of illegal assemblies or demonstrations prohibited by the Act should be considered to stipulate excessive punishment beyond the limit of the state's punishment power under the rule of law, as it imposes the same penalty for the two totally different conducts with different level of infringement on legal interests.

2. *Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence*

[26-1(A) KCCR 136, 2012Hun-Ma409 · 510, 2013Hun-Ma167 (consolidated), January 28, 2014]

In this case, the Constitutional Court held that the part relating to 'probationers with suspended sentence' and the part relating to 'prisoners' in Article 18 Section 1 Item 2 of the Public Official Election Act and Article 43 Section 2 of the Criminal Code infringe upon the complainants' right to vote, in violation of Article 37 Section 2 of the Constitution, and violate the principle of equality as they discriminate probationers with suspended sentences from prisoners in violation of the principle of universal suffrage stipulated in Article 41 Section 1 and Article 67 Section 1 of the Constitution. The Constitutional Court declared that the part relating to probationers with suspended sentence, among the Provisions at Issue, violates the Constitution. But regarding the part relating to prisoners, the Court held that it is not compatible with the Constitution, taking into consideration that the details of granting the right to vote to prisoners can be decided by the legislature exercising its discretion.

Background of the Case

Complainant Gu ○-Hyun was sentenced to imprisonment for four months and suspension of the sentence for two years after the Seoul Eastern District Court found him guilty of obstruction of business, etc. and the judgment was finally confirmed on December 2, 2011. Complainant Hong ○-Seok was sentenced to imprisonment for one and a half year for violation of the Military Service Act by the Seoul Central District Court on December 22 and the judgment was confirmed on December 30, 2011. Complainant Jeon ○-Soo was also sentenced to imprisonment for one and a half year for violation of the Military Service Act by the

Bucheon Branch of Inchon District Court on February 15, 2012 and the judgment was confirmed on February 23, 2012. The complainants were prevented from exercising their right to vote in the election for the 19th National Assembly held on April 11, 2012 on the ground that they fell under the category of disfranchised people stipulated in Article 18 Section 1 Item 2 of the Public Official Election Act. Upon this, the complainants filed this constitutional complaint on April 25, 2012, arguing that Article 18 Section 1 Item 2 of the Public Official Election Act violates their fundamental rights including the right to vote (2012Hun-Ma409).

Provisions at Issue

The subject matters of review in this case are (1) whether the part relating to 'a person who is sentenced to imprisonment for a limited term or without prison labor for a limited term and the execution of his/her sentence is suspended' (hereinafter, for the sake of convenience, we will use the term 'prisoner'; the prisoner here includes a person whose sentence of imprisonment for a fixed term or sentence of imprisonment without prison labor for a fixed term is under execution and a person who was released on parole but his/her prison term has yet to be terminated) and the part relating to 'a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term and his/her sentence is suspended' (hereinafter, for the sake of convenience, we will use the term 'probationer with suspended sentence', excluding those whose right to vote is restricted pursuant to Article 18 Section 1 Item 3) in Article 18 Section 1 Item 2 of the Public Official Election Act (amended by Act No. 7681, August 4, 2005) and (2) whether the part relating to 'the right to vote under the public Acts' of probationer with suspended sentences or prisoners in Article 43 Section 2 of the Criminal Code (enacted by Act No. 293, September 18, 1953) infringe upon the complainants' fundamental rights. The provisions at issue in this case are as follows:

Provisions at Issue

Public Official Election Act (amended by Act No. 7681, August 4, 2005)

Article 18 (Disfranchised Persons) (1) A person falling under any of the following Items, as of the election day, shall be disfranchised:

2. A person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted.

Criminal Code (enacted by Act No. 293, September 18, 1953)

Article 43 (Imposition of Sentence, Deprivation of Qualifications and Suspension of Qualifications) (2) A person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications as mentioned in subparagraphs 1 through 3 of the preceding paragraph until the execution of punishment is completed or remitted.

Summary of the Decision

1. Whether restricting the right to vote of prisoners and probationers infringes on the right to vote or violates the principle of universal election

The Provisions at Issue fully and uniformly restrict the right to vote of a prisoner and a probationer with suspended sentence. In light of the legislative purposes of the Provisions at Issue, it is hard to come up with any reason for the uniform and extensive restriction on the right to vote regardless of the type, elements or degree of culpability of a specific crime. Specifically, unless the execution of sentences is invalidated or cancelled, probationers with suspended sentence will not be incarcerated in correction institutions, thereby leading the same life as other ordinary citizens and in this sense, the necessity to restrict their right to vote does

not seem evident. Therefore, the Provisions at Issue infringe upon the complainants' right to vote in violation of Article 37 Section 2 of the Constitution, and violate the principle of equality as they discriminate probationers with suspended sentences from prisoners in violation of the principle of universal suffrage stipulated in Article 41 Section 1 and Article 67 Section 1 of the Constitution.

2. Decision of simple unconstitutionality in part and decision of incompatibility with the Constitution in part

Among the Provisions at Issue, the part relating to probationers with suspended sentence can regain its constitutionality by declaring it unconstitutional, which removes the infringement on the right to vote. Therefore, we render a decision of simple unconstitutionality on the part. Regarding the part relating to prisoners, however, its unconstitutionality results from the blanket and uniform restriction on the right to vote. Meanwhile, it is within the scope of legislative discretion to remove such unconstitutionality and constitutionally grant prisoners the right to vote. Therefore, the part relating to prisoners among the Provisions at Issue is hereby declared not to be compatible with the Constitution, but it is to be temporarily effective until the legislature revises it. The legislators must make proper revision at the latest by December 31, 2015, and if no such revision is made by then, the part relating to prisoners among the Provisions at issue will become null and void starting on January 1, 2016.

Summary of Concurring Opinion by One Justice

The legislative purpose of the Provisions at Issue, the deprivation of the right to vote in order to o impose social sanction on those who are convicted of crime, is not legitimate. I do not deny the need to impose a certain social sanction on prisoners as retribution against crimes, but such a sanction does not need to be manifested by a way of restricting

the right to vote, which is the most basic right among the suffrage rights. As the legitimacy of law and the duty to abide by law directly derive from exercise of the voting right by citizens, restricting the right to vote of prisoners and probationers with suspended sentence does not seem to strengthen law-abiding spirit, thereby failing to meet the test of reasonableness of means.

Summary of Dissenting-in-part Opinion by One Justice

Different from probationers with suspended sentence who are convicted of crimes with relatively lighter culpability and living in our society as members of community without being imprisoned in extenuation of many factors, prisoners are people who are sentenced to imprisonment without prison labor or heavier punishment but whose sentence execution has not been terminated. It is impossible for them to lead a normal life within our society as they are isolated from the community. I do not think it is excessive to suspend prisoners' right to vote, which decides the formation and management of governmental structure and the direction of our community, for the period of isolation. As such, the part relating to prisoners of the Provisions at Issue does not violate the Constitution.

3. Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled

[26-1(A) KCCR 155, 2012Hun-Ma431, 2012Hun-Ka19 (consolidated), January 28, 2014]

In this case, the Constitutional Court held that Article 44 Section 1 Item 3 of the Political Parties Act which allows the election commission to revoke the registration of a political party failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, and failing to obtain more than 2/100 of total number of effective votes and the part related to Article 44 Section 1 Item 3 of Article 41 Section 4 of the Political Parties Act which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time, violate the freedom to form a political party, running afoul of the Constitution.

Background of the Case

(1) Complainants and requesting petitioners (hereinafter the 'complainants') are political parties whose registrations have been cancelled and their representatives. Pursuant to Article 44 Section 1 of the Political Parties Act, the election committee cancelled the registration of the complainants, the New Progressive Party, the Green Party and the Youth Party, as they failed to obtain more than 2/100 of total number of effective votes. Also, the complainants were unable to use their names, such as the New Progressive Party, the Green Party and the Youth Party, due to Article 41 Section 4 of the Political Parties Act which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time

(2) Upon this, the complainants filed this constitutional complaint for the review of constitutionality of Article 41 Section 4 of the Political Parties Act (2012Hun-Ma431) and filed a suit for the revocation of the cancellation of political party registration. While the case was pending,

the complainants filed a motion to request a constitutional review of Article 44 Section 1 Item 3 of the Political Parties Act.

Provisions at Issue

The subject matter of this case is whether the part related to Article 44 Section 1 item 3 in Article 41 Section 3 (hereinafter, the 'Prohibition Provision') of the Political Parties Act (amended by Act No. 7683, August 4, 2005) and Article 44 Section 1 Item 3 (hereinafter the 'Cancellation Provision') of the Political Parties Act (amended by Act No. 7683, August 4, 2005) violate the Constitution. The provisions at issue are as follows:

Political Parties Act (amended by Act No. 7683, August 4, 2005)

Article 41 (Prohibition of Use of Similar Denomination, etc.) (4) Any title identical with that of a political party whose registration has been cancelled under Article 44 Section 1, shall not be used as the title of a political party from the date of such cancellation of registration until the date of election of National Assembly members first held due to the expiration of their term.

Article 44 (Cancellation of Registration) (1) When a political party falls under any of the following subparagraphs, the relevant election commission shall revoke its registration:

3. When failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, and failing to obtain more than 2/100 of total number of effective votes.

Summary of the Decision

1. Whether the Cancellation Provision infringes on the freedom to form a political party

Any of the record or minutes made when the Cancellation Provision had been first introduced by the Legislative Council for National

Security in 1980 or the minutes of the subsequent sessions of the National Assembly in the process of amendment to the Political Parties Act do not reveal the legislative purposes of the Cancellation Provision. Considering the freedom to form a political party guaranteed by Article 8 Section 1 of the Constitution and the legislative purpose of Article 8 Section 4 of the Constitution, any legislation excluding a political party from the process of forming political opinion by the people simply because it is a small party that fails to achieve a certain level of political support should not be allowed under our Constitution. Having said that, the legislative purpose of the Cancellation Provision can be considered legitimate to the extent that a political party that practically does not have any ability or will to participate in the process of people's forming political opinions can be excluded from such a process in order to foster the development of party democracy. And cancelling the registration of a political party that has no members of the National Assembly or fails to obtain certain number of votes is an effective means to achieve the legislative purposes.

Meanwhile, different from the dissolution of a political party by a ruling of the Constitutional Court, when a political party's registration is revoked pursuant to the Cancellation Provision, a substitute political party can be established upon the same or similar platform as the revoked political party and the name of the revoked political party can be used after a lapse of time as stipulated in the statutory provision. Even so, however, any provision that stipulates the revocation of political party's registration should be legislated based on a strict standard within the necessary minimum scope because it deprives a political party of its existence, making it impossible for the political party to conduct any kind of political activities at all. And it is possible to come up with less restrictive measures to achieve the legislative purposes. For example, the cancellation of registration can be decided depending on the result of election after providing such a political party with several chances to participate in elections for a certain period of time or the cancellation of registration may be limitedly applied to

political parties that fail to fulfill the statutory requirements for registration or have not participated in elections of the National Assembly members and others for a long time. In this regard, the Cancellation Provision does not satisfy the least restrictive means requirement.

Further, the aforementioned provision is unreasonable in that the registration of a political party which fails to attain a certain level of support in the elections of the National Assembly members is supposed to be cancelled no matter how it had been successful in the Presidential Election or local government elections. It is also problematic that newly established or small parties, frustrated by the Cancellation Provision, would not even venture into elections from the beginning.

For the foregoing reasons, the Cancellation Provision infringes upon the complainant's freedom to form a political party, violating the rule against excessive restriction.

2. Whether the Prohibition Provision infringes on the freedom to form a political party

The Prohibition Provision prevents the name of a political party whose registration has been cancelled under the Cancellation Provision from being used as the title of a political party from the date of such cancellation of registration until the date of election of the National Assembly members first held due to the expiration of their terms. As the Prohibition Provision is premised on the Cancellation Provision, it also infringes upon the freedom to form a political party for the same reasons as reviewed above in the constitutionality of the Cancellation Provision.

4. Restriction on Contribution under the Public Official Election Act

[26-1(A) KCCR 272, 2013Hun-Ba106, February 27, 2014]

In this case, the Constitutional Court decided that the part of 'a person intending to become a candidate' in Article 113 Section 1 of Article 257 Section 1 Item 1 of the Public Official Election Act does not run afoul of the Constitution, as not in violation of the rule of clarity under the principle of nulla poena sine lege, the rule against blanket delegation and the rule against excessive restriction.

Background of the Case

The petitioner had registered as a preliminary candidate in Andong City election district to run for the 19th National Assembly Election held in April 11, 2012. He was sentenced to pay a fine of 800,000 won by Daegu District Court Andong Branch in violation of the Public Official Election Act as he made a contribution to his acquaintance Kim ○-Han at the office of secretary general of the National Assembly located in Yeouido-Dong, Yongdungpo-Gu, Seoul around 15 : 00 on December 1, 2011, while having conversation over the local political situation in Andong area. The petitioner, while the case was pending in the Supreme Court, filed a motion to request for a constitutional review of Article 112, Article 113 Section 1 and Article 257 Section 1 of the Public Official Election Act which prohibit political contribution in principle. But the Supreme Court rejected both the motion and the appeal on March 28, 2013. At this, the petitioner filed this constitutional complaint on April 11, 2013.

Provision at Issue

The subject matter of this case is whether the part of 'a person intending to become a candidate' in Article 113 Section 1 of Article 257 Section 1 Item 1 of the Public Official Election Act (amended by Act No. 7189 on March 12, 2004) (hereinafter, the 'Instant Provision', and Article 112 of the Public Official Election Act is referred to as the 'Definition Provision' and the part of 'a person intending to become a candidate' in Article 113 Section 1 is referred to as to the 'Prohibition Provision') violates the Constitution. The provision at issue in this case is as follows:

Public Official Election Act (revised by Act No. 7189 on March 12, 2004)

Article 257 (Violation of Prohibition and Restriction on Contribution Act) Any person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than five years or a fine not exceeding 10 million won:

1. A person who violates the provisions of Article 113, 114 (1) or 115;

Related provisions

Public Official Election Act (revised by Act No. 7189 on March 12, 2004)

Article 113 (Restriction on Contribution Act of Candidates)

(1) A member of the National Assembly, a member of the local council, a head of a local government, a representative of a political party, a candidate (including a person intending to become a candidate), and their spouses shall not be allowed to make a contribution act (including an act of officiating at a wedding) to those within the relevant constituency, or institutions, organizations or facilities, or to those having connections with the electorate even if they are outside of the relevant constituency, or institutions, organizations or facilities.

Former Public Official Election Act (after revised by Act No. 9974 on

January 25, 2012 and before revised by Act No. 12111 on August 13, 2013)

Article 112 (Definition of Contribution Act, etc.)

(1) For the purpose of this Act, the term “contribution act” means to give money, valuables and other benefits to property, to express an intention of providing the benefits, or an act of making a promise of such a providing to the persons in a relevant constituency, or an institution, organization, facilities, and to the meetings or events of the electorate, or to the persons having connections with the electorate even if they are outside the relevant constituency, or an institution, organization and facilities.

(2) Notwithstanding the provisions of paragraph (1), practices falling under any of the following subparagraphs, shall not be regarded as contribution acts:

(3) Reference to “food and drinks provided within reasonable limits” in paragraph (2) shall be construed to mean those which are offered for consumption at the site to the extent of satisfying every day courtesy not exceeding the amount of money as prescribed by the National Election Commission Regulations, excluding what are provided as souvenirs or gifts.

Summary of decision

1. Whether the Instant Provision violates the rule of clarity under the principle of nulla poena sine lege

Although the expression of ‘those who having connections with’ is somewhat abstract, considering the legislative purposes of restricting political contribution, other related provisions and limitation in lawmaking techniques, it is hard to conclude that the meaning is not able to be understood by people with sound common sense. And it is less likely to be construed as having multiple meanings in its application through the supplementary interpretation of judges.

The decision as to whether a person is 'intended to become a candidate' is rendered not simply based on the subjective assertion of the person at issue but relying on the objective manifestation that clearly shows the candidate's intention during the relevant election at issue.

Regarding the act of political 'contribution,' the Public Official Election Act defines the meaning as "an act to give money, valuables and other benefits to property, to express an intention of providing the benefits, or an act of making a promise of such a providing". The meaning of the definition is clear in itself, and comparing to the exceptions enumerated in Article 2, we can also easily understand what kinds of contribution would be prohibited by the Public Official Election Act. Therefore, the Instant Provision does not violate the rule of clarity under the principle of nulla poena sine lege.

2. Whether the Instant Provision violates the rule against blanket delegation

Although Article 112 Section 2 Item 6 of the Public Official Election Act somewhat broadly prescribes 'any other acts corresponding to any of the above subparagraphs, and stipulated by the National Election Commission Regulations' as exceptions to the prohibited contribution, examples of the act of contribution that are not prohibited under the Public Official Election Act are also plainly stipulated from Item 1 to Item 4 of the Article. Therefore, the Public Official Election Act itself clearly and concretely provides the basic contents and scope to be regulated by the Central Election Management Commission Regulations. Also, Section 3 of the same Article provides that the scope of 'food and drinks provided within reasonable limits' shall be prescribed by the National Election Commission Regulations, and it also provides that 'food and drinks provided within reasonable limits' mean "those which are offered for consumption at the site to the extent of satisfying every day courtesy not exceeding the amount of money excluding what are

provided as souvenirs or gifts." Since the aforementioned provisions themselves provide sufficient information, anyone can predict the broad outline of the contents to be concretized by the National Election Commission Regulations simply. Therefore, the Instant Provision does not violate the rule against blanket delegation.

3. Whether the Instant Provision violates the rule against excessive restriction

The restriction imposed on the act of contribution by the Instant Provision is to guarantee the fairness of election through criminalizing and punishing the election campaign that can distort freewill of voters by providing improper financial benefits to them. Therefore, the legislative purpose is legitimate and the means to achieve this purpose are reasonable. The Prohibition Provision in this case does not prohibit all kinds of contribution at any time, but when certain act of contribution falls into the exceptions prescribed in Article 112 Section 2 or does not violate social rules as justifiable conduct, the criminality of the act can be precluded by such circumstances. Therefore, the Instant Provision satisfies the least restrictive means requirement under the rule against excessive restriction. Considering the fact that impairing the fairness of election may distort the true will of people and further threaten the system of representative democracy itself, the Instant Provision also strikes the balance between legal interests. Therefore, the Instant Provision does not infringe upon the right to pursue happiness, the general freedom of action and the freedom of election campaigns in violation of the rule against excessive restriction.

Dissenting Opinions of Two Justices

1. Whether the Instant Provision violates the rule of clarity under the principle of nulla poena sine lege

The expression “having connections with” seems abstract, so that it is hard to grasp its exact meaning or scope. Therefore, it is not suitable to be considered as an element of criminal punishment. Also, since it is hard to predict what kind of people can be considered as “having connection with” the constituents, the law enforcer may arbitrarily interpret and apply the statutory provision. Even based on the Supreme Court’s interpretation regarding “those who have connections with constituents” it is hard to predict its concrete meaning such as the scope of blood relationship, the kind of relationship or the possibility to indirectly influencing their decision making process. Therefore, supplementary interpretation by judges cannot clearly solve the vagueness problem. In this regard, the part of ‘having connections with’ violates the rule of clarity under the principle of nulla poena sine lege.

2. Whether the Instant Provision violates the rule against excessive restriction

The Instant Provision’s failure to demand a clear connection between a certain act of contribution and the relevant election as an element of crime and to provide time limits for the ban on political contribution, in spite of its extensive inclusion of ‘those who having connections with’ as those who cannot contribute, amount to depriving general citizens of the right to contribute even when their candidacy have yet to be decided or when no election is expected to be conducted. Further, it even makes people who contribute in a place where they have certain connection, such as their hometown, unable to run for an election held in the place. Therefore, the Instant Provision does not satisfy the least restrictive means requirement in limiting the right to pursue happiness and also

fails to strike the balance between legal interests. For the foregoing reasons, the Instant Provision violates the rule against excessive restriction.

5. Case on Mutates Mutandis Application of the Statutes and Regulations relating to the Civil Procedure in the Process of Dissolving a Political Party

[26-1(A) KCCR 310, 2014Hun-Ma7, February 27, 2014]

In this case, the Constitutional Court rejected the constitutional complaint on the ground that the former part of Article 40 Section 1 of the Constitutional Court Act that prescribes the mutates mutandis application of statutes and regulations regarding civil procedure to the adjudication on dissolution of a political party and Article 57 of the aforementioned Act that stipulates a preliminary injunction to suspend the political party's activities do not violate political party's right to trial and freedom of activity.

Background of the Case

The complaint is a political party registered with the National Election Commission, and the Korean government requested the Court to adjudicate on dissolution of the complainant, alleging that the complainant's objectives and activities are against the basic democratic order (2013Hun-Da1) and filed a motion for a preliminary injunction to suspend the political party's activities, asking for preventing the complainant from merging, dividing and dissolving and its members from conducting political activities (2013Hun-Sa907).

While the case was pending, the complainant filed this constitutional complaint on January 7, 2014, arguing that (1) as long as Article 40 Section 1 of the Constitutional Court Act is interpreted as that the rules of civil procedure are applied mutate mutandis to the admission of evidence and facts in the process of dissolution of a political party, the complaint's right to a fair trial is infringed; and (2) Article 57 of the Constitutional Court Act, as a ground for a preliminary injunction in the adjudication on dissolution of a political party, is unconstitutional due to

the lack of constitutional basis.

Provisions at Issue

The subject matter of this case is whether the former part of Article 40 Section 1 relating to 'the procedure for dissolution of a political party' (hereinafter the 'Applicable Provision') of the Constitutional Court Act (amended by Act No. 10546, April 5, 2011) and Article 57 of the aforementioned Act regarding a preliminary injunction for the adjudication of dissolution of a political party (hereinafter the 'Preliminary Injunction Provision') infringe on the complainant's fundamental rights. The provisions at issue in this case are as follows:

Constitutional Court Act (amended by Act No. 10546, April 5, 2011)

Article 40 (Applicable Provisions) (1) Except as otherwise provided in this Act, the Acts and subordinate statutes relating to the civil procedure shall apply mutatis mutandis to the procedure for adjudication of the Constitutional Court within the limit not contrary to the nature of constitutional adjudication.

Article 57 (Preliminary Injunction) The Constitutional Court may, upon receiving a request for adjudication on dissolution of a political party, make ex officio or upon a request of the requesting party a decision to suspend the activities of the respondent until the final decision is pronounced.

Summary of the Decision

1. Whether the Applicable Provision infringes upon the right to trial

The Applicable Provision is legislated to supplement insufficient procedural provisions and to promote smooth and efficient procedure of trial, and statues and regulations relating to civil procedure can extensively make up for some procedural deficiencies. Also, applying other procedural

laws is neither the best choice nor always favorable to the parties. Moreover, the Applicable Provision provides solutions to the problems possibly caused by uniform application of statues and regulations relating to the civil procedure as it delineates clear boundary of application by stipulating that statues and regulations relating to the civil procedure apply mutatis mutandis to the adjudication of the Constitutional Court 'within the limit not contrary to the nature of constitutional adjudication.' The meaning of 'not contrary to the nature of constitutional adjudication' here can be interpreted as not impairing the nature of constitutional adjudication through the application of other procedural laws, and this is a matter of legal interpretation by the Constitutional Court that renders an individual and case-specific decision based on comprehensive consideration of the legal nature of political party, the nature of adjudication on dissolution of a political party, the characteristics of application procedure and the subject matters to which the provisions are applied mutatis mutandis. Any provision that could result in admitting facts different from actual truth should not be applied mutatis mutandis to evidence investigation and fact finding as they are contrary to the nature of adjudication on dissolution of a political party. And regarding a legal vacuum, it is the Court's duty as well as right to create relevant proceedings consistent with the nature of adjudication on dissolution of a political party to fill up the blank. Therefore, the Applicable Provision cannot be considered infringing upon the complainant's right to trial, or namely, the right to a fair trial.

2. Whether the Preliminary Injunction Provision infringes upon political party's freedom of activity

Political party's freedom of activity is also subject to the statutory reservation stipulated in Article 37 Section 2 of the Constitution: the Preliminary Injunction Provision is a statutory provision that restricts political party's freedom of activity. Without a preliminary injunction, however, the final decision declared by the Court may lose its effect,

possibly causing irreversible damage to the parties concerned or the constitutional order. Also, in order to protect and maintain the constitutional order, political party's activities need to be suspended in a certain situation. Therefore, the legislative purpose of the Preliminary Injunction Provision is legitimate and the means to achieve the purpose is reasonable. Granting a preliminary injunction should satisfy the requirements for granting and the scope of granting should not go beyond the limit within which the effectiveness of Court's final decision is guaranteed and the constitutional order is protected. Also, strict scrutiny as to whether the requirements for dissolving a political party are fulfilled should be conducted. Further, the preliminary injunction is simply a tentative measure to temporarily suspend political party's activities, applicable until the final decision is announced by the Court. And it is hard to find any other measures that are the same as or similar to the preliminary injunction in their effect, but still less intrusive. Therefore, the Preliminary Injunction Provision satisfies the least restrictive means requirement. The public interests to guarantee effectiveness in the adjudication on dissolution of a political party and to maintain and protect the constitutional order achieved by the Preliminary Injunction Provision are not dwarfed by the private interests temporarily restricted by the announcement of Court's final decision on the dissolution of a political party. Therefore, the Preliminary Injunction Provision strikes the balance between legal interests. As reviewed so far, the Preliminary Injunction Provision does not infringe on political party's freedom of activity.

Summary of Concurring Opinion by One Justice

In light of the special characteristics of the adjudication on dissolution of a political party, the scope of application of the Applicable Provision should be limitedly interpreted and at least the provision regarding the presumption of authenticity of official document should not be applied mutatis mutandis to such a case. Instead, the scope of probative value of evidence should be limited by applying the provision of the Criminal

Procedure Act that limits the probative value of hearsay evidence. Further, the provisions of the Criminal Procedure Act, which exclude illegally obtained evidence and involuntary confession and stipulate that criminal facts shall be proved to the extent that there is no reasonable doubt, should be applied mutates mutandis, which seems to be a proper interpretation corresponding to the spirit of the Constitution. On the assumption of such limited interpretation, the Applicable Provision is not in violation of the Constitution.

6. Case on the Prohibition of Nighttime Demonstration

[26-1(A) KCCR 324, 2010Hun-Ka2, 2012Hun-Ka13 (consolidated), March 27, 2014]

In this case, the Constitutional Court held that Article 10 of the Assembly and Demonstration Act that stipulates that '[n]o one may stage any demonstration either before sunrise or after sunset' as well as its penal provision, Article 23 Item 3 of the Act are unconstitutional by infringing the freedom of demonstration under the principle against excessive restriction if these provisions are applicable to the 'demonstration from sunset to midnight (24 : 00) of the same day'.

Introduction of Case

(1) The petitioner at the requesting court of 2010Hun-Ka2 was charged with the violation of the Assembly and Demonstration Act by allegedly staging a demonstration from 19 : 15 to 21 : 50; and the petitioner at the requesting court of 2012Hun-Ka13 was charged with the violation of the Assembly and Demonstration Act by allegedly staging a demonstration from 18 : 00 to 21 : 00.

(2) During the criminal trials, the petitioners filed motions to request for the constitutional review on Article 10 and Article 23 Item 3 of the Assembly and Demonstration Act. The trial courts granted the motions and requested constitutional reviews on the aforementioned provisions.

Provision at Issue

The subject matter of review is the constitutionality of the part of 'demonstration' of the main text of Article 10 of the Assembly and Demonstration Act (revised by Act No. 8424 on May 11, 2007, hereinafter, "ADA") (hereinafter, the "instant provision") and the part of 'demonstration' of the part of the 'main sentence of Article 10' of Article 23 Item 3 of the ADA. The provisions at issue are as follows:

Assembly and Demonstration Act (revised by Act No. 8424 on May 11, 2007)

Article 10 (Hours Prohibited for Outdoor Assembly and Demonstration)

No one may hold any outdoor assembly or stage any demonstration either before sunrise or after sunset: Provided, That the head of the competent police authority may grant permission for an outdoor assembly to be held even before sunrise or even after sunset along with specified conditions for the maintenance of order if the organizer reports the holding of such assembly in advance with moderators assigned for such occasion as far as the nature of such event makes it inevitable to hold the event during such hours.

Article 23 (Penal Provisions)

Any person who violates the main sentence of Article 10 or Article 11, or who violates the ban as provided for in Article 12, shall be punished according to the following classification of offenders:

3. A person who participates in an assembly or demonstration with the knowledge of the fact shall be punished by a fine not exceeding 500,000 won, penal detention, or a minor fine.

Summary of Decision

1. Definition of 'Demonstration' under the ADA

The term "demonstration" under the ADA means an act of persons associated under common objectives (i) parading along public places available for the free movement of the general public, such as roads, plazas, parks, etc., with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them, or (ii) displaying their will or vigorous determination with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them. It is not required to demonstrate at public places where people can freely pass or move places, such as parading. The

proviso of Article 10 of the ADA that grants an exception for outdoor assemblies before sunrise or after sunset does not apply to demonstrations.

2. Whether the Unconditional Ban on the Nighttime Demonstration Infringes the Freedom of Demonstration

Demonstration would cause more conflicts with public safety and order when it is compared to individual expression of an opinion, in that it is associated with the collective actions of many persons; and affect significantly the public safety and order, legal peace and serenity of others, generally compared to assembly or outdoor assembly. Nighttime, which is a special time frame when the citizens strongly seek serenity, may affect participants of a demonstration more, in stimulating sensitivity of emotions, beclouding reasonable judgment, or losing self-control, compared to daytime. In nighttime demonstrations, it is more difficult to maintain the public order and to respond to unexpected violent situations than daytime demonstrations. The prohibition on nighttime demonstrations under the instant provision is an appropriate means to achieve a legitimate purpose in that it intends to protect the safety and order of our society and maintain peace of the residence and private life of the citizens, considering the nature and unique character of nighttime demonstrations. Nonetheless, the instant provision would prevent daytime workers or students from staging or participating in a demonstration in case of weekdays in winter season, when daytime is short: It implies that the freedom of demonstration is substantially infringed or degenerated. In the modern urbanized and industrialized society, the broad and variable traditional meaning of nighttime, which is ‘before sunrise or after sunset’, does not present the aforementioned nature or distinctiveness of ‘night time’ in a clear sense. The aforementioned nature of distinctiveness of ‘nighttime’ would correspond to the unique danger of ‘late night’. Considering that the instant provision prohibits a demonstration ‘either before sunrise or after sunset’, which is a broad and variable time frame, it violates the principle of least restriction beyond the reasonable necessity

to achieve the legislative purpose; and it also violates the principle of balance of legal interests by excessively restricting the freedom of demonstration for the public interests protected by the instant provision. Therefore, the instant provision infringes the freedom of demonstration by violating the principle against excessive restriction.

3. Necessity to Limit the Unconstitutional Part

The instant provision includes the constitutional part as well as the unconstitutional part. It should be vested in the Legislature to determine the appropriate means to achieve the legislative purpose while restricting the freedom of demonstration in the least manner, among variable alternatives. Accordingly, we have rendered the incompatibility decision to apply tentatively the ADA provision that prohibited a nighttime outdoor assembly in 2008Hun-Ka25 Decision. Nonetheless, the failure of legislative revision led to the nullification of the entire provision prohibiting a nighttime outdoor assembly, resulting in nighttime outdoor assembly being regulated the same as daytime outdoor assembly. Meaningful numbers of increase in illegal or violent assemblies have not been reported, but we are not convinced that nighttime demonstrations do not require any stricter regulation. With the comprehensive considerations of the legal vacuum and practical issues after the aforementioned incompatibility decision (2008Hun-Ka25), we do not agree to the necessity to permit to apply tentatively the provision incompatible with the Constitution. On the other hand, if the instant provision is decided incompatible with the Constitution and suspended completely, practical problems would arise in that nighttime outdoor assemblies and demonstrations would be regulated as daytime outdoor assemblies and demonstrations, implying the difficulty to correspond to the dangerousness of the public order or legal peace in case of nighttime outdoor assemblies or demonstrations, despite of the needs of stricter regulations. Therefore, we declare the instant provision unconstitutional as long as it completely prohibits nighttime demonstrations, under the ADA's current

regulation frame that employs time frame as a standard to distinguish between the constitutional part and unconstitutional part of the instant provision. The instant provision and its penal provision, Article 23 Item 3 of the ADA, are unconstitutional when it is applied to a demonstration 'from sunset to 24 : 00 of the same day', which belongs to the daily living time frame.

Summary of Dissenting Opinion by Three Justices

1. Whether the Unconstitutional Ban on Nighttime Demonstrations Infringes the Freedom of Demonstration

We agree to the majority opinion in a sense that the provisions at issue that completely prohibit nighttime demonstrations are unconstitutional by excessively infringing the freedom of demonstration.

2. Opinion of Unconstitutional Decision

Even if a part of provision were unconstitutional, it would be the principle to decide unconstitutional the whole provision if the unconstitutional part is not clearly distinguished. The provisions at issue that prohibit nighttime demonstrations include unconstitutional parts as well as constitutional parts. Nonetheless, it would not always be ideal for the Constitutional Court to specify the unconstitutional part of nighttime demonstrations. It would be more desirable for the Legislature to determine the specific ways and means to coordinate public safety and order and serenity of privacy. If the Constitutional Court applies a certain time frame to determine the limits of unconstitutional parts and constitutional parts of the provisions at issue, it might violate the principle of separation of powers and the nature of constitutional review on statutes by restricting the legislative powers and responsibilities of the Legislature. Accordingly, the principle to declare unconstitutional the entire provision at issue should be observed in that the unconstitutional

parts of the provision at issue are not clearly distinguished and specified according to a certain time frame.

7. Case on the Provision Forbidding Public Officials from Joining a Political Party and Regulating Political Activities

[26-1(A) KCCR 375, 2011Hun-Ba42, March 27, 2014]

In this case, the Constitutional Court held the part of 'a public official under Article 2 of the State Public Official Act who becomes a member of a political party in violation of the main sentence of Item 1 of Proviso of Section 1 of Article 22' of Article 53 of the former Political Parties Act and the part of 'a person in violation of the part of joining a political party of Article 65 Section 1' of Article 84 of the former State Public Official Act do not violate the principle against excessive restriction and principle of equality; and the part of 'a person in violation of the scope of a political activity prohibited by the Presidential Decree' of Article 84 of the former State Public Official Act does not violate the principle of void for vagueness under the principle of nulla poena sine lege and principle of ban on comprehensive authorization.

Introduction of Case

(1) Petitioners work for elementary schools or secondary schools as teachers after the appointment as a national or public school teacher, belonging to a state public official.

(2) Petitioners, who allegedly joined and contributed to the Democratic Labor Party, were charged with the violation of the Political Parties Act and the State Public Official Act, prohibiting a state public official from joining a political party as well as the violation of the State Public Official Act, regulating the scope of a political activity of a state public official on May 6, 2010.

(3) Petitioners filed a motion to request a constitutional review of the aforementioned provisions, which was eventually denied, while the criminal procedure is pending. Subsequently, the petitioners filed this constitutional complaint on February 24, 2011.

Provision at Issue

The subject matter of review is the constitutionality of the part of ‘a public official under Article 2 of the State Public Official Act who becomes a member of a political party in violation of the main sentence of Item 1 of Proviso of Section 1 of Article 22’ of Article 53 of the former Political Parties Act; the part of ‘a person in violation of the part of joining a political party of Article 65 Section 1’ of Article 84 of the former State Public Official Act (hereinafter, theses provisions are referred to as ‘the provision to forbid from joining a political party’; and the part of ‘a person in violation of the scope of a political activity prohibited by the Presidential Decree’ of Article 84 of the former State Public Official Act (hereinafter, this provision is referred to as ‘the provision regulating a political activity’).

Summary of Decision

A. Constitutionality of the provision to forbid from joining a political party

(1) Principle against excessive restriction

The provision to forbid joining a political party has a legitimate legislative purpose in that it protects the political neutrality for public officials to perform official duties with sincerity and promotes the neutrality of education for elementary or secondary school teachers to prevent any effect of partisan interests. Because a political party, affecting the formation of political opinion of the people, is especially protected by the Constitution, the ban on public officials’ joining a political party is an appropriate means to achieve the aforementioned legislative purpose.

The provision to forbid joining a political party simply prohibits public officials from ‘being a member of a political party’, whereas it permits public officials’ political activities in a limited scope, including the

expression of supports for a political party, regardless of election, in personal situations and voting at elections: Therefore, it does not violate the principle of the least restriction. The public interests to promote the political neutrality and right to education for elementary and secondary school students exceed the restricted private interests of public officials, complying with the principle of balance of interests.

(2) Principle of equality

The provision to forbid joining a political party bans elementary and secondary school teachers from being a member of a political party, whereas it allows university faculty to join a political party. Nonetheless, it is a reasonable discrimination under the comprehensive considerations of nature and contents of their works in knowledge transmission, research, etc., and working environments. Therefore, it does not violate the principle of equality.

B. Constitutionality of the provision regulating a political activity

(1) The comprehensive understandings on the penal provision of the provision regulating a political activity, Article 65 Section 4 of the former State Public Official Act, as well as related provisions suggest that the substance of the crime stipulated by the provision regulating a political activity is ‘an active and positive action of a public official related to a formation of a political party and election campaign’. Accordingly, the principle of void for vagueness under the principle of nulla poena sine lege is not infringed.

(2) The necessity to specify the prohibited political activities of public officials who are affiliated with the National Assembly, Court, Constitutional Court, National Election Commission, Administration and others is confirmed; and the necessity of delegation is also agreeable in that it is impossible to specify such prohibited political activities in statutes from the perspective of the legislative enactment. Because it is

foreseeable to restrict a political action which may substantially injure the political neutrality of public officials, the provision regulating a political activity does not violate the principle against the comprehensive authorization.

Summary of Dissenting Opinion on the Provision to Forbid Joining a Political Party by Four Justices

1. Principle against excessive restriction

The provision to forbid joining a political party, prohibiting public officials from being a member of a political party in principle and ex ante, does not prove the correlation between the legislative purpose and the legislative means, as well as the appropriateness in restricting the right to join a political party of a public official. Considering the State Public Official Act sufficiently provides the means to promote the political neutrality and work discipline, the unconditional ban on joining a political party would infringe the principle of the least restriction. In addition, the principle of balance of interests is infringed in a sense that the public interests achieved by the provision to forbid joining a political party is substantially unforeseeable and abstract, while the right to join a political party is significantly restricted.

2. Principle of equality

The aforementioned provision unconditionally forbids elementary and secondary school teachers from joining a political party because of the possible effects of partisan education, while university faculty is allowed to be a member of a political party. Nonetheless, university education has broader discretion in teaching, more susceptible to being affected by a view of a certain political party. Furthermore, it is not logical to presume an elementary or secondary school teacher will provide partisan education just because he/she is a member of a political party. It is

unreasonable discrimination, exceeding the scope of discretion, thus violating the principle of equality.

Summary of Concurring Opinion

Considering the social conflicts arising out of regionalism, patronage system and top down communication of the public official society as well as election of authority in our election practices, the general permission for a public official to be a member of a political party would not correspond to the Constitutional request that ‘a public official is a servant for the entire people’, by substantially infringing the political neutrality of public officials. Therefore, the provision to forbid joining a political party is not against the Constitution.

8. Case on the Protection Application of North Korean Refugee Involved in Drug Trafficking

[26-1(A) KCCR 468, 2012Hun-Ba192, March 27, 2014]

In this case, the Constitutional Court held constitutional the part of 'drug trafficking' of Article 9 Section 1 Item 1 of the North Korean Refugees Protection and Settlement Support Act that states that a North Korean refugee who has been involved in drug trafficking may not be designated for protection.

Introduction of Case

The petitioner entered South Korea, having resided in and escaping from North Korea. It was found that while residing in North Korea, the petitioner had traded methamphetamine (so-called "Bing-Doo"), a drug produced in North Korea, in China. Accordingly, the Minister of Unification did not accept the petitioner's application for protection due to his drug trafficking history under Article 9 Section 1 Item 1 of the North Korean Refugees Protection and Settlement Support Act (hereinafter, the "Act").

When his claim to annul the above disposition was rejected, the petitioner filed a motion to request a constitutional review of Article 9 Section 1 Item 1 of the Act, which was eventually denied, while the appeal was pending. Subsequently, the petitioner filed this constitutional complaint.

Provision at Issue

The subject matter of review is the constitutionality of the part of 'drug trafficking' of Article 9 Section 1 Item 1 of the North Korean Refugees Protection and Settlement Support Act (revised by Act No. 10188 on March 26, 2010). The provision at issue is as follows:

8. Case on the Protection Application of North Korean Refugee Involved in Drug Trafficking of Multiple Pricing

North Korean Refugees Protection and Settlement Support Act (revised by Act No. 10188 on March 26, 2010)

Article 9 (Criteria for Protection Decision)

(1) In determining whether to provide protection pursuant to the main sentence of Article 8 Section 1, any of the following persons may not be designated as persons eligible for protection:

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.

Summary of Decision

A. Principle of Clarity

The provision at issue intends to correspond with the international response and cooperation on drug trafficking, as well as to achieve national security and public interests. Because its legislative purpose is differentiated from one of the Act on the Control of Narcotics, etc. that aims to regulate the treatment on narcotics, based on criminal punishment, the classification of narcotics and psychotropic drugs under the Act on the Control of Narcotics, etc. does not imply that the 'drug' of the provision at issue means narcotics of the Act on the Control of Narcotics, etc. Psychotropic drugs under the Act on the Control of Narcotics, etc., which affect the central nervous system and cause or may cause physical or psychological dependency in case they are abused, are severely regulated with regard to their treatment and control. The illegal trade of psychotropic drugs would cause substantial harms to our society. In addition, drugs are defined as 'substances for anesthesia that cause addiction upon constant use for their habit-forming nature'. Due to their nature of physical and psychological dependency (toxicity or addictiveness), drugs include, literally, psychotropic drugs of the Act on the Control of Narcotics, etc. Also, the texts of the provision at issue do not exclude the possibilities that the drug trafficking was not commercial or habitual. Considering the text and legislative purpose of the provision

at issue, it may reasonably be assumed that drug trafficking of the provision at issue includes the trafficking of psychotropic drugs, regardless of whether its purpose was commercial or habitual. Therefore, the provision at issue does not violate the principle of clarity.

B. Right to Human Livelihood

A North Korean refugee who is not eligible for protection due to his/her drug trafficking history can still be entitled to several benefits, including protection at settlement support facilities, protection of place of residence, accreditation of academic background and qualifications, and special benefit for national pension (Article 9 Section 3 of the Act); and conditional benefits, including support for minimum living standards under the National Basic Living Security Act, medical care assistance under the Medical Care Assistance Act, and accommodation at national rental housing under the Housing Supply Rule. These benefits imply a North Korean refugee who is not subject to the protection is, even, entitled to some benefits to secure his/her right to human livelihood at the minimum level. Therefore, the provision at issue does not infringe the right to human livelihood of a North Korean refugee who had been involved in drug trafficking.

9. Case on the Mandatory Receipt of Credit Cards and the Prohibition of Multiple Pricing

[26-1(A) KCCR 514, 2011Hun-Ma744, March 27, 2014]

In this case, the Constitutional Court held that Article 19 Section 1 of the Specialized Credit Finance Business Act that prohibits the rejection of payment by credit cards or unfavorable treatment against credit card holders because of transaction by credit cards did not violate the freedom of occupation.

Introduction of Case

(1) The complainant is an owner of grocery store called '○○ Discount Store', located at ○○ Daero ○○○, ○○ Gu, Incheon, and has operated the store with a credit card reader since October 31, 2011. The complainant has been prohibited from refusing credit card payment or discriminating credit card members by Article 19 Section 1 of the Specialized Credit Finance Business Act, despite his/her wish to be paid by cash or to offer some benefits to people who pay by cash within the fees of credit card merchants.

(2) The complainant filed this constitutional complaint, alleging that Article 19 Section 1 of the Specialized Credit Finance Business Act infringed the freedom of occupation or freedom of business on November 23, 2011.

Provision at Issue

The subject matter of review is whether Article 19 Section 1 of the Specialized Credit Finance Business Act (revised by Act No. 10062 on March 1, 2010) (hereinafter, the "instant provision") violates the fundamental rights of the complainant. The provision at issue is as follows:

Specialized Credit Finance Business Act (revised by Act No. 10062 on March 1, 2010)

Article 19 (Matters to be Observed by Credit Card Merchants)

(1) The credit card merchants shall not refuse payment by credit card or treat card holders unfavorably, because of transaction by credit card.

Summary of Decision

The instant provision has a legitimate legislative purpose that contributes to the economy by providing the convenient financial environment and preventing tax evasion through transparent transactions. It also employees the appropriate means to achieve the above purpose by mandating the acceptance of payment by credit cards and non-discrimination against credit card payments.

It may be argued that the refusal of small credit card payment, such as less than 10,000 won, should be permitted. However, such alternative would cause the inconvenience and confusion of credit card holders in that it does not consider the transaction practice where credit card payments are general. The mandatory issuance of cash receipt may resolve the issue of transparency of transaction. Nonetheless, the instant provision intends to promote the transparency of transaction as well as to provide the convenient financial environment and the development of economy. Considering the reduction policy of credit card merchants' fees, introduction of complementary fees for small credit card merchants in March 2012, and tax deduction of credit card sales for qualified small businesses, the instant provision does not violate the principle of the least restrictive means.

In the year of 2013, the sales scale by credit card payments is more than 60% among the entire private consumption market; and the average number of daily credit card payment is more than 20,000,000. Considering the transaction practice that sales omission is generally attempted by cash payment through the arbitral price discrimination, whereas a credit card payment is a common payment method, the public

interests intended by the instant provision are substantial. Nevertheless, the private interests restricted by the instant provision, which prohibits credit card merchants from choosing the payment method freely and discriminating customers according to the payment method, is considerably insignificant, compared to the public interests that are intended by the instant provision. Thus, the instant provision satisfies the principle of balance of interests.

Therefore, the instant provision does not violate the complainant's freedom of occupation under the principle against excessive restriction.

10. Case on the Permission of Photographing a Suspect under Investigation

[26-1(A) KCCR 534, 2012Hun-Ma652, March 27, 2014]

In this case, the Constitutional Court held that it is infringing the right to personality for the respondent to permit taking pictures of the complainant who was handcuffed at the police station during the police investigation, corresponding to the request for coverage by the press; and that the part of the publication of press release regarding the complainant is not justiciable for the lack of the requirement of exhaustion of prior remedies.

Introduction of Case

(1) The respondent, who was the judicial police officer, investigated the complainant who was arrested with fraud charge at the investigation room of Gang-dong police station, Seoul, and distributed the press release with regard to the complainant at the press room of the police station on April 24, 2012.

(2) After the distribution of the press release, the respondent allowed the press to take pictures of the handcuffed complainant during the investigation at the investigation room, corresponding to the request of coverage. The press released the news and articles with regard to the complainant on April 25, 2012. In the news and articles, the complainant was referred to 'Mr. Chung (Age 36)' and the blurred scene of the investigation of the handcuffed complainant, revealing his face, was reported.

(3) The complainant filed this constitutional complaint, alleging that the respondent's aforementioned action infringed the right to personality of the complainant.

Subject Matter of Review

The subject matter of review is whether the respondent's distribution of the press release with regard to the complainant on April 24, 2012 (hereinafter, the 'instant distribution') and the permission to take pictures of the complainant under investigation (hereinafter, the 'instant permission') infringe the basic rights of the complainant. The substances of relevant provisions are as follows:

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

Article 126 (Publication of Facts of Suspected Crime)

A person who, in the performance or supervision of, or in the assistance in, functions involving prosecution, police, or other activities concerning investigation of crimes, makes public, before request for public trial, the facts of a suspected crime which have come to his knowledge during the performance of his duties, shall be punished by imprisonment for not more than three years, or suspension of qualifications for not more than five years.

The former Regulation on the Performance of Duties by Police Officers to Protect the Human Rights (enacted by National Police Agency Directive No. 461 on October 4, 2005 and before repealed by National Police Agency Directive No. 674 on July 23, 2012)

Article 85 (Prohibition of Infringement of the Portrait Right)

A police officer shall not permit taking any picture which may identify a related person, including a suspect and victim or which may reveal the identity of the aforementioned person at the police station.

Summary of Decision

A. Issue of Justiciability

(1) The Requirement of Exhaustion of Prior Remedies

It should be examined whether the instant distribution, publishing facts of suspected crime before trial, constitutes the crime by violating the publication of facts of suspected crimes under Article 126 of the Criminal Act. If the respondent's action constitutes the crime of publication of criminal facts, the complainant can accuse the investigation agency to punish the officer in charge, or apply for a ruling through the appeal proceeding according to the Prosecutors' Office Act, depending on the result. Therefore, the part of the instant distribution does not satisfy the requirement of exhaustion of prior remedies in that the complainant did not exhaust the aforementioned remedies, thereby being dismissed.

(2) The Requirement of Justiciable Interests

The justiciable interests of the instant permission become extinct in that the upholding of the constitutional complaint would not provide remedies for the complainant since the instant permission was already terminated. Nevertheless, the necessity to adjudicate would be admitted if there is a specific danger that revealing the face of the suspect under investigation may be repeated against the his/her will and the conflict between the protection of the right to personality of a suspect and the promotion of right to be informed of the people demand the constitutional clarification to protect and promote the constitutional order.

B. Constitutionality of Permission to Take Pictures

Every individual deserves the right to refuse to be photographed which may reveal the physical characteristics, such as face, against his/her will. Therefore, the instant permission restricts the right to personality,

including the right to portrait, under Article 10 of the Constitution.

In principle, the public nature to be informed of the information on 'suspect' is not as strong as one of the information on 'suspected crime', except the limited case of public search for a suspect. The respondent permitted the press to take pictures of the handcuffed complainant who was investigated at the police station, while his face was identifiable, despite the exception of publicity was not applicable to the complainant. Therefore, the purpose of the instant permission was not legitimate in that the publication and photographing of the complainant during the investigation would not achieve any public interest.

The principle of the least restriction is also violated because the respondent, as the investigation agency, did not take actions to minimize the possibility of revealing the identity of the complainant, such as concealing the face with a hat or mask, considering the seriousness of the damage arising from the publication of suspect's face. Whereas the instant permission does not achieve any public interest, except realistic broadcasting, the complainant's right to personality, including the right to portrait, is substantially infringed by publishing his face as a suspect who is highly criticized in terms of social ethics and by broadcasting his portrait, which would lead to significant labeling effects as a criminal. Therefore, it lost the balance of interests. Accordingly, the instant permission infringes the right to personality of the complainant, violating the principle against excessive restriction.

Summary of Dissenting Opinion by Two Justices

A. The Requirement of Exhaustion of Prior Remedies

The instant distribution and the instant permission that are closely related in terms of place and time under the identical purpose should be regarded as one governmental action, which was done by the respondent to inform the press of a suspected crime of the complainant, from comprehensive view. If the respondent's entire act, including both the

instant distribution and the instant permission, constitutes the crime of publication of criminal facts under Article 126 of the Criminal Act, this constitutional complaint is not justiciable for the lack of the requirement of exhaustion of prior remedies.

B. The Requirement of Justiciable Interests

Even if it is presumed that the instant distribution and instant permission can be viewed separately as the majority opinion, it is obvious that photographing without the complainant's consent is illegal under the related provisions. Because the respondent also recognized that the permission of taking pictures of a handcuffed suspect under the investigation while his face was identifiable without the consent of the suspect, is illegal, the infringement would not be repeated. In addition, the instant permission is an exceptional case for illegal application and enforcement of laws, implying that the constitutional clarification is not required to protect and promote the constitutional order for its general and significant meanings, regardless of the instant case. Therefore, the part of the instant permission is not justiciable for the lack of justiciable interests as well as the necessity to adjudicate.

11. Unlawful Distribution or Posting of Documents and Printed Materials Case

[26-1(A) KCCR 628, 2011Hun-Ba17, 2012Hun-Ba391 (consolidated), April 24, 2014]

In this case, the Court upheld the constitutionality of Article 255 (2) 5 of the Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010) concerning "a person who distributes or posts any document or other printed materials in contravention of Article 93 (1)," which bans and penalizes anyone who distributes or posts documents and other printed materials containing the contents supporting, recommending, or opposing a political party or showing the name of the political party or candidate with the intention of influencing the election, not in accordance with the provisions of this Act, from 180 days before the election day to the election day.

Background of the Case

A. 2011Hun-Ba17

The complainant was prosecuted on charges of violating Article 255 (2) 5 and Article 93 (1) of the Public Official Election Act by posting documents that oppose the Democratic Party on seven occasions starting from 17: 35 on July 26, 2010 to October 19, 2010 with the intention of influencing the parliamentary by-election in Gwangju ○○○-Gu on July 28, 2010 and re-election for the Mayor of Gwangju ○○○-Gu Office on October 27, 2010 (2010Gohap518, Gwangju District Court).

With the above case pending, the complainant filed a motion requesting constitutional review of the aforementioned provision of the Public Official Election Act (2010Choki1323, Gwangju District Court), but had the motion denied and was sentenced to a fine of 1 million won

on December 22, 2010. Thus, the complainant filed the constitutional complaint in this case on January 19, 2011.

B. 2012Hun-Ba391

Complainant Kwon ○-Hun is the Head of ○○○ Team in the New Progressive Party, and complainant Park ○-Gyun is a member of the same Party. The two complainants were indicted on charges of violating Article 2 (5) and Article 93 (1) of the Public Official Election Act— complainant Kwon was charged with making 30,000 copies of printed materials requesting support for the New Progressive Party and having them shipped to every city and provincial chapters of the Party on March 9, 2010 with the purpose of influencing the 19th National Assembly election held on April 11, 2012, while complainant Park was charged with distributing, with two unknown persons, 4,598 copies of the said printed materials in areas including ○○-Dong, ○○-Gu, Incheon starting from March 9 to 12, 2012 (2012Gohap963, Incheon District Court).

The complainants, with the above case pending, filed a motion challenging the constitutionality of Article 93 (1) of the Public Official Election Act (2012Choki2439, Incheon District Court) but had it denied on October 19, 2012, with complainants Kwon and Park being sentenced to a fine of 800,000 Korean won and 500,000 Korean won, respectively. On November 6, 2012, they filed the constitutional complaint in this case.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of Article 255 (2) 5 of the Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010) concerning "a person who distributes or posts any document or other printed materials in contravention of Article 93 (1)." The provision at issue and relevant provision are as follows:

Provision at Issue

Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010)

Article 255 (Unlawful Election Campaign)

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

5. A person who distributes, pastes, scatters, posts, plays, any writing, book, picture or causes another person to do so, in contravention of Article 93 (1), who makes or has another person make an advertisement or appearance, in contravention of paragraph (2) of the same Article, or who issues, distributes or demands any identification card, document or other printed materials, or makes another person do so, in contravention of paragraph (3)

Relevant Provision

Article 93 (Prohibition of Unlawful Distribution or Posting, etc. of Documents and Pictures)

(1) No one shall distribute, post, scatter, play, or run an advertisement, letter of greeting, poster, photograph, document, drawing, printed matter, recording tape, video tape, or the like which contains the contents supporting, recommending or opposing a political party (including the preparatory committee for formation of a political party, and the platform and policy of a political party; hereafter the same shall apply in this Article) or candidate (including a person who intends to be a candidate; hereafter the same shall apply in this Article) or showing the name of the political party or candidate with the intention of influencing the election, not in accordance with the provisions of this Act, from 180 days before the election day (the time when the reason for holding the election becomes final, in case of a special election) to the election day : Provided, That the same shall not apply to acts falling under any of

the following subparagraphs:

1. Cases where any candidate or any person falling under any of the subparagraphs of Article 60-3 (2) (including the chief of an election campaign liaison office, in cases falling under subparagraph 2, and, in such cases, "preliminary candidates" shall be deemed "candidates") personally hands out the name cards of a candidate under Article 60-3 (1) 2 during the election campaign period; and

2. Ordinary political party activities under Article 37 (2) of the Political Parties Act during a period, other than the election period.

Summary of Decision

1. Freedom of Election Campaigning and Fair Election

"Fair election" requires the protection of the citizens' freedom of election and equal opportunity for election campaigning, etc., so without fair election, there is no guarantee of freedom of election or equal opportunity for election campaigning, etc. in the true sense of the word. Therefore, under the representative democratic system, freedom of political expression such as election campaigning is protected on condition of fair election, and therefore the fairness of election functions as a conditional requirement for the enforcement of political speech.

2. Conformity with Void for Vagueness Doctrine

The phrase "with the intention of influencing the election" in the provision at issue indicates an intention to take action that practically has the same effect as election campaigning on the preparation process, campaigning, results, etc. of elections from "180 days before the election day" to the "election day," the time frame when the candidate or the political party is expected to formulate plans and start preparing to win election. Also, whether such intention exists can be reasonably decided in consideration of numerous circumstances including the relationship

between the perpetrator and the candidate and political party, the substance and type of action, the background and result of action, and the circumstance in which the action took place. Therefore, the provision at issue is not void for vagueness.

3. Protection of Freedom of Election Campaigning and Political Expression

The provision at issue prohibits unrestricted production and distribution of documents or other printed materials with the purpose of preventing unfair competition in election campaigning and imbalance between candidates in terms of their financial means, and to guarantee free and fair election. Therefore, it serves a legitimate purpose and appropriate means.

In addition, the provision at issue neither violates the least restrictive means test nor fails to balance the legal interests given the following: the provision, in consideration of the Korean election culture, only regulates the "actions of expression that have the same effect as election campaigning" aimed at influencing the election from 180 days prior to the election to the election day, the period during which the planning and preparation of election campaigning actually begins; delivery and receipt of information using documents or other printed materials are done in a unilateral and passive manner, in which case the communicated information and opinions cannot be instantly corrected and their impact on the peace and fairness of election differs from that of online information exchanges; and as documents and printed materials can easily be manufactured and distributed by voters, the resulting consequences cannot be effectively prevented or regulated solely by regulating the candidate's election expenses.

Therefore, the provision at issue does not violate the freedom of election campaigning or freedom of political expression.

Dissenting Opinion of 3 Justices

1. Freedom of Election Campaigning and Fair Election

The majority opinion states that freedom of political expression such as election campaigning is conditioned on the fairness of election, and that fair election functions as a conditional requirement for freedom of political speech. Yet, the statement that freedom of political speech, one of the fundamental rights, is allowed only on condition of fair election, is equivalent to placing a fair election limit on liberty rights, and this may invoke misconception of the relationship between freedom of expression and fair election.

Regulation to ensure fair election and maintain order should not be a uniform, comprehensive ban on political expression of the general public. It is all the more so since freedom and fairness in election are not always contradictory but at times mutually complementary. Fair election serves as a means to realize an election that accurately reflects the political intention of the public; it cannot be a constitutional objective in itself. Furthermore, granting general voters the right to political expression using printed materials does not necessarily harm fairness of election. It is the expressions such as dissemination of false information or slander that contain the risk of undermining fairness of elections, and so other legislative measures that regulate such expressions can protect fair election.

2. Protection of Freedom of Election Campaigning or Political Expression

The restriction of voters' political expression using documents and other printed materials starting from "180 days before the election day" as set forth in the provision at issue is imposed for an excessively long period of time. Unlike candidates, voters are not given the freedom of expression using documents by law; in fact, they are completely

prohibited from exercising such right. The disparity in financial means between candidates is a matter that should be addressed by the provisions concerning election campaigning management organizations or election expenses, and the damage to fair election caused by malicious propaganda can be prevented by punishing dissemination of false information and slander. Additionally, the person who receives documents can accept written information only when he or she actively reads them, and it is also possible to engage in rebuttal, discussion, and correction of information through documents. The voters' freedom of political expression should be encouraged in order to implement substantial democracy, but the provision at issue imposes general and complete restriction on such freedom for a prolonged period. Therefore, the provision at issue violates the rule against excessive restriction and infringes on the voters' freedom of political expression.

12. Discrimination of Second-Generation Patients of Defoliant Exposure Case

[26-1(B) KCCR 16, 2011Hun-Ba228, April 24, 2014]

In this case, the Court, by a four to five vote, upheld the portion of Article 2 (4) of the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants concerning Article 5 (3) 1 of the Act, stating that, among second-generation patients of defoliant exposure afflicted with spina bifida, providing assistance only to those who are children of patients suffering from actual, not potential aftereffects of defoliant exposure does not contradict the principle of equality and is thus not in violation of the Constitution. The opinion of five Justices who consider the provision at issue to be incompatible with the Constitution contends that it discriminates the second-generation patients of defoliant exposure depending on whether their parents are suffering from actual aftereffects of defoliant exposure and therefore violates the principle of equality.

Background of the Case

1. Sohn ○-Oh, the father of the complainant, fought in the Vietnam War where he was infected with seborrheic dermatitis and was thus registered as a patient suffering from potential aftereffects of defoliant exposure. The complainant, who is inflicted with spina bifida, submitted an application to register himself as a second-generation patient suffering from actual aftereffects of defoliant exposure (a child of a person who has been determined to be or registered as a patient suffering from actual aftereffects of defoliant exposure) to the head of the Incheon Patriots and Veterans District Office. On August 7, 2009, however, the complainant's request for registration was denied, on grounds that "only the children of patients suffering from actual aftereffects of defoliant exposure are entitled to be second-generation patients of defoliant

exposure, so the complainant as the son of Sohn ○-Oh, who is a patient suffering from potential, not actual aftereffects of defoliant exposure, does not qualify as second-generation patients of defoliant exposure."

2. In response, the complainant filed a complaint requesting revocation of the action denying his application for registration as a second-generation defoliant patient with the Incheon District Court (2009 KuDan 2228) and, with this case pending, filed for constitutional review of Article 2 (4) and Article 5 (3) of the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants with the Constitutional Court. As the said request for registration was denied on August 23, 2011 (2010Ah42), the complainant filed the constitutional complaint in this case on September 16, 2011.

Subject Matter of Review

The subject matter of review in this case is whether the portion of Article 2 (4) of the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants (hereinafter the "Defoliants Act" amended by Act No. 8793, Dec. 21, 2007) concerning Article 5 (3) 1 (hereinafter the "provision at issue") conforms to the Constitution. The provision at issue is as follows:

Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants (amended by Act No. 8793, Dec. 21, 2007)

Article 2 (Definitions)

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

4. The term "second-generation patient suffering from actual aftereffects of defoliants" means a child of a person who has been determined to be, and registered as, a patient suffering from actual aftereffects of defoliants pursuant to Articles 4 and 7, or a child of a person who is deceased that was recognized to be a patient suffering from actual aftereffects of defoliants pursuant to Article 8 (referring to a child who was conceived

and born on or after the date on which his/her parent served in the Vietnam War, served in an area adjoining the Southern Limit Line, or took part in spraying defoliants, during a period between October 9, 1967 and July 31, 1970) who suffers from a disease under any subparagraph of Article 5 (3).

Opinion of 4 Justices (upholding constitutionality)

1. Conformity with Equality Principle

There was initially no assistance for the second-generation patients of defoliant exposure when the Defoliants Act was enacted, but the Act was improved to allow support for those afflicted with spina bifida among children of patients suffering from actual aftereffects of defoliant exposure and then to expand support also to include the children suffering from peripheral neuropathy and spondylopathy associated with paraplegia. Given this legislative history, whether to provide support for those experiencing potential aftereffects of defoliant exposure or the scope of assistance to second-generation patients of defoliant exposure are matters to be considered as part of the step-by-step process of institutional improvement. In this case, it is justifiable to confine the scope of beneficiaries given the financial capability of the state responsible for a wide range of support for the beneficiaries.

In this context, the Defoliants Act, which provides support for second-generation veterans by initially starting with the children of patients suffering from actual aftereffects of defoliant exposure whose correlation between the aftereffects and defoliant exposure has been determined, does not greatly fall short of rationality. In other words, there is good reason in the legislator's judgment that there still is greater need to provide support to the patients suffering from actual aftereffects of defoliant exposure and their children than to those suffering from potential aftereffects with no established correlation with defoliant

exposure and their children. Therefore, the provision at issue is not in violation of the principle of equality before the law.

2. Protection of the Right to Decent Life

The complainant is entitled to a range of social security benefits under other laws such as the National Basic Living Security Act, the Act on Welfare of Persons with Disabilities, and the Medical Care Assistance Act initiated by the state. For this reason, even if the second-generation defoliant patients like the complainant are not granted support under the Defoliants Act, this fact alone is not sufficient to conclude that the state did not provide the least and objective level of protection in taking measures to guarantee decent life for citizens who lack the ability to maintain their livelihood due to physical disabilities, etc. or that the state evidently exceeded its discretion vested by the Constitution. Therefore, it is hardly the case that the provision at issue has infringed on the complainant's right to decent life.

3. Protection of the Right to Pursue Happiness

The right to pursue happiness provided in Article 10 of the Constitution does not indicate the right of citizens to actively demand benefits required to pursue happiness from the state, but the right to liberty in the broad sense that citizens are entitled to act freely without being intervened by state powers in pursuing their happiness. However, the right of second-generation patients suffering from actual aftereffects of defoliant exposure to demand support from the state does not fall under the scope of the right to pursue happiness as one of the broad sense of liberty rights. Thus, it cannot be decided that the provision at issue infringes on the complainant's right to pursue happiness.

Opinion of 5 Justices (constitutionally incompatible)

If a person who fought in the Vietnam War, although not having performed distinguished services by directly engaging in combat or other means, was exposed to defoliant chemicals in service and if it is confirmed that his or her children consequently developed certain illness, it is imperative that support is provided for the sacrifice made. Yet, epidemiological research conducted in the United States and Korea show that, biologically, the first generation should not necessarily suffer from actual aftereffects of defoliant exposure for their second generation to develop spina bifida associated with defoliant exposure but that the defoliant exposure of the first generation in itself is sufficient to result in such a disorder. This considered, there is essentially no difference among second-generation defoliant patients inflicted with spina bifida in that, regardless of whether or not their parents suffer from actual aftereffects of defoliant exposure, their parents were exposed to defoliants and that they developed illness whose correlation with defoliant exposure is established by epidemiological research results.

In terms of comparative law, in the U.S. or Australia, if the biological first generation has been exposed to defoliants in the Vietnam War or in the process of spraying defoliants, etc. and their children have developed spina bifida, the second-generation patients are granted support without having to meet the requirement that the first generation should suffer from actual aftereffects of defoliant exposure.

For this reason, it is difficult to find rationality in discriminating some of the second-generation patients afflicted with spina bifida, which has been determined to have correlation with defoliant exposure of the first generation, depending on whether their parents are suffering from actual aftereffects of defoliant exposure in terms of providing support.

Therefore, the standard of discrimination in this case of whether or not

the first generation is a patient suffering from actual aftereffects of defoliant exposure, implies undue consequential difference attributable to accidental circumstances and cannot serve as a rational reason for discrimination. Thus, the discriminatory treatment under the provision at issue which excludes spina bifida patients whose parents suffer from potential aftereffects of defoliant exposure does not comply with the principle of equality.

Yet, as it is necessary to preserve the unconstitutional provision for a certain period of time and apply it on a temporary basis until legal amendment takes place to correct the unconstitutionality, it is pertinent to declare the provision at issue incompatible with the Constitution.

13. Overseas Electors' Presentation of Passports Case

[26-1(B) KCCR 135, 2011Hun-Ma567, April 24, 2014]

In this case, the Court decided that Article 218-5 Section 2 of the Public Official Election Act requiring overseas electors to present passports in applying for electoral registration did not violate their right to vote and equality.

Background of Case

(1) The complainant, over 19 years of age, is an overseas Korean national living in Japan who has not registered or reported his domestic residence.

(2) The complainant applied for re-issuance of an expired passport with the Foreign Minister, and the Foreign Minister rejected the application, arguing that the complainant is "a person whose indictment is suspended due to an escape abroad after committing a crime corresponding to a punishment for a period of at least three years" as prescribed in subparagraph 1 of Article 12 Section 1 of the Passport Act.

(3) As a result, the complainant was unable to present his passport required to file for registration as an overseas elector and therefore ineligible to vote in the 19th proportional National Assembly election and the 19th presidential election scheduled for 2012. Hence, the complainant lodged the constitutional complaint in this case, alleging that Article 218-5 Section 2 of the Public Official Election Act requiring the presentation of one's passport in applying for registration as an overseas elector infringed on his right to vote in elections, etc.

Subject Matter of Review

In this case, the matter under review is whether the portion of Article

218-5 Section 2 of the former Public Official Election Act (amended by Act No. 11070, Sept. 30, 2011 and later by Act No. 11485, Oct. 2, 2012) concerning passports (hereinafter "the present provision"), which is set out below, violates the complainant's fundamental rights.

Former Public Official Election Act (amended by Act No. 11070, Sept. 30, 2011 and later amended by Act No. 11485, Oct. 2, 2012)

Article 218-5 (Application for Registration of Overseas Electors)

(2) Any person who intends to file an application for registration of an overseas elector pursuant to paragraph (1) shall write matters under the following subparagraphs in the application, and attach a copy of any documents publicly notified under paragraph (3) by an overseas returning officer of the mission having jurisdiction over his/her area of residence. In this case, the original copies of his/her passport and the documents publicly notified by the overseas returning officer shall be presented therewith, and the returning officer shall not accept any application for registration of an overseas elector made by an applicant who fails to present the original copies:

1. Name;
2. Passport number, date of birth and distinction of gender;
3. Last domestic address (in cases of a person who does not have the last domestic address, the basic place of registration under the Act on the Registration, etc. of Family Relationship); and
4. Domicile.

Summary of the Decision

1. The Right to Vote in Elections

The present provision is aimed at ensuring fair election by enabling people with the right to vote to participate in elections while preventing those who do not have the voting right from participating in elections. Therefore, the legislative purpose of the present provision is legitimate

and the means to achieve that purpose is appropriate.

If the Passport Act and relevant laws and regulations are fully taken into consideration, a passport is the most authoritative document that allows the Korean government or other countries to verify and identify one's nationality. Thus, a passport is the most sure way to confirm whether an overseas elector is a Korean national having the right to vote and verify his or her identity, whereas a certified copy of one's overseas voter registration or a range of documents issued by foreign governments are hardly a credible and reliable means of verifying identity like passports. The present provision, therefore, is consistent with the least restrictive means requirement.

Significant public interest lies in preserving the essential function of elections to elect representatives in accordance with public opinion by preventing those who are not nationals or ineligible to vote, including those who have lost nationality, and thereby ensuring fairness of presidential and National Assembly elections. Although overseas electors may be restricted from voting under the present provision, the extent of restriction herein is by no means greater than the public interest pursued by the present provision.

For this reason, the present provision is not in violation of the rule against excessive restriction and thus does not infringe on the complainant's voting rights.

2. Right to Equality

The present provision, under the presumption that the names on the overseas electoral register are listed upon application for registration, only defines the method to verify whether the applicant for registration as an overseas elector has the right to vote. Therefore, in terms of applying the present provision, the voters listed on the domestic electoral

register, which is drafted by the state on its own initiative, are in essence not considered as the same group as those on the overseas electoral register, which lists voters upon request for registration. In this context, the complainant's right to equality is not violated by the present provision.

Dissenting Opinion of 4 Justices

A passport is not a document whose issuance depends on whether or not one has the right to vote in organizing state agencies, so not being a passport-holder does not necessarily mean that the person is not a Korean national with voting rights. Furthermore, according to a former decision of the Court (2012Hun-Ma409, Jan. 28, 2014, etc.), only a portion of inmates that fell under the condition that one's passport application is denied under the Passport Act were deemed ineligible to vote, but not those satisfying the remaining conditions, which indicates that the requirement for denial of passport application is barely associated with the grounds for restriction of voting rights. Despite this, verifying the qualification of overseas electors' right to vote solely by their possession of passports as provided in the present provision may result in an unjust situation where Korean nationals with justifiable rights to vote in elections are stripped of their voting rights just because they do not possess passports.

Additionally, the Registration of Korean Nationals Residing Abroad Act and other relevant rules and regulations show that there are many other less restrictive means to achieve the legislative purpose of verifying whether the applicant for overseas voter registration is a Korean national or not, such as supporting documents like a certified copy of overseas voter registration, a family relation certificate issued by the Korean government or a certified copy/ abstract of a cancelled resident registration certificate.

Since being a passport-holder is linked to voting rights, the present provision is in effect barring overseas electors whose passport applications are denied from voting, on grounds of administrative expediency that verification of nationality is convenient, and, in light of the importance of the fundamental right to vote in elections, the restricted private interest is by no means less significant than the public interest involved in achieving the fairness of elections.

For the stated reasons, the present provision breaches the rule against excessive restriction and therefore violates the voting right of the complainant who does not possess a passport.

14. Prohibition of Adolescents' Nighttime Access to Online Games Case

[26-1(B) KCCR 176, 2011Hun-Ma659 · 683 (consolidated), April 24, 2014]

In this case, the Court decided that a provision of the Juvenile Protection Act banning access to Internet games by juveniles under the age of 16 from midnight to 6 a.m., known as the "shutdown system," is constitutional, stating that it neither violates nullum crimen sine lege, or void for vagueness doctrine, nor infringes on the online game providers' occupational freedom and the adolescents' general freedom of action.

Background of the Case

The complainants of this case are children under the age of 16, parents of children under 16, and online game providers. They filed a constitutional complaint in this case, arguing that the provisions of the Juvenile Protection Act prohibiting access to online games by adolescents between midnight and 6 a.m. as well as imposing criminal punishment for violation thereof are an infringement of rights including the online game providers' occupational freedom, the adolescents' general freedom of action, and the parents' right to education.

Subject Matter of Review

The subject matter of review in this case is whether Article 23-3 Section 1 and Article 51 Section 6-2 of the former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, Sept. 15, 2011) and Article 26 Section 1 and Article 59 paragraph 5 of the current Juvenile Protection Act (wholly amended by Act No. 11048, Sept. 15, 2011) (the aforementioned provisions except for Penal Provisions are hereinafter referred to as the "provisions at issue") infringe on constitutional rights of the complainants and thereby violate the Constitution.

Former Juvenile Protection Act (later amended by Act No. 10659, May 19, 2011 and wholly amended by Act No. 11048, September 15, 2011)

Article 23-3 (Restriction on Hours Provided for Internet Games in Late Night Time, etc)

(1) No provider of an Internet game (referring to a person who has reported him/herself as a value-added telecommunications business operator, as defined in Article 22 of the Telecommunications Business Act, including where a person is deemed to have reported him/herself as a value-added telecommunications business operator under the latter part of paragraph (1) or paragraph (4) of the aforesaid Article; the same shall apply hereinafter) that is provided in real time via an information and communications network, as defined in Article 2 (1) 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., among game products defined in the Game Industry Promotion Act (hereinafter referred to as "Internet game") shall provide the Internet game to juveniles under the age of 16 between midnight and 6 a.m.

Article 51 (Penal Provisions)

Any of the following persons shall be punished by imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won:

6-2. A person who provides an Internet game to juveniles under the age of 16 late at night, in violation of Article 23-3

Juvenile Protection Act (Wholly amended by Act No. 11048, Sept. 15, 2011)

Article 26 (Restriction on Hours Provided for Internet Games in Late Night Time)

(1) No provider of an Internet game shall provide the internet game to

juveniles under the age of 16 between midnight and 6 a.m.

Article 59 (Penal Provisions)

Any of the following persons shall be punished by imprisonment with prison labor for not more than two years or by a fine not exceeding ten million won:

5. A person who provides an Internet game to juveniles under the age of 16 late at night, in violation of Article 26

Summary of Decision

1. Conformity with Void for Vagueness Doctrine

Under the Juvenile Protection Act, "Internet game" is defined as game products provided in real time via an information and communications network among those defined in the Game Industry Promotion Act (hereinafter the "Game Industry Act"). Therefore, anyone can easily comprehend that all game products, requiring access to information and communications networks including the Internet to get themselves started or executed, are classified as Internet games regardless of the devices used or game types, and that those which are not defined as games under the Game Industry Act or which do not require access to information and communications networks are not Internet games. Thus, the meaning of "Internet game" in the provisions at issue is very clear. Meanwhile, the Addenda of the Juvenile Protection Act and Notification No. 2013-9 of the Ministry of Gender Equality and Family defer the application of the shutdown system to Internet games on smart phones and other mobile devices. In this case, reducing the applicable scope of the shutdown system is hardly a restriction on the complainants' fundamental rights, and the stay of application for some Internet games does not necessarily imply that the meaning of "Internet game" as defined in this case is rendered ambiguous. For this reason, the provisions at issue are not void for vagueness.

2. Conformity with Rule against Excessive Restriction

The provisions at issue are designed to promote sound growth and development of adolescents and prevent their addiction to Internet games. Internet game itself is a kind of entertainment or pastime and is not considered negative, and banning access to Internet games only from midnight to 6 a.m. limited to adolescents is hardly an excessive regulation given the high rate of Internet game access by adolescents, the negative impact of excessive indulgence or addiction to Internet games, the nature of Internet games not allowing easy, voluntary cessation, etc. There is also a mechanism to minimize the damage resulting from such restriction, such as authorizing the Minister of Gender Equality and Family to conduct biennial reviews to avoid other kinds of excessive regulations and excluding pilot or educational games from prohibition. The "optional shutdown system" under the Game Industry Act requiring voluntary request for shutdown from the juveniles themselves or their legal representatives is scarcely used in practice and is therefore not sufficient to serve as an alternative means. For the said reasons, the provisions at issue satisfy the least restrictive means test. The balance of interests is also achieved, taking into account the importance of public interest served by protecting the health of juveniles and preventing their addiction to Internet games. Therefore, the provisions at issue do not infringe on the online game providers' occupational freedom, the adolescents' general freedom of action in terms of their pastime and entertainment activities, and the parents' right to education.

3. Protection of Right to Equality

Internet game is highly addictive as it allows real-time interaction between users, and it is very likely to be accessed easily at anytime where information and communication networks are available and thus may result in long-hour gaming. Therefore, reasonable grounds exist for

applying the shutdown system only to Internet games. Additionally, Internet game products provided by those who have reported themselves as value-added telecommunications business operators defined by the Telecommunications Business Act through regular routes following the rating process under the Game Industry Act are subject to the shutdown regardless of whether the provider is domestic or foreign, and the fact alone that some game products illegally distributed through foreign servers are exempted from the shutdown does not necessarily mean that the domestic providers' right to equality and non-discrimination has been violated.

Dissenting Opinion of 2 Justices

1. Concept of a Cultural State

The shutdown system, grounded on an outdated, nationalistic, and administratively expedient notion, represents an excessive intervention and interference by the state in violation of the respect for cultural autonomy and diversity, which ignores the concept of a cultural state.

2. Conformity with Void for Vagueness Doctrine

From the viewpoint of Internet game providers, the meaning and scope of "Internet game" is interpreted as the "elements of crime" set forth in penal provisions, but the standard for providing exception to Internet game products that are unlikely to cause serious addiction is not clearly laid out in the Addenda of the Juvenile Protection Act, which makes it difficult for ordinary people to properly identify the scope of applicable Internet games. Therefore, the provisions at issue are void for vagueness.

3. Conformity with Rule against Excessive Restriction

It is doubted whether the legislative purpose of the provisions at issue,

namely “securing sufficient sleeping hours for adolescents,” is a good reason to justify the restriction on fundamental rights, and it is difficult to decide that the provisions at issue serve as appropriate means because they are basically premised on the assumption that Internet games are harmful and valueless. Furthermore, the shutdown system is applied uniformly without exception while in fact only the games accessible by adolescents are supposed to be regulated by the provisions at issue, and the “optional shutdown” already exists under the Game Industry Act. Thus, the provisions at issue fail the least restrictive means test. The shutdown under the provisions at issue are not very effective since the rate of nighttime access to Internet games by adolescents has not been so high in the first place and it is impossible to control or prevent access using other people’s names. Meanwhile, the provisions at issue do not even achieve the balance of interests when considering the possibilities of excessive regulation infringing on fundamental rights and intimidating the online game market. Therefore, the provisions at issue violate the rule against excessive restriction.

4. Protection of Right to Equality

Regulation is placed only on Internet games although they, in essence, are hardly different from other types of games in terms of their addictiveness, and the equality rights of domestic online game providers are also infringed in the sense that mainly domestic game providers are practically regulated by the provisions at issue.

15. Age Restriction for Voting, Electoral Eligibility, Election Campaigning and Political Party Activities Case

[26-1(B) KCCR 223, 2012Hun-Ma287, April 24, 2014]

In this case, the Court decided that the following provisions did not violate the fundamental rights of those under 19 years old: ① Article 16 Section 2 of the former Public Official Election Act (amended by Act No. 11071, Nov. 7, 2011 and later amended by Act No. 12267, Jan. 17, 2014) granting nationals aged 19 or over the right to vote in elections of local council members and the head of the local government in the district, ② Article 16 Section 2 of the Public Official Election Act (enacted as Act No. 4739, Mar. 16, 1994) and Article 16 Section 3 of the Act (enacted as Act No. 9466, Feb. 12, 2009) providing that nationals who are 25 years of age and older shall be eligible for election as a member of the National Assembly, relevant local council member and the head of the local government, ③ sub-paragraph 2 of Article 60 Section 1 of the Public Official Election Act (amended by Act. 7681, Aug. 4, 2005) preventing minors aged 19 or under from engaging in election campaigns and ④ the part concerning Article 15 Section 1 of the Public Official Election Act of Article 22 Section 1 of the Political Parties Act (wholly amended by Act No. 7683, Aug. 4, 2005) allowing only those who have the right to elect members of the National Assembly to become either the promoter or a member of a political party.

Background of the Case

(1) The complainants, when it became foreseeable that they would be unable to exercise their right to vote in the 19th National Assembly elections on April 11, 2012 as they were under the age of 19, filed a complaint in this case on March 22 and August 31, 2012, asserting that the following provisions infringe on their rights including the right to

vote, electoral eligibility, freedom of election campaign and freedom of political parties:

① Article 15 Section 1 of the former Public Official Election Act granting voting rights to nationals aged 19 or above (hereinafter the "Parliamentary Voting Rights Provision"), ② Article 15 Section 2 of the same Act (hereinafter the "Local Council Voting Rights Provision"), ③ Article 16 Section 2 of the current Public Official Election Act stipulating that nationals who are 25 years or older shall be eligible for election as a member of the National Assembly, relevant local council member and the head of the local government (hereinafter the "National Assembly Electoral Eligibility Provision"), ④ Article 16 Section 3 of the same Act (hereinafter the "Local Council Electoral Eligibility Provision"), ⑤ sub-paragraph 2 of Article 60 Section 1 of the Public Official Election Act (amended by Act. 7681, Aug. 4, 2005) preventing minors who are aged 19 or under from engaging in election campaigns (hereinafter the "Restriction of Election Campaign Provision"), ⑥ the portion of Article 5 Section 1 of the Residents Voting Act which grants residents' voting right to residents who are 19 years of age or older (hereinafter the "Residents Voting Right Provision"), ⑦ Article 15 Section 1 of the Local Autonomy Act requiring residents aged at least 19 years to request the enactment, revision or abolition of Municipal Ordinances (hereinafter the "Right to Enactment, Revision or Abolition of Municipal Ordinances Provision") and ⑧ Article 22 Section 1 of the Political Parties Act requiring only those who have the right to elect members of the National Assembly to be eligible for a promoter or a member of a political party (hereinafter the "Party Member Qualification Provision").

Subject Matter of Review

The matter under review in this case is whether the following provisions infringe on the fundamental rights of the complainants: Parliamentary Voting Rights Provision, Local Council Voting Rights

Provision, National Assembly Electoral Eligibility Provision, Local Council Electoral Eligibility Provision, Restriction of Election Campaign Provision, Residents Voting Right Provision, Right to Enactment, Revision or Abolition of Municipal Ordinances Provision and Party Member Qualification Provision, which are set out below:

Former Public Official Election Act (amended by Act No. 11071, Nov. 7, 2011 and later amended by Act No. 12267, Jan. 17, 2014)

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):

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

2. 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.

(2) Any person 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 under Article 37 (1) shall have a right to vote in the elections of local council members and the head of the local government in the district:

1. Any person whose resident registration is made in the district under the jurisdiction of the relevant local government;

2. Any national who has been enrolled for not less than three months in the register of persons reporting their domestic domiciles of the relevant local government (hereafter referred to as the “register of

persons reporting their domestic domiciles" in this CHAPTER) pursuant to Article 6 (1) of the Act on the Immigration and Legal Status of Overseas Koreans; and

3. Any person who is enrolled in the register of foreigners of the relevant local government pursuant to Article 34 of the Immigration Control Act as a foreigner for whom three years have passed after the acquisition date of qualification for permanent residence under Article 10 of the same Act.

Public Official Election Act (enacted as Act No. 4739, Mar. 16, 1994)

Article 16 (Electoral Eligibility)

(2) A national of 25 years of age or above shall be eligible for election as a member of the National Assembly.

Public Official Election Act (amended by Act No. 9466, Feb. 12, 2009)

Article 16 (Electoral Eligibility)

(3) A national who is aged 25 years or above and who has registered as a resident (including cases where he/she is enrolled in the register of persons reporting their domestic domiciles; hereafter the same shall apply in this Article) in the district under the jurisdiction of the local government concerned for 60 consecutive days or longer (from the record date of the electoral register up to the election day consecutively, in cases of any person who had been sent to a foreign country in public services and has returned to the Republic of Korea after 60 days before the election day) as of the election day shall be eligible for election for the relevant local council member and the head of the local government. In such cases, a period of 60 days shall not be interrupted by establishment, abolition, division, or merger of the local government, or change in the boundary of a district (including a change of district under any subparagraph of Article 28).

Public Official Election Act (amended by Act No. 7681, Aug. 4,

2005)

Article 60 (Persons Barred from Election Campaign)

(1) A person who falls under any one of the following subparagraphs shall not engage in an election campaign (proviso omitted);

2. A minor (referring to a person aged 19 or under 19; hereinafter the same shall apply);

Residents Voting Act (amended by Act No. 9468, Feb. 12, 2009)

Article 5 (Residents' Voting Rights)

(1) Those who fall under any of the following subparagraphs as of the base date of preparation of a list of voters pursuant to Article 6 (1) among residents over 19 years old shall have the residents' voting right : Provided, That those who have no suffrage pursuant to Article 18 of the Public Official Election Act have no residents' voting right:

1. A person who has resident registration in a district over which the local government has jurisdiction or an oversea Korean who has reported a domicile in the Republic of Korea pursuant to Article 6 of the Act on the Immigration and Legal Status of Overseas Koreans;

2. A foreigner who is qualified for continuous residence in the Republic of Korea (including cases where he/she is qualified for continuous residence by permission for change of qualifications for staying or permission for extension of the period for staying) pursuant to Acts and subordinate statutes related to immigration control, and who is prescribed by municipal ordinance of a local government.

Local Autonomy Act (amended by Act No. 9577, Apr. 1, 2009)

Article 15 (Request for Enactment, Revision or Abolition of Municipal Ordinance)

(1) Residents of 19 years of age or older falling under any of the following subparagraphs (those who have no suffrage pursuant to Article 18 of the Public Official Election Act shall be excluded; hereafter referred to as the "residents of 19 years of age or older" in this Article and Article 16) may request the enactment, revision or abolition of

Municipal Ordinances under the joint signatures of not less than the number of residents of 19 years of age or older prescribed by Municipal Ordinance of the relevant local government within the extent between 1/100 or more and 1/70 or fewer of the total number of the residents of 19 years of age or older for the City/Do and a large city with 500,000 or more residents pursuant to Article 175, or within the extent between 1/50 or more and 1/20 or fewer of the total number of the residents of 19 years of age or older for the Si/Gun/autonomous Gu, from the head of the competent local government.

1. A person registered as a resident in the area of jurisdiction of the relevant local government;

2. A person listed in the registry of persons having reported their Korean address of the relevant local government as referred to in Article 6 (1) of the Act on the Immigration and Legal Status of Overseas Koreans;

3. A person listed in the registry of foreigners of the relevant local government under Article 34 of the Immigration Control Act, as a foreigner for whom three years have passed since the date when he/she was granted the right of permanent residence under Article 10 of the same Act.

Political Parties Act (Wholly amended by Act No. 7683, Aug. 4, 2005)

Article 22 (Promoters' and Party Members' Qualifications)

(1) Whoever who has the right to elect members of the National Assembly may become either the promoter or a member of a political party, notwithstanding the provisions of other Acts and subordinate statutes that prohibit them from joining any particular political party or being involved in political activities by reason of their being public officials or their holding other relevant social positions. (proviso omitted)

Summary of the Decision

1. Conditions of Admissibility

Regarding the claims concerning the Parliamentary Voting Rights Provision and the Local Council Voting Rights Provision, there is no possibility for remedies since the complainants will be entitled to vote in the next elections for National Assembly members and the President, and constitutional judgment on these claims has already been made in case 2012Hun-Ma174, which makes the complaint on these claims inadmissible. As to the claims concerning the Residents Voting Right Provision and the Right to Enactment, Revision or Abolition of Municipal Ordinances Provision, the residents' voting rights or the right to enact, revise or abolish municipal ordinances are hardly considered as constitutional fundamental rights and so the provisions cannot infringe on the complainants' fundamental rights. The claims on these provisions, therefore, are also inadmissible. As complainant Jung ○-Hwan reaches the age of 19 or older and becomes entitled to vote as of the day of local council and government elections, Mr. Jung's claim on the Local Council Voting Rights Provision fails to meet the self-relatedness requirement for the provision to constitute a violation of fundamental rights and is thus inadmissible.

2. Review on Merits

A. Local Council Voting Rights Provision

The exercise of voting rights should be preconditioned on a certain level of ability to make political judgments, and legislators have set the minimum voting age for local council member elections, etc. at 19 on grounds that given our reality, political, social views of minors under the age of 19 are still in the making and that they are not yet fully equipped with mental and physical abilities to make independent political

judgments. Additionally, although a number of countries have minimum voting age of 18 years, this is a matter to be decided by taking into account the particular circumstances of each country, and the legal minimum age for voting need not be the same as the minimum working or military service age of 18 years as provided in other laws. Therefore, it is not without reason to have the minimum voting age of 19. Accordingly, legislators did not exceed their lawmaking authority in deciding the voting age to be 19 in elections for local council members, etc., and thus did not violate the voting rights of those under the age of 19.

B. National Assembly and Local Council Electoral Eligibility Provisions

According to Article 25 and Article 118 Section 2 of the Constitution, legislators may consider factors such as the significance and function of elections as well as the status and duties of candidates in deciding the minimum age for being eligible to be elected as National Assembly members, local council members and heads of local governments. In this context, legislators' decision to set 25 as the minimum age of electoral eligibility, which factored in the ability required of an elected representative such as a National Assembly member, the minimum period of education curricula, etc. required to develop such ability, expectations and demands from the public for an elected public official to fulfill his or her obligation to pay taxes and perform military service, and legislation of other countries that generally have higher age requirements for electoral eligibility than for voting, is reasonable and is within their legislative discretion. Therefore, the provisions on the eligibility for election as members of the National Assembly and local councils do not violate the right of complainants under the age of 25 to hold public office.

C. Restriction of Election Campaign Provision

The Restriction of Election Campaign Provision prohibits minors from engaging in election campaigns, which is founded on a legitimate legislative purpose to ensure fairness of election by restricting the freedom of election campaigning of those lacking the ability to make political judgments, and using the age criteria in determining whether or not a person is equipped with the ability to make political decisions is an appropriate means to achieve the goal. In addition, the provision only restricts election campaigning whereas other acts of political expression are permitted without limits; this restriction is merely a delay of freedom to engage in election campaigns until people turn 19 years old; and minors lack mental or physical autonomy. All these considered, the provision meets the least restrictive means requirement and also strikes the balance of interests as the extent of restriction on political expression is not greater than the public interest brought by fair election. For this reason, it does not violate the freedom of complainants under the age of 19 to engage in election campaigns.

D. Party Member Qualification Provision

The Party Member Qualification Provision stipulates that anyone who has the right to elect National Assembly members can become either the promoter or a member of a political party, so those who are under the age of 19 cannot be promoters or members of a political party under the Public Official Election Act that gives voting rights only to those aged 19 years old or over. This provision prevents those with insufficient ability to make political judgments from becoming promoters or members of a political party and thereby protects the functions of a political party as provided in the Constitution, so it serves legitimate purpose and offers an appropriate means. Given the importance of a political party's public function, it is difficult to achieve the legislative purpose solely by limiting the freedom of founding political parties or a

certain form of political party activities. In fact, the provision satisfies the least restrictive means requirement given that it is only the political parties and no other association of general character that are banned; the intention of the provision is to suspend the exercise of voting rights only until one reaches 19 years old; and that minors lack mental and physical autonomy and thus need politically correct education. The provision also achieves the balance of interests since the risk for individuals incapable of making political decisions to disrupt the functioning of a political party is more significant than the risk of denying those under the age of 19 the freedom of political parties. Therefore, it cannot be said that the provision infringes on the complainants' freedom of political party activities.

Dissenting Opinion of 3 Justices Regarding Provisions on the Right to Vote for Local Council Members and Restriction of Election Campaigning

1. Local Council Voting Rights Provision

If a person of a certain age is capable of making political judgments but the minimum age for voting was set at a higher age, this requirement exceeds the limits of legislative discretion. The Korean society has undergone a tremendous change since the minimum voting age was adjusted to 19 years and older, and the level of political awareness of people including adolescents has grown considerably, which means those at the age of having completed secondary education should be considered as possessing the ability to make independent political decisions. However, those aged between 18 and 19 who are to complete secondary education, including third graders of high school, tend to have great interest in issues of employment or education, and, therefore, their political and social judgments grow in maturity. Other laws such as the Military Service Act also recognize that people who are 18 years or older have reached the level of mental and physical ability to participate

in the shaping of society and nation, and it cannot be reasoned that18 year-old Korean nationals who are highly adaptive to new lifestyles and sensitive to social changes have lower ability to make political decisions than those of the same age in other countries where minimum voting age is 18. For this reason, the Local Council Voting Rights Provision that requires voters to be at least 19 years old even if those aged 18 or above are capable of making their own political decisions exceeds the power to legislate and violates the voting rights, etc. of those who are between 18 years or older and under 19 years old.

2. Restriction of Election Campaign Provision

The Restriction of Election Campaign Provision denies minors the right to engage in election campaigns, and it should be viewed that, as in the decision regarding the voting right provisions which cited the increase in political awareness driven by social change, particularly those between the age of 18 and 19 who are to complete secondary education have the ability to make their own political and social judgments as such ability has significantly matured by their great interest in employment or education and IT development. In addition, the minimum age for voting and election campaigning need not necessarily be the same, and it can be concluded that those aged 18 and over who should have completed secondary education given our social and educational environment are capable of showing their political will in elections. In this context, giving only those who are at least 19 years old the right to engage in election campaigns amounts to an excessive restriction that fails to satisfy the least restrictive means requirement. Furthermore, it also fails to balance the interests concerned in that it is doubted how much fairer the elections can be by denying those aged between 18 and over and 19 who possess political judgment capabilities the freedom to engage in election campaigns. Therefore, the Restriction of Election Campaign Provision infringes on the freedom of election campaigning of those who are between 18 years or over and under 19 years old.

Dissenting Opinion of 2 Justices on the Party Member Qualification Provision

A political party is a private association by legal nature; the state, in principle, must not intervene in deciding the qualification of party members and may restrict the freedom of parties only when necessary. However, the Party Member Qualification Provision demands excessive ability from party members on the ground that a member of a political party as private association needs political judgment capability equal to that required in exercising the right to vote as a means of participating in state affairs, and bans those under the age of 19 from engaging in all kinds of activities as a party member for the purpose of safeguarding the constitutional function of a political party when this purpose can be served just by restricting only a certain form of freedom. The Party Member Qualification Provision, therefore, fails to meet the least restrictive means requirement. It also fails to strike the balance of interests as it is uncertain how much the restriction of political party activities imposed to people under 19 will contribute to achieving the legislative purpose of the provision. Therefore, it violates the freedom of those under 19 to engage in political parties.

Dissenting Opinion of 1 Justice on the Party Member Qualification Provision

A political party cannot simply be seen as a private association given its important public role, and qualification of political party members is not something that can be left to the party to decide on its own. Yet, the Party Member Qualification Provision violates the rule against excessive restriction and therefore the fundamental rights as well.

Although legislators believe that people under the age of 19 do not have the ability to make political decisions required of a political party

member, the risk of disrupting the public function of a political party can be prevented just by restricting certain forms of freedom. Hence, banning those aged between 18 or over and under 19 from engaging in all kinds of activities as a party member is against the least restrictive rule. Those between 18 and over and 19 are considered to be capable of making political judgments, and it is to be questioned whether keeping them from establishing and joining political parties will be effective in achieving the legislative purpose to protect constitutional functions of a political party. Thus, the Party Member Qualification Provision fails to strike the balance of interests and, consequently, violates the freedom of political party activities of those between 18 years and older and less than 19 years old.

16. Case on Prohibition of Remunerating Full Time Trade Union Official and Time Off

[26-1(B) KCCR 354, 2010Hun-Ma606, May 29, 2014]

In this case, the Constitutional Court held that the relevant provisions of the Trade Union and Labor Relations Adjustment Act which prohibit remuneration to full time trade union official and time off are not in violation of the Constitution, because it is not against nulla poena sine lege even if the specific time off limit is not provided directly in the Act, and it is not infringing on the complainants' right to collective bargaining and collective action to prohibit unions from demanding remuneration to full time trade union official and taking collective action.

Background of the Case

Complainants are National Federation of Democratic Labor Unions, NH Central Committee Labor Unions, National Health and Medical Industry Labor Unions, and full time trade union officials. On January 1, 2010 the Trade Union and Labor Relations Adjustment Act (the 'Act') was amended by Act No. 9930 to prohibit employers remunerating full time trade union officials('full time official'), and to allow payment up to a certain limit for labor union related activities('time off'). Complainants filed a constitutional complaint on September 28, 2010 arguing that the relevant provisions of the Act, the decision made by the Time－Off System Deliberation Committee ('Committee') regarding time off limit, and the Notification on Time Off Limit by the Ministry of Labor infringe on the complainants' labor rights.

Provisions at Issue

The subject matter of this case is whether the following provisions infringe on the complainants' fundamental rights ① Article 24 Section 2 of the Act(amended by Act No. 9930 on January 1, 2010) prohibiting

remuneration to full time trade officials, Article 24 Section 4 about time off, Article 24 Section 5 and Article 92 Item 1 prohibiting trade unions to demand remuneration and take collective action, and in case of violation imposing a fine(Article 92 Item 1 is referred to as 'the Punishment Provision', the others 'the Instant Provisions of the Act'), ② Article 11-2 of Enforcement Decree of the Trade Union and Labor Relations Adjustment Act(Amended by Enforcement Decree No. 22030 on February 12, 2010) stipulating that the Committee may determine the number of hours and persons who may use such hours when setting the time off limit ③ the decision made by the Committee on May 1, 2010 ④ Notification on Time Off Limit by the Ministry of Labor on May 14, 2010(Ministry of Labor Notification No. 2010－39) ('the Notification')

Trade Union and Labor Relations Adjustment Act(Amended by Act No. 9930 on January 1, 2010)

Article 24 (Full-time Official of Trade Union)

② A person who is engaged in duties only for a trade union in accordance with paragraph (1) (hereinafter referred to as "full-time official") shall not be remunerated in any way by the employer for the duration of his/her tenure.

④ Notwithstanding paragraph (2), a worker may take time off from work to carry out the functions prescribed by this Act or other applicable acts, including consulting and bargaining with the employer, handling of grievance and occupational safety activities, and the functions of maintaining and managing the trade union for the sound development of industrial relations without any loss of wages as long as he/she does not exceed the maximum time-off limit (hereinafter referred to as "the maximum time-off limit") set in consideration of the number of union members, in each business or workplace in accordance with Article 24-2, if it is stipulated in the collective agreement or consented by the employer.

⑤ A trade union shall not demand the payment of wages in violation of paragraphs (2) and (4) and take industrial action to achieve such a

goal.

Article 92 (Penal Provision)

A person who falls under the purview of any of the following subparagraphs shall be punished by a fine up to Ten Million Won:

1. A person who violates Article 24 (5)

Enforcement Decree of the Trade Union and Labor Relations Adjustment Act(amended by Enforcement Decree No. 22030 on February 12, 2010)

Article 11-2 (Maximum Time-Off Limit) When the Time-Off System Deliberation Committee (hereinafter referred to as the "Committee") pursuant to Article 24-2 (1) of the Act determines the maximum time-off limit pursuant to paragraph (2) of the same Article, the Committee may determine the number of hours and persons who may use such hours in consideration of the number of all union members of a business or place of business and the scope of the relevant affairs, etc. pursuant to Article 24 (4) of the Act.

Ministry of Labor Notification No. 2010－39

According to Article 24, 24-2 and the relevant Enforcement Decree 11-2 of the Trade Union and Labor Relations Adjustment Act on the time off limit is set as below.

May 14, 2010

Ministry of Labor

Notification on Time Off Limit

1. Time Off Limit

number of union members	time limit	number of people allowed
less than 50	up to 1,000 hours	○ less than 300 union members: part time number may not be more than 3 times those full time ○ over 300 union members: part time number may not be more than 2 times those full time
50～99	up to 2,000hours	
100～199	up to 3,000hours	
200～299	up to 4,000hours	
300～499	up to 5,000hours	
500～999	up to 6,000hours	
1,000～2,999	up to 10,000hours	
3,000～4,999	up to 14,000hours	
5,000～9,999	up to 22,000hours	
10,000～14,999	up to 28,000hours	
over 15,000	until June 30, 2012: 28,000hours + up to additional 2,000 hours for every 3,000 people	
	after July 1, 2012: up to 36,000hours	

* Numbers refer to those of the entire union members in the business
2. application period: from July 1, 2010

Summary of the Decision

1. Admissibility

① The decision made by the Committee regarding time off limit is only internal procedure and does not in itself affect complainants' legal status, not amounting to governmental action subject to constitutional complaint. ② Article 11-2 of the Enforcement Decree of the Trade Union and Labor Relations Adjustment Act does not directly restrict complainants' rights or impose duties, so there is no direct infringement of fundamental rights. ③ Complainants other than Lee ○-Bae filed an

administrative lawsuit arguing that this Decree is void but was rejected by the Supreme Court on March 27, 2014(2011Do8420). The above court decision is not one that is exceptionally subject to constitutional complaint so the Decree is not subject to constitutional complaint. Lee ○-Bae did not take prior steps against the Decree such as lawsuit etc, so his complaint did not exhaust all other means of resource. ④ Thus the complaint regarding Article 92 Item 1 of the Act, Article 11-2 of the Enforcement Decree, the decision by the Committee, the Notification limiting time off hours is all inadmissible.

2. Whether it is against nulla poena sine lege

According to Article 24 Section 5 of the Act, a trade union is not allowed to demand payment of wages in violation of time off limit and take industrial action to achieve such a goal. It is punishable by fine, so time off limit constitutes one of the elements of crime. As Article 24 Section 4 of the Act stipulates that the time off limit shall be determined by the Ministry of Labor Notification after the Committee's decision, the problem of nulla poena sine lege needs to be dealt with.

Specific time off limit is a field of administration that requires use of experts' knowledge and grasp on the limit of time and personnel needed to carry out union activities in the industry, not only the number of union members. It also requires expert adjustment between employers and workers. The Committee is composed of five members recommended from labor, business and government so both sides' interests as well as expert opinion can be reflected, making up for the legislators' lack of expertise. Thus it is necessary to ensure flexible and expert solution to mirror the reality of labor relations and adjust various interests, instead of direct legislation. So it is reasonable to stipulate that the time off limit shall be determined by the Ministry of Labor Notification after the Committee's decision.

Article 24 Section 4 of the Act stipulates the type of work subject to time off only comprehensively, and it is not clearly set forth which

union work is subject to time off. Therefore it is predictable that what the Ministry of Labor Notification will provide for is not the type of work subject to time off, but the normally necessary 'time' and appropriate number of personnel for union operations according to each (place of) business' number of union members. Thus the 'time off limit' part of Article 24 Section 4 is not against nulla poena sine lege.

3. Whether it is against the rule of proportionality

The Instant Provisions of the Act makes the union bear the full time official costs as a rule, and contributes to the independence and neutrality of the union. Also they protect and support union activities in the place of business at a certain level to promote reasonable and stable labor relations as well as business efficiency. Through these means labor disputes may be prevented and contribute to industrial peace, so the legislative purpose is legitimate. To solve relevant problems it is not wholly left to the discretion of workers and employers, but it is stipulated that unions shall not demand the payment of wages to full time official or over the time off limit or take industrial action to achieve such a goal, and it is appropriate means.

To wholly prohibit remuneration to full time official or allow exceptions to time off limit is the necessary minimum to achieve legislative purpose. In the past, enterprise union was prevalent, but after 90s industrial unions and occupational unions increased and workers demanded plural unions, so the practice of employers paying wages to full time officials as facilities were challenged with unreasonable aspects as such changes came about. To correct past practice, on March 13, 1997 provision was introduced to prohibit remuneration to full time official but was put on hold for 13 years as workers and employers could not reach an agreement. Time off was adopted as a compromise by amendment (Act No. 9930) on January 1, 2010 to prevent impairment of union activities as a result of prohibiting remuneration to full time official, and to facilitate full time official system. Through the

new time off system, the full time official may opt for part time workers' representative and still keep up level of union activities he was responsible for, to minimize the loss caused by total prohibition of remuneration.

Setting only the minimum of time off limit by law and letting the parties freely decide other matters may be ideal. Nevertheless, unlike European nations where industrial unions are prevalent and financially sound, in Korea enterprise unions are more common and time off was adopted to correct the long time practice of employers paying wages to full time officials. Against such background, it is practically incapacitating the purpose of the Instant Provisions of the Act to let the parties decide. Therefore the Instant Provisions of the Act are necessary minimum to achieve legislative purpose and not against the least restriction rule.

Under the Instant Provisions of the Act, complainants' right to collective bargaining and industrial action are restricted only to the extent of wages for union activities exceeding the time off limit, while the public good such as union's independence, stable labor relations, industrial peace are very significant by correcting past unreasonable practices regarding remunerating full time officials and by guaranteeing union activities within time off limit. Therefore the balance of interests is satisfied.

Thus the Instant Provisions of the Act do not violate the proportionality rule and infringe on the workers' right to collective action or collective bargaining, or the principle of free labor relations.

4. Whether it is against regard for international law

The ILO Convention 135 'Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking' was adopted by ILO in 1971. As it was ratified by Korea on December 27, 2002 and came into effect, Korea has a duty to abide by the Convention just as domestic law. Article 2 Section 1 of the Convention states that workers' representatives in the undertaking shall enjoy effective protection

against any act prejudicial to them, and such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently. However, it is also stated that account shall be taken of the characteristics of the industrial relations system of the country and the needs, size, and capabilities of the undertaking concerned, and as time off system was adopted as a compromise to prohibition of remunerating full time official, the Instant Provisions of the Act cannot be said to violate the Convention. Also according to ILO Recommendation 143 'Recommendation concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking', which helps to interpret the Convention, in Article 10 'time off from work' is included in the 'appropriate facilities' of the 135 Convention, and reasonable limits may be set on the amount of time off. Therefore, the Instant Provisions of the Act are not in conflict with the Convention or the Recommendation, in that the total amount of time off is set by prior legislation.

Meanwhile, Recommendation of the Committee on Freedom of Association, an organization set up by the ILO, does not have the same effect as domestic law or regarded as generally accepted international law. As noted above, as time off system was adopted as a compromise to prohibition of remunerating full time official, the Instant Provisions of the Act are not in conflict with the Recommendation of the Committee on Freedom of Association.

Therefore the Instant Provisions of the Act do not violate the principle of regard for international law.

17. Case on the constitutionality of provisions of the Single－Parent Family Support Act prohibiting adoption agency from operating 'unmarried mother and child family welfare facility for supporting basic needs'

[26-1(B) KCCR 378, 2011Hun-Ma363, May 29, 2014]

In this case, the Constitutional Court held that Article 20 Section 4, etc. of the Single－Parent Family Support Act that prohibits an adoption agency from operating a single parent family welfare facility infringe upon neither the freedom to operate social welfare corporation nor the right to equality.

Background of the Case

(1) Complainants are social welfare corporations that operate both adoption agencies and 'unmarried mother and child family welfare facilities for supporting basic needs' of unmarried mothers before and after delivery as well as their babies.

(2) Due to the amendment of the Single-Parent Family Support Act on April 12, 2011, no adoption agency could simultaneously operate 'unmarried mother and child family welfare facilities for supporting basic needs'(Article 20 Section 4) and those who had been operating adoption agencies and the aforementioned welfare facilities at the same time should change such welfare facilities into other kinds of unmarried mother and child family welfare facilities or close them down by June 30, 2015(Article 2 Section 3 of the Addenda to the Act).

(3) Upon this, the complainants filed this constitutional complaint on July 8, 2011, claiming that Article 20 Section 4 of the Single-Parent Family Support Act and Article 2 Section 3 of the Addenda to the Act infringe upon their fundamental rights.

Provisions at Issue

The subject matter of this case is whether Article 20 Section 4 of the Single-Parent Family Support Act (amended by Act No. 10582, April 12, 2011) and Article 2 Section 3 of the Addenda to the Act(hereinafter the "Instant Provisions") infringe on the constitutional rights of the complainants and thereby violate the Constitution. The provisions at issue in this case are as follows:

Single-Parent Family Support Act (amended by Act No. 10582, April 12, 2011)

Article 20 (Establishment of Single-Parents Family Welfare Facilities) (4) those who operate adoption agencies pursuant to Article 10 of the 'Special Act Relating to the Promotion and Procedure of Adoption' shall not establish and operate facilities stipulated in Article 19 Section 1 Item 3(Ka).

Addenda to the Single-Parent Family Support Act (Act No. 10582, April 12, 2011)

Article 2 (Transitional Measures for Single－Parent Family Welfare Facilities) (3) any adoption agency in operation pursuant to Article 10 of the 'Special Act Relating to the Promotion and Procedure of Adoption' which also operates any welfare facility pursuant to amended Article 19 Section 1 Item 3(Ka) at the time when amended Article 19 enters into force shall chance such a facility into any one of the unmarried mother and child family welfare facilities stipulated in amended Article 19 Section 1 Item 1, Item 2, Item 3(Na) and Item 5 or close such a facility down by June 30, 2015.

Summary of the Decision

1. Whether the Instant Provisions infringe upon the freedom to operate social welfare corporation

The restriction on the freedom to operate social welfare corporation should conform to the rule against excessive restriction. But, since the State, which is responsible for promoting social security and welfare under Article 34 Section 2 of the Constitution, directly and indirectly supports social welfare corporations by providing financial support for their operation and tax benefits, the legislature can impose broader restriction and control on the operation of social welfare corporations while acknowledging their autonomy as well (see 2004Hun-Ba10, February 3, 2005).

In principle, it is desirable for unmarried mothers and their children to live together and Article 36 Section 2 also provides that "the State shall endeavor to protect mothers." Therefore, the Instant Provisions' prohibition against the multiple operation of both adoption agency and 'unmarried mother and child family welfare facility for supporting basic needs,' which is intended to practically guarantee unmarried mothers' right to child custody and prevent an adoption agency from making a wrongful suggestion or offer to unmarried mothers to put their children up for adoption, is legitimate in terms of the legislative purposes. Also the means to achieve such purposes are reasonable.

The Instant Provisions simply prohibit adoption agencies from simultaneously operating 'unmarried mother and child family welfare facilities for supporting basic needs,' and therefore, the complainants are still able to run other five types of single parent family welfare facilities except the aforementioned type of facility. Also the Instant Provisions, in consideration of the adoption agencies' situation, provide for four year grace period to help adoption agencies change existing 'unmarried mother and child family welfare facilities for supporting basic needs' into other types of single parent family welfare facilities. Meanwhile, the

public interests to help unmarried mothers to prepare themselves for independently raising their own children and to decrease the number of adoptions, especially overseas adoptions, achieved by preventing adoption agencies with a strong propensity to recommend adoptions from operating 'unmarried mother and child family welfare facilities for supporting basic needs,' are important. In this regard, the Instant Provisions satisfy the least restrictive means requirement and strike the balance between legal interests.

Therefore, the Instant Provisions do not infringe on the complainants' freedom to operate social welfare corporation, in violation of the rule against excessive restriction.

2. Whether the Instant Provisions infringe on the right to equality

Since the issue as to allowing an adoption agency to simultaneously operate an unmarried mother and child family welfare facility for supporting basic needs is not related to a case where the Constitution specifically calls for equality or grave restriction on fundamental rights by unequal treatment are expected, it is proper to review this case on the basis of the principle against arbitrariness (see 2011Hun-Ma782 etc., September 26, 2013).

The simultaneous operation of both adoption agency and unmarried mother and child family welfare facility for supporting basic needs can induce unmarried mothers to opt for adoption instead of raising their children by themselves, which is economically and socially more burdensome than adoption. In practice, it is proven that unmarried mothers who gave birth to their babies at unmarried mother and child family welfare facilities operated by adoption agencies choose more adoptions than other unmarried mothers. Given this situation, the prohibition imposed by the Instant Provisions to prevent adoption agencies from unduly recommending adoption to unmarried mothers is reasonable and therefore, the Instant Provisions do not infringe on the right to equality.

Summary of the Dissenting Opinion by Four Justices

1. Whether the Instant Provisions infringe upon the freedom to operate social welfare corporation

Considering the facts that the complaints have accumulated professional infrastructure and knowhow in child adoption and unmarried mother and child protection for a long time and take up 80% of domestic adoption and 50% of the 'unmarried mother and child family welfare facilities for supporting basic needs,' prohibition against multiple operation of such facilities can bring about huge vacuum in adoption and unmarried mother and child protection.

Since the Instant Provisions seem to be legislated based on the prejudices against adoption, especially international adoption, and the reference and date that served as the premise for the legislative purposes of the Instant Provision are based on very limited statistics, the legitimacy of the legislative purposes is questionable. Also, as unmarried mothers' decision to place their children up for international adoption is actually based on social prejudice, stigma and lack of financial support, prohibiting an adoption agency from simultaneously operating 'unmarried mother and child family welfare facilities for supporting basic needs' cannot be a solution to the problem. Therefore, the means to achieve the legislative purpose does not seem reasonable.

The current Special Act on Adoption and the Single-Parent Family Support Act provides various support and restrictions to get rid of social prejudice against unmarried mother and child family, which is the very source of the problem, and extends financial support. Furthermore, it is possible to find a way to prevent an adoption agency from inappropriately recommending adoption through strict supervision and oversight by the State. In this regards, the aforementioned prohibition against the simultaneous operation of both an adoption agency and a 'unmarried mother and child family welfare facility for supporting basic needs' fails to meet the least restrictive means requirement and to strike the balance between legal

interests.

Therefore, the Instant Provisions infringe on the complainants' 'freedom to operate social welfare corporation,' violating the rule against excessive restriction.

2. Whether the Instant Provisions infringe upon the right to equality

The policy to encourage unwed mothers to raise their own children and to decrease the rate of international adoption can be achieved by creating social environment in which unwed mothers can raise their children on their own and lead self-supporting lives, not by imposing strict restriction against an adoption agency to operate 'unmarried mother and child family welfare facilities for supporting basic needs.'

Therefore, the discrimination by the Instant Provisions between social welfare corporations that do not operate adoption agencies and those that operate such agencies in terms of the operation of 'unmarried mother and child family welfare facilities for supporting basic needs' are unreasonable. For the forgoing reasons, the Instant Provisions infringe upon the right to equality.

18. Case on Children 18 years old or over Requesting Survivors' Benefit under the Public Officials Pension Act

[26-1(B) KCCR 423, 2012Hun-Ma515, May 29, 2014]

In this case, the Constitutional Court held that ① the part about children in Public Officials Pension Act Article 3 Section 2 which excludes children 18 years old or over from the recipient of survivors' benefits ② Public Officials Pension Act Article 30 Section 1 which stipulates that 1/2 of lump-sum survivors' pension amount shall be paid to linear ascendents or descendents who is not a survivor in case there are no survivors, and the part about lump-sum survivors' pension in Enforcement Decree of the Public Officials Pension Act Article 24 Section 1 do not infringe on the equality right or property right of the complainant who is 18 years old or older.

Background of the Case

Complainant requested lump-sum survivors' pension to Government Employees Pension Service after his mother, a public official, died. However the Government Employees Pension Service paid the complainant only 1/2 of the lump-sum survivors' pension amount according to Enforcement Decree of the Public Officials Pension Act Article 24 Section 1, as complainant does not qualify as survivor under Article 3 of the Public Officials Pension Act, being over 18 at the time of his mother's death, and because he is a linear descendent who is not his/her survivor under Article 30 Section 1 of the Public Officials Pension Act.

Complainant filed this constitutional complaint arguing that Public Officials Pension Act Article 3 Section 2 which excludes children 18 years old or over from the recipient of survivors' benefits, and Public Officials Pension Act Article 30 Section 1 which stipulates that 1/2 of lump-sum survivors' pension amount shall be paid to linear ascendents or descendents who is not a survivor in case there are no survivors

infringe on the equality right or property right of the complainant who is 18 years old or older.

Provisions at Issue

The subject matter of this case is whether the part about children in Former Public Officials Pension Act (amended by Act No. 9905 on December 31, 2009, and before amended by Act No. 11488 on October 22, 2012) Article 3 Section 2 (hereinafter 'Survivor Provision'), part about lump-sum survivors' pension in Public Officials Pension Act (amended by Act No. 10984 on August 4, 2011) Article 30 Section 1, Former Enforcement Decree of Public Officials Pension Act (amended by Enforcement Decree No. 23276 on November 1, 2011, before amended by Enforcement Decree No. 23651 on March 2, 2012) Article 24 Section 1 Item 4 respectively (hereinafter 'Benefit Provision') infringe on the complainant's fundamental rights.

Former Public Officials Pension Act (amended by Act No. 9905 on December 31, 2009, and before amended by Act No. 11488 on October 22, 2012)

Article 3 (Definitions) ② Children and grandchildren prescribed in paragraph (1) 3 shall be limited to the following persons. In such cases, grandchildren shall be limited to cases where they do not have fathers or where their fathers are in the status of disability prescribed by Presidential Decree:

1. Those who are under 18 years of age;
2. Those who are not less than 18 years of age and in the status of disability determined by Presidential Decree.

Public Officials Pension Act (amended by Act No. 10984 on August 4, 2011)

Article 30 (Special Cases for Recipients of Benefits) (1) In the case of death of any public official or former public official, when no survivor

to receive benefits exists, an amount not exceeding the limit prescribed by Presidential Decree shall be paid to his/her lineal ascendant or descendent who is not his/her survivor, and if no such lineal ascendant or descendent exists, it may be used for the said public official or former public official.

Former Enforcement Decree of Public Officials Pension Act (amended by Enforcement Decree No. 23276 on November 1, 2011, before amended by Enforcement Decree No. 23651 on March 2, 2012)

Article 24(Special cases for when there are no survivors) ① In case there are no survivors to receive the pension, the amount paid to his/her lineal ascendant or descendent who is not his/her survivor, according to Article 30 of the Act or the amount that may be used for deceased public official is as follows.

4. In case of other long term benefits, the whole original benefit amount. However, in case of lump-sum survivors' pension and survivors' compensation, 1/2 of the original benefit amount

Summary of the Decision

1. Whether the Survivor Provision infringes on complainant's equality right

Public officials pension requires managing limited funds to contribute to livelihoods and welfare of public officials and their survivors. So the scope of children eligible to become recipients of lump-sum survivors' pension can be restricted according to needs and importance of survivors' benefits, which is judged by whether the children have ability to pursue independent livelihoods at minimum. When children reach the age of 18 they are presumed to have independent working abilities according to Labor Standards Act, can marry, acquire powers to independently judge for themselves and overall, reach physical and mental maturity. The Survivor Provision excluded children 18 or older

from the recipient of survivors' benefits considering that they are able to acquire social independence to earn minimum livelihood.

Acknowledging that in case of children 18 or older pursuing education or military draft service it is difficult to assume independent lives, still the scope of survivors needs to be restricted due to limited pension. As children may be differentiated by the age of 18 regarding the ability to pursue independent livelihoods at minimum, it is not unreasonable that children 18 or older still pursuing education or drafted by military are excluded.

Thus it is reasonable that the Survivor Provision excluded children 18 or older from the scope of survivors, and the Survivor Provision does not infringe on complainant's equality right.

2. Whether Public Officials Pension Act Article 30 Section 1 part of the Benefit Provision violates rule against blanket delegation

In case there are no survivors to receive lump-sum survivors' pension, the amount to be paid to linear ascendents/descendents who are not survivors should be determined according to the financial state of public officials pension, as well as the size and different types of payment to linear ascendents/descendents who are not survivors. This decision should be made by the administrative branch equipped with the expertise to factor in such mercurial and technical considerations.

In case there are no survivors to receive lump-sum survivors' pension, the amount to be paid to linear ascendents/descendents who are not survivors will predictably be at most the lump-sum survivors' pension paid to survivors if there were such survivors. Also as lump-sum survivors' pension is paid in accordance with insurance rules funded by contributions of public officials, it is foreseeable that the extent of such contributions and insurance rules will be taken into consideration.

As such, in case there are no survivors to receive lump-sum survivors' pension, what will be stipulated in the Enforcement Decree about the amount paid to the linear ascendents/descendents who are not survivors

is sufficiently predictable, according to the Public Officials Pension Act Section 30 Article 1 part of the Benefit Provision. Thus the Public Officials Pension Act Section 30 Article 1 part of the Benefit Provision does not violate the rule against blanket delegation.

3. Whether Benefit Provision infringes on complainant's property right

The Benefit Provision pays 1/2 of the lump-sum survivors' pension amount to linear ascendents/descendents who are not survivors in case there are no survivors, to promote stable livelihoods and welfare of public officials and their survivors according to insurance rules with the limited pension funds, and also to take into account the large part of pension funds created by contributions made by public officials. The reason the Benefit Provision pays 1/2 of the lump-sum survivors' pension amount to linear ascendents/descendents who are not survivors in case there are no survivors is because at least the part created by the contributions made by public officials should benefit linear ascendents/descendents who are not survivors. Also, linear ascendents/descendents who are not survivors receive not only 1/2 of the lump-sum survivors' pension amount pursuant to the Benefit Provision but also receive retirement allowances funded by state or local government from Government Employees Pension Service, regardless of contributions made by public officials. Considering all of the above, it cannot be said that the Benefit Provision fails to embody the property aspect of contributions made by public officials in legislating benefit rights of linear ascendents/descendents who are not survivors.

As seen above, the Benefit Provision reasonably specifies the benefit rights of linear ascendents/descendents who are not survivors taking into account the limit of pension funds, the property aspects of contributions made by public officials, etc. Thus the Benefit Provision does not violate complainant's property right exceeding legislative discretion.

18. Case on Children 18 years old or over Requesting Survivors' Benefit under the Public Officials Pension Act

Summary of Concurring Opinion by one Justice

Children 18 or older pursuing education for jobs like college or serving various military duties cannot be expected to earn sufficient income to maintain independent livelihood, putting them in no different situation from those under 18 in terms of needs and importance of survivor benefit. The standard of age of 18 stipulated by the Survivor Provision indiscriminately excluding children 18 or older from the scope of survivors is unreasonable discrimination, violating equality rights of children 18 or older pursuing education or in military service.

However in this case there was no evidence to show that the complainant, 29 years old at the time of his mother's death, was pursuing education for jobs like college or serving various military duties. Therefore the Survivor Provision is unconstitutional but does not infringe on the complainant's equality rights.

19. Braille-Type Election Campaign Bulletins Case

[26-1(B) KCCR 448, 2012Hun-Ma913, May 29, 2014]

In this case, the Constitutional Court held that the part related to the Presidential Election in Article 65 Section 4 of the Public Official Election Act, which allows candidates to prepare one type of election campaign bulletins in braille within the number of pages of book-type election campaign bulletins, does not infringe upon the complainant's right to vote and right to equality.

Background of the Case

Complainant, with Class 1 visual impairment, filed this constitutional complaint, arguing that Article 65 Section 4 of Public Official Election Act, which prescribes the preparation of braille-type campaign bulletins for visually impaired electors as a voluntary measure and stipulates that such braille-type campaign bulletins shall be prepared within the number of pages of book-type election campaign bulletins, is in violation of the State's duty to protect disabled people under Article 34 Section 4 of the Constitution.

Provisions at Issue

The subject matter of this case is whether the part related to the Presidential Election in Article 65 Section 4 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010)(hereinafter, the Instant Provision) infringes on the complainant's fundamental rights. The provision at issue in this case is as follows:

Public Official Election Act (amended by Act No. 9974, January 25, 2010)

Article 65 (Election Campaign Bulletins) (4) Any candidate may

prepare one type of election campaign bulletins (hereinafter referred to as "braille-type election campaign bulletins") other than the election campaign bulletins referred to in Section 1 for visually impaired electors (referring to visually impaired persons who are registered pursuant to Article 32 of the Welfare of Disabled Persons Act; the same shall apply hereafter in this Article). In such cases, class one type election campaign bulletins in braille shall be prepared within the number of pages of book-type election campaign bulletins under Section 2.

Summary of the Decision

1. Infringement on the right to vote and right to equality

Individuals with visual impairment can get enough information on election through various mandatory broadcasts for election campaign. Particularly, considering the facts that election campaign via Internet with the use of technology for voice transmission is freely available without specific limitation; that it is possible to locate information in Internet through voice web browser; and screen reading technology has been rapidly developed and actively used, the campaign bulletin is merely one of the resources to be used for providing candidate information, and the information provided by the campaign bulletin cannot be regarded as the very essence that can decisively influence the voters' decision. Also, it is expected that the mandatory preparation of election campaign bulletins in braille would inevitably bring about restriction on candidates' freedom of election campaign, and given that considerable number of people with visual impairment or the blind are unable to read braille, it seems that making the preparation of election campaign bulletin mandatory can be an excessive restraint on the freedom of election campaign. Therefore, Although the Instant Provision prescribes the preparation of braille-type election campaign bulletins for visually impaired electors as a voluntary measure and stipulates that the election campaign bulletins in braille shall be prepared within the

number of pages of book-type election campaign bulletins, the legislative intention to form such an election system seems not so much unreasonable or unfair as to be in violation of the right to vote and the right to equality.

2. Violation of Article 34 Section 5 of the Constitution

Considering the contents of Article 34 of the Constitution and the interests to be protected by the provision, restriction on the right to vote is not subject to the protection guaranteed under Article 34 Section 5 of the Constitution that stipulates the State's duty to financially support and economically protect unprivileged people, and therefore the Instant Provision does not violate Article 34 Section 5 of the Constitution.

Summary of Dissenting Opinion by Four Justices

The Public Official Election Act, aside from campaign bulletins in braille, offers various methods of non-visual election campaigns such as voice transmission via Internet, phone calls, television or radio advertisements, candidate's career broadcasting, campaign speeches, candidate interviews or debates. But election campaigns through phone calls, campaign speeches, candidate interviews or debates need specific time, media or place to air. And for television or radio advertisements and candidate's career broadcasting, only one or two minutes are allowed, which seem insufficient to convey proper information on candidates. Meanwhile, although non-visual election campaigns such as voice transmission via Internet can be repeatedly heard, important candidate information such as military service, tax delinquency records or criminal records can be intentionally omitted. With this in mind, campaign bulletins in braille can be regarded as the only or essential means to convey proper information on candidates in a comprehensive and systemic manner to blind or visually impaired voters who have limited access to other promotional materials for election campaign

without regard to time or place.

The Instant Provision, by leaving the preparation of campaign bulletins in braille up to the choice of candidate, allows candidates who prepare for book-type election campaign bulletins not to choose to make those in braille. Moreover, since the number of pages for campaign bulletin in braille should also be counted as being included in the number of pages for regular book type campaign bulletins, it results in discrepancy in contents between the campaign bulletins in braille and the regular campaign bulletins.

The President, as the head of the State and the administrative branch of the government, is strongly related to the realization of fundamental rights of the disabled, as he/she can exercise broad authority over general national policies including welfare for the disabled. Also, since the State bears all the responsibility for financing the preparation and mailing of campaign bulletins in braille, obligating the preparation of campaign bulletins in braille as mandatory does not seem to restrict candidates' freedom of election campaign. Therefore, the Instant Provision infringes upon the right to vote and the right to equality of people with visual impairment like the complainant.

20. Case on the General Prohibition of Multiple Nationalities

[26-1(B) KCCR 578, 2011Hun-Ma502, June 26, 2014]

In this case, the Constitutional Court held that the complainants' claims with regard to Article 10 Section 1 and Article 15 Section 1 of the Nationality Act that prohibit multiple nationalities in principle and Article 10 Section 2 Item 4 of the Nationality Act that permits multiple nationalities in exception are not justiciable for the lack of self-relatedness and presentness, except the complainant Kim ○-Nam; and the Court rejected the complainant Kim ○-Nam's claim with regard to Article 15 Section 1 of the Nationality Act for not infringing the freedom to move residence and right to pursue happiness under the principle against excessive restriction.

Introduction of Case

(1) The complainant, Korea Oversea Voters Association (hereinafter, KOVA), was established under the purpose to promote the political rights of Koreans living overseas on May 14, 2009. The complainant, Kim ○-Nam, was a 69 years old Korean at the time of the filing of this Constitutional Complaint, who also attained the right of permanent residence of the U.S. on June 6, 1984.

(2) The complainant Sul ○-Hyuk, Lee ○-Chang, Choi ○-Sun, and Choi ○-Jong were Koreans who were born on March 17, 1960, December 10, 1947, March 5, 1951, and July 19, 1948, in order, and lost their Korean nationalities by attaining the citizenship of the U.S.

(3) The constitutional complainant was filed on September 1, 2011 in that the complainant Kim ○-Nam alleged the unconstitutionality of Article 15 Section 1 of the Nationality Act, the complainant Sul ○-Hyuk, Lee ○-Chang, Choi ○-Sun and Choi ○-Jong alleged the unconstitutionality of Article 10 Section 1, Section 2 Item 4 of the Nationality Act, and the KOVA alleged the unconstitutionality of the aforementioned provisions that prohibit multiple nationalities in principle.

Subject Matter of Review

The subject matter of review is whether Article 10 Section 1, Section 2 Item 4 of the Nationality Act (revised by Act No. 10275 on May 4, 2010) and Article 15 Section 1 of the Nationality Act (revised by Act No. 8892 on March 14, 2008) infringe the basic rights of the complainants, and the substances of the provisions at issue are as follows:

Nationality Act (revised by Act No. 10275 on May 4, 2010)

Article 10 (Obligation of Persons who Retain Nationality of the Republic of Korea to Renounce Foreign Nationality)

(1) A foreigner who has attained the nationality of the Republic of Korea but retains a nationality of a foreign country shall renounce the nationality of the foreign country within one year after the attainment of the nationality of the Republic of Korea.

(2) Notwithstanding paragraph (1), any of the following persons shall either renounce the nationality of the foreign country or vow his/her intention not to exercise his/her foreign nationality in the Republic of Korea to the Minister of Justice, as prescribed by the Minister of Justice, within one year from the date he/she attained the nationality of the Republic of Korea:

4. A person who has obtained permission for the reinstatement of nationality under Article 9 by entering the Republic of Korea for the purpose of permanently residing therein after fully turning 65 years of age after having resided in a foreign country;

Nationality Act (revised by Act No. 8892 on March 14, 2008)

Article 15 (Loss of Nationality by Attainment of Foreign Nationality)

(1) A national of the Republic of Korea who has voluntarily attained the nationality of a foreign country shall lose the nationality of the Republic of Korea at the time of attainment of the foreign nationality.

Summary of Decision

A. Review on Justiciability

The claim of the KOVA does not satisfy the requirement of self-relatedness since the organization filed the constitutional complaint for remedies of its members.

With regard to the claim of the complainants Sul ○-Hyeok and others, who retain foreign nationalities, relating to Article 10 Section 1 of the Nationality Act, foreigners are not the bearers of the basic rights relating to political rights and freedom of entry to Korea. A person who attained the Korean nationality and lost the foreign nationality can still exercise the right to property, and the freedom to multiple nationalities is not protected by the right to pursue happiness under our Constitution. These considerations suggest that this claim lacks the bearers of basic rights and possibilities of restriction on basic rights.

The claim of the complainants, Sul ○-Hyeok and others, relating to Article 10 Section 2 Item 4 of the Nationality Act, lacks the self-relatedness and presentness in restricting the basic rights since the aforementioned complainants have not obtained or applied to the permission for the reinstatement of nationality by entering Korea for the purpose of permanently residing.

Therefore, the claims of the complainants are not justiciable, except the claim of the complainant Kim ○-Nam.

B. Review on Merits

Article 15 Section 1 of the Nationality Act, which is the subject of the claim of the complainant Kim ○-Nam, has legitimate legislative purpose and appropriate means since it stipulates that a Korean national who has voluntarily attained the nationality of a foreign country shall lose the nationality of Korea at the time of attainment of the foreign nationality to protect our Nation and People and to prevent the problems of

immigration control, evasion of duties as Korean nationals, and diplomatic protection arising from multiple nationalities.

The policy on nationality should be determined comprehensively taking into account historical tradition and political, economic, social and cultural backgrounds. If the nationality of Korea is allowed to a person who has voluntarily attained the nationality of a foreign country, several problems may occur: Immigration control would become difficult, multiple nationalities would be abused to evade the obligatory military service and duty of tax payment, and diplomatic protection would overlap. The growing international awareness that the issue surrounding nationality is not exclusive domestic jurisdiction, is targeted at the prevention of a stateless person, which should be distinguished from this case. The Nationality Act allows multiple nationalities in exception and has provisions to reinstate Korean nationality through permission, which is a separate and simple procedure, for a foreigner who lost the Korean nationality. These circumstances suggest that Article 15 Section 1 of the Nationality Act does not violate the principle against the least restriction.

Article 15 Section 1 of the Nationality Act does not violate the principle of balance of interests, because the public interests to prevent the problems, including the evasion of obligatory military service, arising out of unlimited multiple nationalities, exceed the restricted private interest.

Therefore, Article 15 Section 1 of the Nationality Act does not infringe the freedom to move his/her residence and right to pursue happiness under the principle against the excessive restriction.

21. Case on the Constitutionality of Using Water Cannon

[26-1(B) KCCR 588, 2011Hun-Ma815, June 26, 2014]

In this case, the Constitutional Court held that the constitutional complaint regarding the use of water cannon by the police superintendent of Seoul Yeongdeungpo Police Station on November 10, 2011 is dismissed for the lack of justiciable interests.

Introduction of Case

(1) The Korean Alliance against Korea-U.S. FTA held a rally against Korea-U.S. FTA in front of the Korea Development Bank building at Yeoeuido around 14:00 on November 10, 2011. However, the participants of the aforementioned rally attempted to enter the National Assembly building and the headquarter of Grand National Party, after occupying the four traffic lanes in front of Yeoeuido Culture Plaza and four traffic lanes in front of the Korea Development Bank, beyond the notified assembly place, which was sidewalk in front of the back gate of the Korea Development Bank, after the aforementioned rally was terminated around 15:30. The respondent deterred the participants from occupying the roads under the decision that the rally did not observe the notified assembly place and obstructed general traffics. During between 15:46 and 16:16, the respondent turned water cannon on the rally participants, including the complainants.

(2) Because of the use of water cannon, the complainant Park ○-Jin was injured for traumatic tympanic membrane perforation, and the complainant Lee ○-Sil was injured for concussion. The complainants filed this constitutional complaint on December 15, 2011, alleging that the use of water cannon infringed the basic rights of the complainants.

Subject Matter of Review

The subject matter of review is whether the use of water cannon around between 15:46 and 16:16 on November 10, 2011 (hereinafter, the 'use of water cannon') infringed the basic rights of the complainants.

Summary of Decision

The use of cannon was terminated, suggesting that the infringement on the basic rights of the complainants was also terminated. This case lacks the justiciable interests since remedies would not be provided even if this constitutional complaint is sustained.

According to Article 10 of the former Act on the Performance of Duties by Police Officers, Article 2 Item 4 of the Usage Standard of Police Equipment, Article 97 Section 2 Item 3 of the former Management Standard of Police Equipment, related provisions of Manual for Water Cannon and judgments of the Supreme Court, water cannon can be turned against an assembly or demonstration which causes direct and clear danger to interests of others or public safety and order, with the notice of specific grounds for dissolution. Therefore, the alleged infringement of the basic rights, which is a short-distance direct use of water cannon at places of assembly in this case, would not be repeated. Even if the use of water cannon violated the limits under the laws, it would be a matter to be determined by the ordinary court to specific fact findings: It is not a constitutional subject that should be decided by the Constitutional Court. Therefore, there are no exceptional justiciable interests for constitutional review

Summary of Dissenting Opinion by Three Justices

A. Issue of Justiciable Interests

The justiciable interest can be exceptionally sustained because use of water cannon at places of assembly or demonstration may be repeated

and there has been no constitutional review.

B. Principle of Statutory Reservation

Statutes should stipulate the significant substances on grounds of usage and standard for water cannon, a police equipment that may cause substantial danger to life and body of the people. Because the former Act on the Performance of Duties by Police Officers does not provide any provision, the usage of water cannon in this case violates the principle of statutory reservation.

C. Due Process

The use of water cannon in this case violates the principle of due process in that it did not follow the proceedings for dissolution order.

D. Freedom of Assembly

There were no active offences or violence or dangerous objects, except that the rally participants attempted to march to the National Assembly building with slogans, using a microphone and speaker, and pickets. Nonetheless, the respondent promptly turned on the water cannon: The respondent used a warning watering in mere 10 minutes right after the marching began, a dispersion watering for around 15 seconds, a curved watering for around 10 seconds, and three direct watering for around 14 minutes in total. The respondent intensively used direct watering that may cause serious injuries to life and body for the longest time. Direct watering of water cannon should be the last resort only when there is a direct and clear danger to interests of others or public safety and order because direct watering may cause serious effects, regardless of whether it was intentional or accidental. Because we cannot find any grounds to justify direct watering of water cannon in this case, the freedom of assembly was violated.

22. Case on the Property Registration and Employment Restriction on Employees of Grade IV or Higher of the Financial Supervisory Service

[26-1(B) KCCR 609, 2012Hun-Ma331, June 26, 2014]

In this case, the Constitutional Court held that provisions under the Public Service Ethics Act that impose the obligation to register property and to restrict employment at private firms for two years from the retirement on employees of grade IV or higher working for the Financial Supervisory Service are not unconstitutional. The provisions do not infringe the privacy right, freedom to occupation and right to equality in that the provisions have the purposes to prevent possible corruption arising from the substantial exercise of influence to financial institutions and back scratching alliance with financial institutions, under the nature of the Financial Supervisory Service that examines, supervises and sanctions business and status of property of financial institutions.

Introduction of Case

The complainants are employees of grade IV or higher working for the Financial Supervisory Service. The complainants filed this constitutional complaint with the allegation that the provisions of the Public Service Ethics Act that impose the duty to register property and the restriction of employment for a certain period after retirement on employees of grade IV or higher working for the Financial Supervisory Service infringe their privacy right, freedom to occupation and right to equality.

Subject Matter of Review

The subject matter of review is the unconstitutionality of the part relating to Article 3 Section 4 Item 15 of the Enforcement Decree of the

Public Service Ethics Act (revised by Presidential Decree No. 23271 on October 28, 2011) of Article 3 Section 1 Item 13 of the Public Service Ethics Act (revised by Act No. 9402 on February 3, 2009) (hereinafter referred to as the "property registration provision") and the part relating to Article 3 Section 4 Item 15, which is applicable under Article 31 of the Enforcement Decree of the Public Service Ethics Act of Article 17 Section 1 of the former Public Service Ethics Act (revised by Act No. 10982 on July 29, but prior to the revision of Act No. 11873 on June 7, 2013) (hereinafter referred to as the "employment restriction provision").

Public Service Ethics Act (revised by Act No. 9402 on February 3, 2009)

Article 3 (Persons Liable for Registration)

(1) Any of the following public officials (hereinafter referred to as "person liable for registration") shall register property as prescribed in this Act:

13. Other public officials in specified fields and personnel of public service-related organizations as prescribed by the National Assembly Regulations, the Supreme Court Regulations, and Presidential Decree.

The former Public Service Ethics Act (revised by Act No. 10982 on July 29, but prior to the revision of Act No. 11873 on June 7, 2013)

Article 17 (Restriction on Employment of Retired Public Officials in Related Private Enterprises, etc.)

(1) No public official or executive or employee of a public service-related organization who was engaged in a grade of position or field of duties prescribed by Presidential Decree (hereinafter referred to as a "person subject to employment examination") shall be employed for a period of two years immediately after his/her retirement by any of the following private enterprises, etc. (hereinafter referred to as a "private enterprise, etc.") connected closely with the business of the department to which he/she belonged for five years immediately before his/her

retirement: Provided, That this shall not apply if such employment is approved by the competent public service ethics committee:

(The items are intentionally omitted)

Related Provision

Enforcement Decree of the Public Service Ethics Act (revised by Presidential Decree No. 23271 on October 28, 2011)

Article 3 (Persons Liable for Registration)

(4) The term "public officials in specified fields and personnel of public service-related organizations as prescribed by Presidential Decree" in Article 3 (1) 13 of the Act shall be as follows:

15. Employees of Grade IV or higher working for the Financial Supervisory Service under the Act on the Establishment of Financial Services Commission

Article 31 (Persons Subject to Employment Review)

Public officials and executives and employees of public service-related organizations whose employment is restricted under Article 17 (1) of the Act (hereinafter referred to as "persons subject to employment review") shall be those liable for registration provided for in Article 3 of the Act.

Summary of Decision

A. Constitutionality of the Property Registration Provision

(1) Privacy Right

The property registration provision that provides the obligation to register their property under the Public Service Ethics Act for employees of the Financial Supervisory Service has a legitimate purpose to prevent possible corruption in advance and to promote transparency and integrity. The imposition of obligation to register their property for employees of certain grade or higher would be the appropriate means under the

circumstances that the Financial Supervisory Service, which is responsible for the examination, supervision, and sanction on the business and status of property of financial institutions, may exercise the substantial influence to financial institutions and have the possibility of corruption.

The registration of property should be distinguished from the public disclosure of property: Several protections, including the prohibition of disclosure of registered property items and the use beyond the original purpose, are provided for the registration of property. Spouses and lineal ascendants and descendants are also subject to the registration of property; nonetheless, it is inevitable to prevent concealing the property to be registered. The option of refusal notice and exclusion of property belonging to the married lineal women descendant and maternal grandparent also minimizes the damage. Considering that the public interests to promote the transparency and responsibility of the Financial Supervisory Service under the property registration provision exceed the restricted private interests which merely concerns the privacy in property, the principle of balance of interests are not infringed. Therefore, the property registration provision does not violate the right and freedom to privacy.

(2) Right to Equality

It is alleged that the property registration provision discriminates employees of grade IV or higher working for the Financial Supervisory Service against the employees of the Financial Services Commission, Bank of Korea, and Korea Deposit Insurance Corporation. Because the Financial Services Commission is also responsible for the supervision and sanction on the financial institutions, which is identical to the business of the Financial Supervisory Service, it is reasonable to impose the obligation to register property on employees of grade IV or higher as the case of the Financial Service Commission. On the other hand, the Bank of Korea is responsible for the establishment and execution of the monetary policy and currency issuance and the Korea Deposit Insurance

Corporation is responsible for the liquidation of insolvent financial institutions, implying that the employees of the Financial Supervisory Service has more substantial influence and higher possibilities of corruption than the employees of those organizations. Accordingly, it is reasonable to require the employees of grade IV or higher of the Financial Supervisory Service to register their properties, unlike the employees of the Bank of Korea or the Korea Deposit Insurance Corporation. Therefore, the property registration provision does not violate the right to equality.

B. Constitutionality of the Employment Restriction Provision

(1) Freedom to Occupation

The employment restriction provision has a legitimate legislative purpose in that it intends to promote the fairness of business of the Financial Supervisory Service and sound financial order by preventing the possibilities to give preference to a certain firm for the employment at the firm after their retirement, to use confidential information obtained in office for the new employer after their retirement, and to exercise illegitimate influence to the Financial Supervisory Service in advance. The restriction on the employment of a former employee of a certain grade or higher at a private firm which is closely connected with the business of the department to which he/she belonged for a certain period is the appropriate means to achieve the legislative purpose.

The employment restriction provision restricts the employment at a large-scale private firm which is closely related to the business of the department where the former employee belonged; provides that the employees of the Financial Supervisory Service who worked at the department relating to the examination, review, supervision, and permission business are only subject to the employment examination; and restricts the employment of grade IV and higher only. In addition, the instant provision provides that the re-employment is restricted in case of working more than five years at the related department, based on the

reflective consideration that the former provision provided the restriction in case of working more than three years at the related department. The instant provision also allows the re-employment after two years from his/her retirement. The system to examine whether he/she is subject to the employment restriction in advance is provided; preferential employment is possible; and there is an exception for the employment if it is permitted by the Commission of Public Service Ethics. Therefore, the employment restriction provision does not violate the principle of the least restriction. The principle of balance of interests is not violated under the consideration of the significance of the public interests achieved by the employment restriction provision. Therefore, the employment restriction provision does not infringe the freedom to occupation.

(2) Right to Equality

It should be examined whether the employment restriction provision discriminates the employees of grade IV or higher of the Financial Supervisory Service against the employees of the Financial Services Commission, Bank of Korea, and Korea Deposit Insurance Corporation. For the similarity between the Financial Supervisory Service and the Financial Service Commission in the possibilities of back scratching alliance with financial institutions and exercising illegitimate influence to financial institutions, based on their identical business, it is reasonable to restrict the employment of employees of grade IV or higher of the Financial Supervisory Service as the ones of the Financial Services Commission. The fundamental differences between the Financial Supervisory Service and the Bank of Korea and Korea Deposit Insurance in the possibilities of back scratching alliance and illegitimate influence to financial institutions, based on their different business, justify the stricter provision to restrict the employment of employees of grade IV or higher working for the Financial Supervisory Service, compared to the case of the Bank of Korea or the Korea Deposit Insurance. Therefore, the employment restriction provision does not violate the right to equality.

23. Case on the Restriction on Religious Assemblies of Pretrial Detainees and Unassigned Inmates

[26-1(B) KCCR 670, 2012Hun-Ma782, June 26, 2014]

In this case, the Constitutional Court held that it was unconstitutional for the warden of the Busan Detention Center to limit the participation of the complainant in religious activities that were served on every Tuesday within the detention center when the complainant had been detained from April 16, 2012 to September 19, 2012, except the period of April 18 through April 27, May 4 through May 20, and May 25 through June 21, 2012, ruling that such action infringed the freedom of religion.

Introduction of Case

(1) The complainants had been detained on a charge of violation of the Punishment of Violence, etc. Act at the Busan Detention Center from April 16, 2012 to even after July 26, 2012 when his conviction was confirmed because another trial was pending. The complainant filed this constitutional complaint on September 19, 2012, alleging that the restriction on his attendance at religious assemblies held within the Busan Detention Center since his detention infringed his freedom of religion.

(2) The Busan Detention Center provided several opportunities of religious activities under the ‘operating plan to educate and reform detainees’ and the ‘implementation plan for religious assemblies of unassigned inmates’: 3 or 4 religious assemblies per month for working inmates (inmates in charge of working) and 1 religious assembly per month for other inmates, including labor inmates, unassigned inmates (inmates whose additional trial is pending, whose remaining detention period is less than 3 months, or who is subject to transfer), and pretrial

detainees at the ‘religion hall’ where around 40 men inmates can be accommodated. The Busan Detention Center provides various religious activities depending on the day of the week. The Christian religious assemblies are held on every Tuesday.

Subject Matter of Review

The subject matter of review is whether it infringed the complainant’s basic rights for the respondent to restrict the participation in religious assemblies held within the detention center on every Tuesday from April 16, 2012 to July 26, 2012, when the complainant had been detained as a pretrial detainee, except April 18 through April 27, May 4 through May 16, May 25 through June 6, and June 7 through June 21 when the complainant had been under the investigation and punishment and except May 17 through May 20 when he had been detained at the special cell; and from July 27, 2012 to September 19, 2012 when the complainant had been detained as an unassigned inmate(hereinafter, the “restriction on the attendance at religious activities”).

Summary of Decision

The correctional facility, including a detention center and prison, requires strict discipline and regulation to maintain the security of the facility, staff, and detainees. Nonetheless, sentenced inmates as well as pretrial detainees should deserve the opportunity to attend religious activities because religious activities contribute to education and reformation of inmates and mental security of detainees and the law provides that detainees can attend religious activities.

The original purpose of religious activities at the detention center is education and reformation, suggesting that it is reasonable for the respondent to provide religious activities in principle. Nevertheless, the respondent provides 3 or 4 opportunities to attend religious activities per month for working inmates which amounts 1/8 of pretrial detainees and

unassigned inmates, whereas pretrial detainees and unassigned inmates are provided 1 opportunity to attend religious activities per month in principle. In practice, pretrial detainees and unassigned inmates are provided 1 opportunity to attend per year because the religious assemblies are held at each building in turn, due to the lack of seating capacity and staff. Considering that the detention period of pretrial detainees and unassigned inmates is short, the opportunities to attend religious activities are de facto not provided for them. Therefore, the respondent's action excessively restricted the freedom of religion of the complainant even under the consideration of inferior facilities of the Busan Detention Center.

In addition, the respondent did not consider the less restrictive means, which could be a way to distribute appropriately opportunities to attend religious activities for the freedom of religion to working inmates and other inmates under the given circumstances, a way to allow the attendance at religious activities by separating accessories or related persons, if any, or a way to allow the attendance of unassigned inmates at the religious activities for working inmates if there are no accessories or related persons. Therefore, the restriction on the attendance at religious activities did not satisfy the least restriction principle.

The restriction on the attendance at religious activities may contribute to the security and order of the detention center and smooth religious activities. Nevertheless, such public interests did not exceed the significance of the infringement of freedom of religion, suggesting the principle of balance of interest was violated.

Therefore, the respondent's restriction on the attendance at religious activities infringed the freedom of religion of the complainant under the principle against excessive restriction.

24. Interim Injunction Case on Refugee's Right to Counsel

[26-1(B) KCCR 680, 2014Hun-Sa592, June 5, 2014]

In this case, the Constitutional Court issued the interim injunction to determine the temporary status that the head of Incheon Airport Immigration Office shall immediately grant an application to consultation with a counsel, where the head of Incheon Airport Immigration Office disallowed a request to consultation with counsel by a foreigner, who was prohibited from entering the Republic of Korea and filed, subsequently, a habeas corpus petition and a lawsuit to annul the decision to disallow the referring to refugee status determination.

Introduction of Case

(1) The complainant, whose nationality is the Republic of the Sudan, departed from Khartoum Airport on November 18, 2013 and arrived at Incheon International Airport on November 20, 2013. In the entry procedure, the complainant applied for recognition of refugee status, alleging life-threatening circumstances because of his refusal to the conscription for slaughter of his people by the North Sudan Government around September 2013. He received the decision to disallow the referring to refugee status determination and prohibition of entry on the same day.

(2) The complainant filed a habeas corpus petition and a lawsuit to annul the decision to disallow the referring to refugee status determination against the head of Incheon Airport Immigration Office (hereinafter, "respondent"). For the consultation with regard to the petition and lawsuit, the complainant requested to be visited by his counsel. When the respondent disallowed the complainant's request to consultation with his counsel (hereinafter, the "disallowance") on April 25, 2014, the complainant argued his right to counsel was infringed, thereby filing the Constitutional Complaint (Case No. 2014Hun-Ma346).

(3) While filing the Constitutional Complaint, the complainant also

filed a motion for interim injunction to permit the request to be visited by counsel on April 25, 2014, for consulting with his counsel with regard to his cases as his principal claim, and to suspend the effects of the disallowance until the final decision of the Constitutional Complaint as his secondary claim.

Summary of Decision

A. The complainant's case to request the temporary release from confinement against the respondent under the Habeas Corpus Act was decided in favor of the complainant; the re-appeal for the habeas corpus petition is pending after its appeal was admitted; and the district court admitted the complainant's request to annul the decision to disallow the referring to refugee status determination. Nonetheless, there are possibilities that both petition and lawsuit may be rejected at the appellate court. We should note that the appellate court cancelled the judgment of the trial court with regard to the habeas corpus petition. The complainant has not been visited by his counsel for more than five months, since the case was filed, implying that the right to fair trial was significantly infringed. Under these circumstances, the complainant may lose the opportunity to appeal without consulting with his counsel if the respondent's re-appeal was admitted, causing substantially irrecoverable damages. We also recognize the urgent necessity to prevent damages in that the re-appeal of habeas corpus petition was filed on May 19, 2014, assuming the court decision regarding the re-appeal is imminent.

B. While the immediate permission of the complainant's consultation with his counsel would not specifically affect the respondent's affairs including immigration control and maintenance of order in transit area, the dismissal of this interim injunction would cause irrecoverable damage to the complainant as stated above. Accordingly, the disadvantages that would be followed by the rejection of the Constitutional Complainant after the acceptance of the instant interim injunction would not

overweigh the disadvantages that would be followed by the acceptance of the Constitutional Complainant after the rejection of the instant interim injunction.

25. Case on restricting voting right of overseas electors

[26-2(A) KCCR 173, 2009Hun-Ma256, 2010Hun-Ma394 (consolidated), July 24, 2014]

In this case, the Constitutional Court held that Article 14 Section 1 of the National Referendum Act that restricts the suffrage of overseas Koreans does not conform to the Constitution, as it violates the right to vote of overseas Koreans. Also, the Court declared that the proviso of Article 15 Section 1 and Article 218-5 Section 1 of the Public Official Election Act that do not recognize overseas electors' right to vote in an election of the National Assembly members of local constituencies due to the termination of the term of membership; Article 218-5 Section 1 of the Public Official Election Act that does not recognize the right to vote in the by-election of the National Assembly members and adopts the apply-and-register system for overseas electors for making the overseas electoral register; and Article 218-19 Section 1 and Section 2 of the Public Official Election Act that require overseas electors to visit a polling place in person prepared in embassies are not in violation of the Constitution.

Background of the Case

The complainants are Korean nationals over 19 years old, living in Japan and the U.S.A. without reporting domestic residence or being registered as residents (hereinafter, 'overseas electors'). They filed this constitutional complaint on May 12, 2009, arguing that Article 218-4 Section 1 of the Public Official Election Act and Article 14 Section 1 of the National Referendum Act, etc., infringe on their fundamental right to vote as the provisions deprive them of their right to cast votes for National Assembly elections and participate in national referendums.

Provisions at Issue

The subject matters of this case are whether (1) the proviso of Article 15 Article 20 Section 4 of the Public Official Election Act (amended by Act No.12267, January 17, 2014) (hereinafter the 'Right to Vote Provision'); (2) the part of 'whenever an election of members of proportional representation for the National Assembly due to the termination of the term of membership are held, any elector who intends to vote overseas shall file an application for registration of an overseas elector' in Article 218-5 Section 1 of the Public Official Election Act (amended by Act No. 11485, October 2, 2012) (hereinafter, the 'Overseas Elector Registration Provision'); (3) the part of Article 218-19 Section 1 and Section 2 of the Public Official Election Act (amended by Act No. 11485, October 2, 2012) that requires overseas electors to visit in person overseas polling places to case votes (hereinafter, the 'Overseas Voting Procedure Provision'); and (4) the part of 'eligible voters registered as residents in their jurisdictional area and those, as Korean nationals residing abroad under Article 2 of the Act on the Immigration and Legal Status of Overseas Koreans, whose domestic residence reports have been made under Article 6 of the same Act' in Article 14 Section 1 of the National Referendum Act(amended by Act No. 9467, February 12, 2009)' (hereinafter, the 'National Referendum Provision') infringe on the fundamental rights of the complainants. The provisions at issue in this case are as follows:

○ Public Official Election Act (amended by Act No.12267, January 17, 2014)

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):

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

2. 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

○ Public Official Election Act (amended by Act No. 11485, October 2, 2012)

Article 218-5 (Application for Registration of Overseas Electors) (1) Whenever a presidential election and an election of members of proportional representation for the National Assembly due to the termination of the term of membership are held, any elector who intends to vote overseas, as a person whose resident registration has not been made or whose domestic domicile has not been reported, shall file an application for registration of an overseas elector with the National Election Commission from 150 days to 60 days before the election day (hereinafter referred to as the “period for application for registration of overseas electors” in this CHAPTER) in one of the following manners:

1. by visiting overseas diplomatic missions in person. In this case, Korean nationals can file an application on behalf of their family members (including spouses, lineal descendents and ascendants and spouses’ lineal descendents and ascendants) with the copy of their passport

2. by submitting an application to officers who make the rounds for overseas voter

3. by e-mail

Article 218-19 (Procedures for Voting of Overseas Election) (1) An overseas elector, etc. shall go to an overseas polling place and shall present a ballot paper, an envelope for sending and an envelope for return, which are received from his/her Gu/Si/Gun election commission, and an identification card (referring to a passport, resident registration card, public official identification card, driver’s license, or other

certificate issued by a public office or public agency of the Republic of Korea and by which a person is identifiable with a photograph attached thereto, or a certificate issued the government of his/her residing country and by which a person is identifiable with a photograph attached thereto and his/her name and date of birth are written thereon, to identify such elector) in the presence of the members of an overseas election commission and voting witnesses, and shall, after the identification is confirmed, enter a polling booth to write the name of a candidate (limited to a presidential election and an election of members of local constituencies for the National Assembly) or the name or mark of a party on a ballot paper, put such paper in an envelope for return and seal the envelope, and put such envelope in a ballot box before voting witnesses.

(2) Overseas elector who applied for regulation pursuant to Article 218-5 Section 1 Item 3, shall cast a vote pursuant to Section 1 after conforming their identity by presenting original copies of the documents publicly notified by the officer of the mission having jurisdiction over his/her area of residence under Article 3 to, and presenting any identification card pursuant to Section 1 if no photo to identify such elector was attached to the document.

○ National Referendum Act (amended by Act No. 9467, February 12, 2009)

Article 14 (Preparation of Pollbooks) (1) Each time a national referendum is held, the head of a Gu (including the head of an autonomous Gu, and in cases of a Si which is of the urban and rural complex form, it is limited to the Dong area), the head of a Si (referring to a Si where no Guis established, and in cases of a Si which is of the urban and rural complex form, it is limited to the Dong area), the head of an Eup/Myon (hereinafter referred to as “head of the Si/Gu/ Eup/Myon”), shall investigate for each voting district the eligible voters registered as residents in his jurisdictional area and those, as Korean nationals residing abroad under Article 2 of the Act on the Immigration and Legal Status of Overseas Koreans, whose domestic residence reports

have been made under Article 6 of the same Act as of the day on which the date of the national referendum is announced publicly, and prepare a pollbook within five days after the date of the national referendum is announced publicly.

Summary of the Decision

1. Whether the proviso of Article 15 Article 20 Section 4 of the Public Official Election Act that does not recognize overseas electors' right to vote in an election of the National Assembly members of local constituencies due to the termination of the term of membership (hereinafter, the 'Right to Vote Provision') and the part of 'whenever an election of members of proportional representation for the National Assembly due to the termination of the term of membership are held, any elector who intends to vote overseas shall file an application for registration of an overseas elector' in Article 218-5 Section 1 of the Public Official Election Act (hereinafter, the 'Overseas Elector Registration Provision')' violate overseas electors' right to vote or the principle of universal suffrage.

A local constituency National Assembly member speaks for the interests of his/her constituency, and works as a representative of the people. In this regard, compared to the Presidential Election or election of proportional representation members for the National Assembly conducted nationwide for which Korean nationals are eligible to vote, local elections require prospective voters to have 'connection with the specific locations' where such elections are held. Requiring registration as residents and report of domestic residence for participating in local constituency National Assembly member elections is a reasonable means to certify the relevant people's local connection. Therefore, the Right to Vote Provision and the Overseas Elector Registration Provision that do not acknowledge overseas elector's right to vote for an election of members of proportional representation for the National Assembly due to the termination of the term of membership cannot be regarded as

infringing on the overseas elector's right to vote or violating the principle of universal suffrage.

2. Whether the Overseas Elector Registration Provision that does not recognize the right to vote in the by-election of the National Assembly members violates the overseas elector's right to vote or the principle of universal suffrage

The legislature, while establishing overseas election system, decided not to empower overseas electors to vote for the by-election of the National Assembly members, considering the facts that frequent by-elections held in Korea may place overseas electors in constant elections; it is expected that the voting rate of by-elections held in foreign countries would be low; and it requires tremendous time and expenses to conduct overseas by-elections because whenever the grounds for by-elections are confirmed, diplomatic missions in foreign countries should prepare for such elections. And the election system established by the legislature cannot be considered distinctively unreasonable or unfair. Therefore, the Overseas Elector Registration Provision does not violate overseas elector's right to vote or the principle of universal suffrage.

3. Whether the Overseas Elector Registration Provision that requires overseas electors to file an application for registration whenever elections are held violates overseas elector's right to vote

The method to make the electoral roll of overseas electors based on their application for registration is a reasonable way to prevent disorder in voting as it confirms overseas electors' right to vote in a relevant election and to register overseas electors who have the right to vote in the electoral roll. Therefore, the Overseas Elector Registration Provision does not violate overseas elector's right to vote.

4. Whether the part of Article 218-19 Section 1 and Section 2 of the Public Official Election Act that requires overseas electors to visit in person, not by mail or Internet, overseas polling places to case votes

(hereinafter, the 'Overseas Voting Procedure Provision') violates overseas electors' right to vote

The legislators' decision, in consideration of the fairness in election, the technical problems in election such as delivery of voting paper, effectiveness, etc., to opt for overseas elector's personal visit to a overseas polling place in order to cast a vote, not by mail or internet, does not seem unacceptably unfair or unreasonable. Therefore, the Overseas Voting Procedure Provision does not violate overseas elector's right to vote.

5. Whether the part of 'eligible voters registered as residents in their jurisdictional area and those, as Korean nationals residing abroad under Article 2 of the Act on the Immigration and Legal Status of Overseas Koreans, whose domestic residence reports have been made under Article 6 of the same Act' in Article 14 Section 1 of the National Referendum Act (hereinafter, the 'National Referendum Provision')' violates overseas elector's right to vote

A referendum on important national policy stipulated in Article 72 of the Constitution and a referendum on the amendment to the Constitution stipulated in Article 130 of the Constitution are the process in which citizens approve the decision of the National Assembly and the President. It is a logical conclusion that the subject of the right to elect representative organs also becomes the subject of the right to approve the decision of such representative organs. Since overseas electors, as the people with the right to elect representative organs, have also the right to approve the decisions made by the representative organs, overseas electors should be considered as the people with the right to participate in a national referendum. Also, different from elections, as a national referendum is a process where the people directly participate in national politics, those who are qualified as Korean nationals should be eligible to participate in referendum. As such, the exclusion of the right to participate in referendum, fundamentally derived from the status as Korean nationals, simply due to abstract danger or difficulties in election

technics, amounts to practical deprivation of the franchise endowed by the Constitution. Therefore, the National Referendum Provision infringes on overseas electors' right to participate in referendum.

6. Decision of nonconformity to the Constitution regarding the National Referendum Provision

The instant nullification of the National Referendum Provision on the ground of the Court's declaration of unconstitutionality will result in making it impossible to prepare for voter's list even when a referendum is scheduled to be held. Therefore, tentative application of the National Referendum Provision is necessary until when the legislature amends the provision. Also, there are many problems to be solved in terms of technical difficulties in the referendum process and fairness of referendum. Therefore, the Court declares that the National Referendum Provision does not conform to the Constitution, but orders tentative application of the provision until the legislature cures the defects.

Summary of Partial Dissenting Opinion by Two Justices

Under the Constitution which adopts free delegation system, although the National Assembly members are elected within their relevant constituencies, they are also the 'representatives of the people', not legally bound by electors within their constituencies or directives of political parties. Although the National Assembly members of local constituencies are practically considered as local representatives in practice, they should not be jurisdictionally considered as mere local representatives. The possibility that some practical difficulties, such as choice of local constituency may be expected, cannot be the ground for denial of the right to vote itself, which is apparently contradictory to the representativeness of National Assembly members. Also, such a denial can bring about not only inequality in the value of vote but also inequality in the distribution of seats in the National Assembly, violating the principle of equality in election. As a result, the Voting Right

Provision and the Overseas Elector Registration Provision infringe on overseas electors' right to vote.

Summary of Partial Dissenting Opinion by Three Justices

The only way for overseas electors to vote in foreign countries under the Overseas Voting Procedure Provision is to visit polling places in person located in foreign missions, which fails to effectively guarantee the right to vote of overseas electors who live in countries where no foreign missions exist or far from Korean embassies, if any. The vote-by-mail system enables such long distance voters or those who are unable to attend their polling places due to work commitment on Election Day to participate in elections. As such, even though it is possible to practically assure overseas electors' right to vote while effectively preventing fraudulent election, the Overseas Voting Procedure Provision only allows overseas electors to visit polling places in person. This method clearly imposes excessive burden on overseas electors in exercising their voting right, thereby infringing the right to vote.

Summary of Partial Dissenting Opinion by Two Justices

A referendum is the process in which the people's opinions and intention on the key issues under the Korean constitutional order are directly reflected and implemented: therefore, geographical proximity to the country can be a factor that limits the scope of right to participate in a referendum. As the subject matters of a national referendum including the important policies on diplomacy, national defense, unification and other matters relating to national security stipulated in Article 72 of the Constitution are areas that can cause conflict of interests with other countries, the degree of seriousness in terms of the need to participate in a national referendum would be different between those who have registered as Korean residents or reported their domestic domicile in Korea and those who settled down in foreign countries with permanent

residency. In order to reflect people's genuine intention toward the constitutional amendment, it is possible to limit the right to participate in a referendum to those who live within the territory of Korea and reflecting geographical proximity in the constitutional amendment process is not necessarily unconstitutional. Therefore, the legislature's decision to recognize the right to participate in a referendum only to people who registered as resident or reported domestic domicile is within the reasonable legislative discretion and in this regard, the National Referendum Provision does not violate the Constitution.

26. Case on Registration of Personal Information of Sexual Offenders

[26-2(A) KCCR 226, 2013Hun-Ma423 · 426 (consolidated), July 24, 2014]

In this case, the Constitutional Court rejected the constitutional complaint on the ground that Article 32 Section 1 of the former 'Act on Special Cases concerning the Punishment, etc. of Sex Crimes,' which stipulates that any person who is finally declared guilty of indecent act by compulsion as a person subject to registration of personal information, does not infringe upon complainants' right to informational self-determination, etc., in violation of the rule against excessive restriction.

Background of the Case

The complainants were finally declared guilty of committing indecent act by compulsion and their personal information thereby became subject to registration for public disclosure pursuant to Article 32 Section 1 of the former 'Act on Special Cases concerning the Punishment, etc. of Sex Crimes.' The complainants, arguing that the aforementioned provision as a ground for registration of personal information infringes upon their fundamental rights, filed this constitutional complaint.

Provision at Issue

The subject matter of this case is whether the part providing that 'any person who is convicted of committing the crime stipulated in Article 298 of the Criminal Code (indecent act by compulsion) among those referred to in Article 2 Section 1 Item 3 is subject to registration of personal information' in Article 32 Section 1(hereinafter the 'Instant Provision') of the former 'Act on Special Cases concerning the Punishment, etc. of Sex Crimes'(enacted by Act No. 10258 on April 15, 2010 and before fully amended by Act No. 11556 on December 18,

2012, hereinafter 'the Sex Crimes Special Act') infringes on the fundamental rights of the complainants. The provision at issue in this case is as follows:

Former Act on Special Cases concerning the Punishment, etc. of Sex Crimes (enacted by Act No. 10258 on April 15, 2010 and before fully amended by Act No. 11556 on December 18, 2012)

Article 32 (Persons Subject to Registration of Personal Information) (1) Any person who is finally declared guilty of committing a crime referred to in any of Articles 2 Section 1 Item 3 and Item 4 and Section 2 (limited to Section 1 Item 3 and 4 of the same Article), Article 3 through Article 10 and Article 14 or who is conclusively declared to be subject to a disclosure order pursuant to Article 37 Section 1 Item 2 shall be subject to registration of personal information (excluding those subject to registration of personal information under Article 33 of the Act on the Protection of Children and Juveniles from Sexual Abuse).

Summary of the Decision

1. Whether the Instant Provision violates the right of informational self-determination

The Instant Provision serves as a ground for collecting and storing personal information of people who are found guilty of committing specific sexual crimes including an indecent act by compulsion. This is a proper means to achieve the legitimate purposes to protect society by curbing the recurrence of sexual crimes and to prevent social confusion through effective investigation. The criminal record or investigation materials administrated and managed pursuant to the Act on the Lapse of Criminal Sentence contain narrower scope of personal information than those collected and stored pursuant to the Instant Provision and do not reflect changes in such information, thereby being unable to provide

same effect as the information collected under the Instant Provision. Also, the series of security measures taken for sexual crimes are applicable to narrower scope of people compared to the Instant Provision. Although the Instant Provision does not consider various types of conduct constituting the crime of indecent act by compulsion or difference in the graveness of illegality, it cannot be considered as imposing unnecessary restriction to achieve the legislative purposes as the comprehensiveness is based on the characters of sexual crimes which include adultery or indecent act by compulsion as the elements of crime. Therefore, the Instant Provision satisfies the least restrictive means requirement. Further, while the restriction imposed on the private interests by the registration of personal information is relatively minor and within acceptable scope, the public interests achieved by the Instant Provision are very important, and therefore, the Instant Provision strikes the balance between legal interests. As such, the Instant Provision does not infringe upon the right of informational self determination.

2. Whether the Instant Provision violates the right to equality

The Instant Provision stipulates specific sexual crimes as subject matters to registration of personal information. Considering the types of crime, the characteristics of legal interests to be protected, social situation, prevailing public sentiment on law, trends of crime, etc., the sexual crimes prescribed under the Instant Provision and other crimes with different legal interests to protect cannot be considered as fundamentally identical groups for comparison in conducting equality review. Therefore the Instant Provision does not violate the right to equality as it is neither arbitrary nor unreasonable.

3. Recommendation to the Legislature

As reviewed before, the Instant Provision does not violate the Constitution. However, given the possibility of a certain exception to the

registration requirement in which personal information is not required to be registered, it is desirable for the legislature to come up with legislative measures that can compensate insufficient process such as appeal procedure.

Summary of Dissenting Opinion by Two Justices

Although one of the important legislative purposes of the Instant Provision is to prevent the recurrence of sexual crimes, the danger of 'recurrence of crime' has not been considered in choosing criminals subject to the registration of personal information, thereby imposing unnecessary restriction to achieve the legislative purposes and as a result, violating the least restrictive means requirement. Also, the Instant Provision fails to satisfy the least restrictive means requirement as it could have minimized the scope of crimes subject to the registration requirement by considering the characteristics of types of conduct constituting the crime or weighing the relative seriousness of culpability; subdivided categories of criminals subject to registration or periods of registration pursuant to statutory penalty or sentence by court; or provided separate appeal proceedings. Accordingly, the Instant Provision fails to strike balance between legal interests as it can result in imbalance between the private interests to be infringed and the public interests to be achieved. Therefore, the Instant Provision, in violation of the rule against excessive restriction, runs afoul of the Constitution, infringing upon the complainants' right of informational self determination.

27. Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union

[26-2(A) KCCR 242, 2011Hun-Ba32, 2011Hun-Ka18, 2012Hun-Ba185 (consolidated), August 28, 2014]

In this case, the Constitutional Court held the provision of the State Public Officials Act that prohibits collective actions of public officials and the provision of the Act on the Establishment, Operation, etc. of Trade Unions for Teachers that prohibits political activities of trade union for teachers do not violate the principle of clarity, principle against excessive restriction and principle of equality under the Constitution, despite they restrict the freedom of political expression of trade union for teachers.

Introduction of Case

(1) Petitioners of 2011Hun-Ba32 who worked for public elementary schools or secondary schools as teachers were executive members of the Korean Teachers and Education Workers Union (hereinafter, 'KTU'). At the first declaration of the state of affairs by teachers affiliated to KTU on June 18, 2009, petitioners criticized the then government for the self-righteous operation of administration that allegedly caused the crisis of democracy and lead the issuance of the declaration of the state of affairs to demand the apology of the President and the renovation of administration operation. The then minister of Education, Science and Technology decided to take disciplinary actions against the petitioners. Against the disciplinary actions, the petitioners issued the second declaration of the state of affairs on July 19, 2009. The school superintendent of Gyeongsangbuk-do dismissed or suspended the petitioners on November 26, 2009. The petitioners initiated the lawsuit to annul the disciplinary actions and also filed a motion to request a constitutional review of the State Public Officials Act (hereinafter, the "SPOA") and

Act on the Establishment, Operation, etc. of Trade Unions for Teachers (hereinafter, the "TUT Act"). When the motion was denied, the petitioners filed the constitutional complaint.

(2) Petitioners of 2011Hun-Ka18 who worked for public elementary schools or secondary schools as teachers were executive members of the KTU. The petitioners were suspended by the school superintendent of Seoul for the participation in the first and second declaration of the state of affairs on December 10, 2009. The petitioners initiated the lawsuit to annul the disciplinary action and filed a motion to request a constitutional review of the part of 'any' of Article 3 of the TUT Act while the trial was pending, which was sustained. According to the motion, the ordinary court requested a constitutional review of the aforementioned provision.

(3) Petitioners of 2012Hun-Ba185, who worked as teachers of public schools, were also executive members of KTU. The school superintendent of Busan suspended the petitioners for the participation in the first and second declaration of the state of affairs on December 21, 2009. The petitioners initiated the lawsuit to annul the disciplinary actions and filed a motion to request a constitutional review of Article 3 of the TUT Act while the appellate court procedure was pending. When the motion was denied, the petitioners filed this constitutional complaint.

Provisions at Issue

The subject matter of review is the constitutionality of the part of 'this Act' of Article 78 Section 1 Item 1 with regard to the part of 'collective activities other than public services' of the main text of Article 66 Section 1 of the State Public Officials Act (revised by Act No. 8996 on March 28, 2008) and the part of 'any political activity' of Article 3 of the Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to

the revision by Act No. 10132 on March 17, 2010), the substances of the provisions at issue are as follows:

State Public Officials Act (revised by Act No. 8996 on March 28, 2008)

Article 78 (Causes for Disciplinary Disposition) (1) If a public official falls under any of the following subparagraphs, a resolution on disciplinary action shall be requested, and a disciplinary disposition shall be taken according to the result of such disciplinary resolution:

1. Where he/she violates this Act or any order issued under this Act

Act on the Establishment, Operation, etc. of Trade Unions for Teachers (enacted by Act No. 5727 on January 29, 1999, but prior to the revision by Act No. 10132 on March 17, 2010)

Article 3 (Prohibition of Political Activities) Trade unions for teachers (hereinafter referred to as "trade unions") shall not be allowed to participate in any political activity.

Summary of Decision

A. Constitutionality of the provision of the SPOA

(1) The term of 'collective activities other than public services' of the SPOA can be interpreted as 'collective activities of public officials that may not conform to the obligation of concentration on duties for the purpose against the public interests or that may impair the credibility of public services', when Article 21 Section 1 of the Constitution that protects the freedom of press, publication, assembly, and demonstration, the legislative purpose of the SPOA, and the obligations of sincerity and concentration on duties of public officials under the SPOA are comprehensively considered. Thus, the principle of clarity is not infringed.

(2) The instant provision of the SPOA prohibits the collective political

expression of public officials in that collective activities could inherently affect public order or legal peace, contrary to individual activity; collective political expression of public officials could be regarded as the expression to represent the group interests of public officials; and it could impair the political neutrality and undermine the fairness and objectivity of public services. Especially in our political practices, the collective criticism or opposition against the government policy would be misunderstood, being regarded as intervention in politics or support for a particular political party, even if it does not express any support for a particular political party or political power. Therefore, it is unavoidable to restrict the collective expression of public officials, concluding that the principle against excessive restriction is not violated.

B. Constitutionality of the provision of the TUT Act

(1) The provision of the TUT Act prohibits 'any' political activity. Nonetheless, the comprehensive consideration of the Constitution and the Framework Act on Education that declare the political neutrality of public officials, the legislative purpose of the TUT Act, implications of trade unions for teachers (hereinafter, "TUT"), and other related provisions suggest that the instant provision of the TUT Act inherently allows activities to promote the economic and social status of teachers as union activities, and also allows political expression with regard to the education policy of elementary or secondary schools as education experts as long as it does not impair the political neutrality and does not infringe the right to education of students. Because it is reasonable to interpret the meaning of the provision of the TUT Act in a limited sense, the principle of clarity is not violated.

(2) Despite the provision of the TUT Act prohibiting any political activity of TUT, the prohibition of political activities with the collectivity of TUT does not violate the principle against the excessive restriction in that activities of teacher may substantially affect character buildings of

students who are in process to build sound character through education; a political expression of teachers that is explicitly and extensively made under the name of TUT may bring biased values to students who are not mature in developing sound views toward the world and life based on diverse values; and the allowance of teachers' political activities under the name of extensive protection of freedom of political expression could impair the substance of the right to education of students who deserve to be a responsible and sound person through education.

(3) While the provision of the TUT Act prohibits TUT from participating in political activities which are permitted to general trade unions, it does not violate the principle of equality to distinguish TUT from a general trade union, public officials union or organization of university faculty because the TUT is strictly required to be neutral in politics with regard to business and activities, due to the protection of political neutrality of education; the TUT is allowed to participate in activities to improve working conditions even though the TUT Act prohibits 'any' political activity, contrary to the Act on the Establishment, Operation, etc. of Trade Unions for Public Officials; and university faculty, who can participate in political activities without restraint, educate university students who would not be affected by the political tendency of their professors.

Summary of Opinion of Partial Dismissal by Three Justices

It were the entire teachers who signed the declarations, not the TUT, who issued the declarations of the state of affairs of this case pending in ordinary court. Because the instant provision of the TUT Act restricts political activities of TUT, not ones of individual teacher, and a penal provision of the instant provision of the TUT Act is not provided, the relevance to the underlying case is not found.

Summary of Dissenting Opinion by Two Justices

(1) The decision of whether an expression impairs public interests or not depends on the values or ethical belief of a person, implying that the interpretation of law enforcement cannot determine the meaning of the expression from an objective perspective. Even if 'collective actions other than public services' can be limitedly interpreted as 'collective actions that may bring negative effects to impair the obligation of concentration on duties against public interests', the meaning is still unclear, concluding that the principle of clarity is violated.

In addition, the provision of the SPOA prohibits any collective expression regardless of the duties or rank of public officials or office hours, even if it is expressed to protect constitutional orders. Therefore, it violates the principle against excessive restriction.

(2) The instant provision of the TUT Act prohibits 'any political activity' of teachers or TUT. Even though some political activities of teachers may be restricted for the political neutrality of education, the restriction on place, target, and contents of political activities should be limited to a partisan propaganda, political argument, or campaign toward students at schools, allowing other political activities of teachers under their political basic rights. Therefore, it violates the principle against excessive restriction.

It is unreasonable discrimination, violating the principle of equality, to prohibit any political activity of teachers of elementary or secondary schools, while university faculty can participate in political activities.

28. Case on the Inheritance of De Facto Marriage Spouse

[26-2(A) KCCR 311, 2013Hun-Ba119, August 28, 2014]

In this case, the Constitutional Court held that the part of 'spouse' in Article 1003 Section 1 of the Civil Act which does not admit the inheritance of a spouse of de facto marriage does not infringe the right to inheritance and the right to equality and does not violate Article 36 Section 1 of the Constitution.

Introduction of Case

(1) Petitioner and Lee ○-Kyeong had been in de facto marriage since August 2007, until Lee ○-Kyeong died on March 21, 2011. Kim ○-Ok, who is a mother of the decedent Lee ○-Kyeong, completed the registration of ownership transfer of the 1/2 portion of the instant real estate due to the inheritance on March 21, 2011, on April 11, 2011.

(2) Petitioner filed a complaint consisting of the principal claim for division of property and the preparatory claim for the enforcement of the procedure for the registration of ownership transfer due to the recovery of inheritance against Kim ○-Ok with Busan District Court on September 1, 2011 (The instant case was transferred to Busan Family Court on December 23, 2012).

(3) Petitioner filed a motion to request a constitutional review of Article 1003 Section 1 of the Civil Act, which was eventually denied, while the trial was pending. Subsequently, the petitioner filed this constitutional complaint on April 26, 2013.

Provision at Issue

The subject matter of review is the constitutionality of the part of 'spouse' of Article 1003 Section 1 of the Civil Act (revised by Act No.

4199 on January 13, 1990) (hereinafter, the 'instant provision') and the substance of the provision at issue is as follows:

Civil Act (revised by Act No. 4199 on January 13, 1990)
Article 1003 (Order of Inheritance of Spouse)
(1) If there exist such inheritors as provided in Article 1000 (1) 1 and 2, the spouse of the inheritee becomes a co-inheritor, in the same order as the said inheritor. If not, the spouse becomes the sole inheritor.

Summary of Decision

A. Right to Inheritance

The substance of the right to inheritance, as the right to property, should be in accord with the legislative policy. The Legislature has a broad discretion in creating the substances and limits of the right to inheritance.

The instant provision that does not recognize inheritance of a de facto marriage spouse intends to prevent possible disputes arising from inheritance, to promptly confirm legal relations regarding inheritance, and to promote the security of transaction by providing the neutral standard for inheritance. If a de facto marriage spouse can be inherit by rule, it would be against the intent of parties and it could cause legal disputes regarding inheritance to determine whether it was de facto marriage or not. A spouse of de facto marriage may inherit through the registration of marriage, or may obtain property of the deceased through gift or bequest. Also, the right to receive benefits under the Labor Standards Act, the National Pension Act and other laws is recognized for a spouse of de facto marriage. Therefore, the instant provision does not infringe the right to inheritance of the de facto marriage spouse.

B. Right to Equality

Considering that legal marriage and de facto marriage cannot be equally treated with regard to the legal relation such as inheritance which requires clarity and uniformity because of the possible effects to the third party, under the principle of legal marriage, the instant provision does not infringe the right to equality.

C. Article 36 Section 1 of the Constitution

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.” Nonetheless, Article 36 Section 1 of the Constitution does not include de facto marriage that is not legally recognized. Therefore, the instant provision does not violate Article 36 Section 1 of the Constitution.

Summary of Concurring Opinion by Justice Cho Yong-Ho

Even though the instant provision does not violate the Constitution, the general denial of inheritance of spouse of de facto marriage would lead to substantial imbalance, considering that a spouse of de facto marriage can request division of property, and may cause infringement of the right to property and welfare of a spouse of de facto marriage. Considering the meaning of inheritance that supports the family of the deceased after death and liquidates the contribution of the property of the deceased, spouses of de facto marriage are not distinguishable from spouses of legal marriage in essence. Therefore, the law should be revised to allow the right to inheritance of a spouse of de facto marriage in some cases.

Summary of Concurring Opinion by Justice Kim Chang-Jong

The right to inheritance could be recognized for a spouse of de facto marriage. Nonetheless, if inheritance should not be allowed to a spouse of de facto marriage because of neutral clarity of standard of inheritors, prompt confirmation of inheritance legal relation, and security of transaction, then the right of division of property could be an alternative to protect a spouse of de facto marriage. Therefore, the Legislature should consider measures to protect and support the right to property of a surviving spouse of de facto marriage, including the recognition of the right of division of property of a surviving spouse of de facto marriage.

29. Case on the Act on Use and Protection of DNA Identification Information

[26-2(A) KCCR 337, 2011Hun-Ma28·106·141·156·326, 2013Hun-Ma215·360 (consolidated), August 28, 2014]

In this case, the Constitutional Court held that Article 5 Section 1, Article 8 Section 3, Article 11 Section 1 of the Act on Use and Protection of DNA Identification Information regarding the collection and relevant consent for DNA samples, the storage, search and reply of DNA identification information, as well as Addenda Article 2 Section 1 about applicability are not in violation of the Constitution.

Background of the Case

(1) Complainants were subject to collection of DNA samples by warrant or consent after their court sentences of crimes listed in Article 5 Section 1 of the Act on Use and Protection of DNA Identification Information were finally affirmed.

(2) Complainants filed this constitutional complaint, arguing that the provisions of the Act on Use and Protection of DNA Identification Information regarding the collection of DNA samples from people whose sentences of certain crimes were finally affirmed, the collection of DNA samples by warrant or consent, identification of DNA samples, storage of DNA identification information and database management, search and reply of DNA identification information, deletion of DNA identification information in case of death, as well as applicability were in violation of their basic rights.

Provisions at Issue

The subject matter of this case is whether the following provisions infringe on the complainants' fundamental rights ① 'Act on Use and Protection of DNA Identification Information' (enacted by Act No. 9949, January 25, 2010, hereinafter 'the Act') Article 5 Section 1 Item 1, 4, 6 and part of 'Act on Use and Protection of DNA Identification Information' (amended by Act No. 10258, April 15, 2010) Article 5 Section 1 Item 8 relevant to complainants (hereinafter 'the Collection Provision') ② part of Article 8 Section 1 regarding a person subject to collection of DNA samples under Article 5 (hereinafter 'the Collection Warrant Provision') ③ Article 8 Section 3 (hereinafter 'the Collection Consent Provision') ④ Article 10 Section 1 (hereinafter 'the Identification, Storage and Management Provision') ⑤ Article 11 Section 1 (hereinafter 'the Search and Reply Provision') ⑥ part of Article 13 Section 3 regarding prisoners etc (hereinafter 'the Deletion Provision') ⑦ part of Addenda Article 2 Section 1 regarding a person who is in custody to serve a sentence of imprisonment, with or without prison labor, imposed and finally and conclusively affirmed for a crime under any subparagraph of Article 5 Section 1 (hereinafter 'the Addenda').

The provisions at issue in this case are as follows.

Act on Use and Protection of DNA Identification Information (enacted by Act No. 9949, January 25, 2010)

Article 5 (Collection of DNA Samples from Prisoners, etc.) (1) A public prosecutor (including a military prosecutor; the same shall apply hereinafter) may collect DNA sample from a person against whom a sentence of criminal punishment, a probation order under Article 59-2 of the Criminal Act, a sentence of medical treatment and custody under the Medical Treatment and Custody Act, or a decision of protective detention under Article 32 (1) 9 or 10 of the Juvenile Act is, or has been, finally and conclusively affirmed for any of the following crimes

or a crime concurrent to any of the following crimes (hereinafter referred to as "prisoner"): Provided, That the foregoing shall not apply where DNA identification information from DNA samples collected pursuant to Article 6 has been already stored:

1. A crime under any provision of Articles 164, 165, 166 (1), 167 (1), and 174 (applicable only to an attempted crime under Article 164 (1), 165, or 166 (1)), among crimes of arson and fire caused by negligence in Part II, Chapter III of the Criminal Act;

4. A crime under any provision of Articles 297 through 301, 301-2, 302, 303, and 305, among crimes of rape and molestation in Part II, Chapter XXXII of the Criminal Act;

6. A crime under any provision of Articles 2 (excluding cases under paragraph (2) of the same Article), 3 through 5, and 6 (excluding an attempted crime under Article 2 (2)) of the Punishment of Violences, etc. Act;

Act on Use and Protection of DNA Identification Information (amended by Act No. 10258, April 15, 2010)

Article 5 (Collection of DNA Samples from Prisoners, etc.) (1) A public prosecutor (including a military prosecutor; the same shall apply hereinafter) may collect DNA sample from a person against whom a sentence of criminal punishment, a probation order under Article 59-2 of the Criminal Act, a sentence of medical treatment and custody under the Medical Treatment and Custody Act, or a decision of protective detention under Article 32 (1) 9 or 10 of the Juvenile Act is, or has been, finally and conclusively affirmed for any of the following crimes or a crime concurrent to any of the following crimes (hereinafter referred to as "prisoner"): Provided, That the foregoing shall not apply where DNA identification information from DNA samples collected pursuant to Article 6 has been already stored:

8. A crime under any provision of Articles 3 through 11 and 14 (excluding an attempted crime under Article 13) of the Act on Special

Cases concerning the Punishment, etc. of Victims of Sexual Crimes;

Act on Use and Protection of DNA Identification Information (enacted by Act No. 9949, January 25, 2010)

Article 8 (Warrant to Collect DNA Samples) ① A public prosecutor may collect DNA samples from a person subject to collection of DNA samples under Article 5 or 6 with a warrant issued by the competent district court judge (including a military judge; the same shall apply hereinafter) at the request of the public prosecutor.

③ If a person subject to collection of DNA samples under paragraph (1) or (2) consents to the collection, DNA samples may be collected without a warrant. In such cases, a notice that the person may refuse the collection shall be given in advance, and consent thereto shall be obtained in writing.

Article 10 (Storage of DNA Identification Information, etc.) ① The Prosecutor General or the Commissioner General of the National Policy Agency may delegate or entrust a person or an agency specified by Presidential Decree (hereinafter referred to as the "person in charge of DNA identification information") with the following works:

1. Identification of DNA samples collected pursuant to Articles 5 through 9 and storage of such DNA identification information in the database;
2. Management of the database.

Article 11 (Search and Reply of DNA Identification Information) ① The person in charge of DNA identification information may search DNA identification information or reply to an inquiry with results of search in any of the following cases:

1. When new DNA identification information is stored in the database;
2. When a public prosecutor or a judicial police officer requests for

investigation of a crime or the identification of a person who died of unnatural cause;

3. When a court sends an inquiry of facts for a criminal case pending on trial;

4. When it is necessary for mutual verification between databases.

Article 13 (Deletion of DNA Identification Information) ③ If a prisoner or a detained suspect is dead, the person in charge of DNA identification information shall, ex officio or at the request of any of the deceased's relatives, delete DNA identification information collected pursuant to Article 5 or 6 and stored in the database.

Addenda((enacted by Act No. 9949, January 25, 2010)

Article 2 (Applicability to Storage of DNA Identification Information of Prisoners and Detained Suspects) ① Article 5 shall also apply to a person who is in custody to serve a sentence of imprisonment, with or without prison labor, imposed and finally and conclusively affirmed for a crime under any subparagraph of Article 5 (1) or a crime concurrent to the aforesaid crime, or a person who is in the custody of a medical treatment and custody facility or a juvenile reformatory to serve a sentence of medical treatment and custody under the Medical Treatment and Custody Act or a decision of protective detention under Article 32 (1) 9 or 10 of the Juvenile Act, as at the time this Act enters into force.

Summary of the Decision

1. The Possibility of Fundamental Rights Violation as to the Collection Warrant Provision, the Identification, Storage and Management Provision

The Collection Warrant Provision merely expresses the rule of warrant under the constitution, and the Identification, Storage and Management Provision only sets forth the logistics. Therefore there is no possibility of

fundamental rights violation as complainants' rights are not directly violated or their legal status affected by the above provisions.

2. Whether the Collection Provision violates personal liberty and equality right

The legitimacy of purpose and appropriate means requirement are satisfied as the Collection Provision allows collection of DNA samples from prisoners who committed certain crimes for investigation and prevention of crimes. The crimes subject to DNA sample collection have high risk of second offense and requires storing and managing of the DNA identification information. The Instant Provision allows collection by written consent or warrant, requires notice of the cause of the collection as well as the types and manners of DNA samples to be collected. First oral mucosa, hair then only in exceptional circumstances other body parts, body fluids etc may be collected in order to minimize the infringement on the person's body or honor, which satisfies the least restriction rule. The extent of restricted personal liberty is comparable to normal day to day life discomfort, not greater than the public good of investigation and prevention of crimes, thus the balance of interests is satisfied. So the Collection Provision does not infringe on personal liberty in violation of proportionality rule.

The crimes subject to DNA sample collection are those heavily punished due to the method or danger of the act committed, or those with statistically high risk of second offense, and it is reasonable to group these crimes subject to DNA sample collection. Thus, it is not against equality rule to collect DNA samples from only criminals who committed the crimes set forth in the Collection Provision.

3. Whether the Collection Consent Provision violates personal liberty

The Collection Consent Provision requires prior written notice that the person may decline to consent and if there is no consent then a warrant

signed by a judge is necessary for collecting. The Collection Consent Provision itself which is about collection of DNA sample with consent does not violate personal liberty against the rule of warrant and due process.

4. Whether the Deletion Provision violates the right to personal information

Prisoners etc who committed crimes with high risk of second offense have second offense risk as long as they are alive, and the Deletion Provision which seeks to help investigation and prevention of crimes by managing DNA identification information until the prisoners' death have legitimacy of purpose and is an appropriate means to achieve such purpose. DNA identification information is only numbers required for personal identification and personal genetic information cannot be deduced therefrom. Thus it is not sensitive information with serious effect on individual dignity and personality. The Instant Provision stipulates that after storing DNA identification information in the database, the DNA samples and extracted DNA shall be immediately destoyed. Also, in case of confirmed acquittal judgment, DNA identification information shall be deleted. The persons in charge of DNA personal management and DNA identification information are separate, there is a managing committee of DNA identification information database, and the use, offer, or leakage of DNA identification information outside operational purposes is prohibited and punished. In addition, database security measures are provided to protect personal information. Thus the Deletion Provision does not violate the least restriction rule. The balance of interests is also satisfied as the importance of public good achieved by using DNA identification information in crime investigation is greater than complainants' interests at stake. The Deletion Provision does not violate the right to personal information against proportionality rule.

5. Whether the Search and Reply Provision violates the right to personal information

The legitimacy of purpose and appropriate means requirement are satisfied as the necessity of the cases set forth in the Search and Reply Provision is accepted. As the measures to protect personal information are in place, it is not in violation of the least restriction rule, and the balance of interests is also satisfied as the public good for crime investigation etc is greater than the complainants' interests at stake. Thus the Search and Reply Provision does not infringe on the right to personal information against the rule of proportionality.

6. Whether the Addenda violates the rule against retroactive legislation, proportionality, and equality right

The collection and use of DNA identification information are similar to probation order etc in that they have crime prevention effects through psychological pressure. However, they are not punishment and thus not subject to the rule against retroactive legislation. As the public interests gained by retroactive application is greater than the individual's loss, the Addenda does not violate the rule against retroactive legislation by applying the Instant Provision to those in custody to serve a sentence of imprisonment, conclusively affirmed for a crime subject to DNA sample collection.

The legitimacy of purpose and appropriate means requirement are satisfied as the Addenda seeks to handle second offense risks effectively and utilize DNA identification information. It does not violate the least restriction requirement as it is within legal discretion to retroactively apply to ex-convicts serving imprisonment sentences. The trust of those serving imprisonment sentences already affirmed before the enactment of the Act are low, while public interests such as second offense risk and effective utilization of database are high, so the balance of interests is satisfied. Therefore the Addenda does not violate the personal liberty and

right to personal information of those serving imprisonment sentences affirmed before the enactment of the Act against the proportionality rule.

Those who were already released at the time of enactment of the Act have lower second offense risk compared to those still imprisoned, and it is too much to apply retroactively to those leading peaceful lives. Thus the Addenda is reasonable in that only those imprisoned are subject to retroactive application, not violating equality rights.

Summary of Dissenting Opinion by Four Justices regarding the Collection Provision

The main purpose of the Collection Provision is to utilize DNA Identification Information in future crime investigation. However, this is irrelevant in case of persons with no second offense risk. The Collection Provision is against the principle of least restriction in that it does not factor in second offense risk and allows indiscriminate collection of DNA samples from prisoners etc as long as they committed certain crimes. The Collection Provision also fails the balance of interests because the private interests of prisoners etc infringed by the Collection Provision are greater than the public interests the Collection Provision is aiming at. Thus, the Collection Provision infringes on the complainants' personal liberty in violation of the rule of proportionality.

Summary of Dissenting Opinion by One Justice regarding the Deletion Provision and the Addenda

To store DNA identification information until the person's death regardless of whether a considerable amount of time has passed with no second offense, is overly restrictive especially in case of juveniles. Included among the crimes subject to collection are those with low culpability and not very high in second offense risk. In case of sexual criminals the personal information registration period is limited to only

20 years. Also taking into account unpredicted information acquisition and the risk of leakage and misuse, it is possible to select less restrictive means such as subdividing management periods according to individual crimes and respective second offense risks. Therefore the Deletion Provision is against the least restrictive rule. In case of persons with no second offense for a long time, the Deletion Provision fails to strike the balance of interests because there is imbalance between the public good to be achieved which is at best exceptional and the private interests infringed, and also because the practical disadvantage to the person when his information is leaked or misused while in long storage is very grave. Therefore the Deletion Provision infringes on the right to personal information against the proportionality rule.

The collection and use of DNA identification information pertaining to prisoners whose sentence is already announced is a type of security measure such as probation order etc based on future second offense risk, which restricts the person's personal liberty and right to personal information. There is no clear distinction between punishment and security measure. Security measure cannot be free from the rule against retroactive legislation in that it is no different from punishment because it is a criminal sanction by the government. The rule against retroactive legislation which is based on nulla poena sine lege seeks to protect people from all types of governmental action infringing on people's liberties and legal stability in an unpredictable manner, and since retroactive application of the Act through the Addenda imposes new criminal sanction not existent at the time of the criminal act, it violates the rule against retroactive legislation. Even presuming that the rule against retroactive legislation does not apply in the case of non-punishment security measure, from the view of criminal policy it is difficult to find any needs or grounds for the Addenda to retroactively apply to prisoners who were serving sentences already affirmed. It infringes on the prisoners' trust and legal stability, and is also against the least restrictive rule in that it applies indiscriminately to all long term prisoners regardless of their trust. Even if the person's loss is not

great the trust in legal stability is gravely harmed, so the balance of interests is not satisfied. The Addenda infringes on the right to personal information against the proportionality rule.

Summary of Dissenting Opinion by Two Justices regarding the Collection Consent Provision

The Collection Consent Provision stipulates the exception where DNA samples may be collected without warrant when there is prior consent. Persons are free to decline to consent, and there are no disadvantages for declining. Compulsory collection by warrant is merely the result of the Collection Warrant Provision, and since the Collection Consent Provision does not directly restrict or infringe on the person's fundamental rights, there is no possibility of fundamental rights violation.

Summary of Concurring Opinion by Four Justices regarding the Deletion Provision

It is not clear whether the Deletion Provision unconstitutionally infringes on the right to personal information. However, considering the decrease of second offense risk over time, dangers of leakage and misuse of information kept overlong, private interests of persons with no second offense for a long time, it is necessary to make legislative reforms to delete DNA identification information in certain cases where there was no second offense for some period in order to minimize restriction of fundamental rights.

30. Case on the Allotment of Youth Employment

[26-2(A) KCCR 429, 2013Hun-Ma553, August 28, 2014]

In this case, the Constitutional Court decided whether the provision to stipulate that public institutions over a certain scale shall endeavor to employ unemployed youths at the rate of 3/100 of its full number of employees or more each year for three years in order to resolve youth unemployment infringed the freedom of occupation and right to equality, thereby violating the Constitution. The opinions were split into constitutional opinion by four Justices and unconstitutional opinion by five Justices. Despite the unconstitutional opinion being the majority, the provision was declared constitutional for being short of quorum for unconstitutional decision (6 Justices).

Introduction of Case

Article 5 Section 1 of the Special Act on the Promotion of Youth Employment (hereinafter, the "Act"), which was revised by Act No. 11792 on May 22, 2013, mandated that public institutions and local public enterprises shall endeavor to employ unemployed youths at the rate of 3/100 of its full number of employees or more each year for three years, starting from January 1, 2014 (hereinafter, it will be referred to as the 'youth allotment program'). The complainants who tried to be employed at public institutions and local public enterprises filed this constitutional complaint on August 6, 2013, alleging that Article 5 Section 1 of the Act and Article 2 of its enforcement decree (hereinafter, the "enforcement decree") infringed their right to equality and freedom of occupation.

Provisions at Issue

Special Act on the Promotion of Youth Employment (revised by Act

No. 11792 on May 22, 2013)

Article 5 (Increase of Employment of Unemployed Youth by Public Institutions) (1) The heads of public Institutions under the Act on the Management of Public Institutions and local public enterprises under the Local Public Enterprises Act, which are stipulated by Presidential Decree, shall endeavor to employ unemployed youth at the rate of 3/100 of its full number of employees or more each year. Provided, this section would not be applied in inevitable case, such as restructuring, prescribed by Presidential Decree.

Enforcement Decree on the Special Act on the Promotion of Youth Employment (revised by Presidential Decree No. 24817 on October 30, 2013)

Article 2 (Age of Youth)

The "person who has attained the age specified by Presidential Decree" of Article 2 Item 1 of the Special Act on the Promotion of Youth Employment (hereinafter, the "Act") means a person who is more than 15 years old but less than 29 years old. Provided, when the public institutions under the Act on the Management of Public Institutions and local public enterprises under the Local Public Enterprises Act employ unemployed youth according to Article 5 Section 1 of the Act, the term of youth means a person whose age is between 15 and 34.

Summary of Decision

[Constitutional Opinion by Four Justices]

1. The youth allotment program has been introduced to resolve youth unemployment and promote sustainable economic development and social security, which is a legitimate legislative purpose. It is an appropriate means to achieve the legislative purpose in that youth allotment program would contribute to relieve youth unemployment to a certain degree.

2. The National Assembly and the Government have tried to resolve the issue of youth unemployment. Nonetheless, the rate of youth unemployment has increased. Accordingly, the National Assembly and the Government have to introduce the youth allotment program in order to promote youth employment in public sectors. The youth allotment program is not mandated to every public institution without exceptions: it applies only to public institutions over a certain scale; it permits several exceptions, including the case of the employment of a person with professional license or other eligible persons; and it minimizes the disadvantages of the people who are not benefited, by temporarily operating the youth allotment program for three years. Thus, it does not violate the principle of the least restriction.

3. Whereas the public interests pursued by the youth allotment program, which are sustainable economic development and social security through the resolution of youth unemployment, are extraordinarily significant, the disadvantages of the applicants for the public institutions over 35 years old are not substantial in practice, conforming to the principle of balance of legal interests. Therefore, the youth allotment program does not infringe the right to equality and freedom of occupation at public institutions, thereby not violating the Constitution.

[Unconstitutional Opinion by Five Justices]

1. The youth allotment program does not conform to our legal system whose supremacy is in the Constitution. The Constitution prohibits unreasonable discrimination in all areas; and the Framework Act on Employment Policy, Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion, and National Human Rights Commission Act prohibit age discrimination in employment. Prohibition of age discrimination in employment is the general principle established in our legal system under the Constitution as well as the universal international principle.

2. The youth allotment program cannot resolve youth unemployment fundamentally. The recent issue of youth unemployment is based on the structural problem of labor market, implying that the issue of youth unemployment can be resolved by the creation of appropriate jobs for youth. The youth allotment program is merely an allopathic treatment to allocate the limited jobs for youth, without creating jobs.

3. The youth allotment program is not affirmative action to relieve and compensate the disadvantages caused by past discrimination for protecting traditionally disadvantaged groups, such as the disabled or women, unlike the disabled allotment program or women allotment program. The youth allotment program cannot be constitutionally justified.

4. Public institutions should provide fair opportunities for the employment based on meritocracy as quasi national institutions, in principle. Even if the youth allotment program should be introduced under the exceptional circumstances, the 'soft' youth allotment program that creates additional employment by financial support should be introduced for minimizing the disadvantages of people who are not benefited by the youth allotment program, rather than mandating the 'rigid' youth allotment program that allots youth to a certain rate of employment. The youth allotment program of this case is not a means which minimizes disadvantages.

5. The youth allotment program would not contribute to the resolution of youth unemployment, while the freedom of occupation at public institutions of people who are not youth is severely restricted, suggesting that the principle of balance is not satisfied. The youth allotment program violates the Constitution by infringing the freedom of occupation at public institutions and the right to equality of people more than 35 years old.

31. Removal of Posts Containing Unlawful Information Case

[26-2(A) KCCR 466, 2012Hun-Ba325, September 25, 2014]

In this case, the Court upheld subparagraph 8 of Article 44-7 Section 1 and Section 3 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. that bans circulation of "information with a content that commits an activity prohibited by the National Security Act" through an information and communications network and orders the Korea Communications Commission to reject, suspend or restrict handling of information falling under certain conditions.

Background of the Case

(1) The complainants are managers/operators of an online message board. The Commissioner General of the Korean National Police Agency urged the Korea Communications Commission to order the complainants to delete posts written by users of a website they manage and operate, arguing that the posts contain information with a content that commits an act prohibited by the National Security Act. In addition, the Korea Communications Commission requested a review of the content of the said posts to the Korea Communications Standards Commission, which in turn demanded removal of the posts to the complainants, stating that the messages qualify as unlawful information containing activities banned by the Act as they include praises of Kim Il-sung and Kim Jong-il, as well as propaganda and agitation of North Korea's ideology and perception such as military-first politics.

(2) The complainants notwithstanding did not delete the stated posts, and the Korea Communications Commission ordered the complainants to remove the posts from the message board in accordance with Article 44-7 Section 3 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. In response, the

complainants lodged a suit seeking cancellation of the abovementioned action of the Commission ordering the refusal of handling information in the said posts, and with this case pending, filed a motion requesting a constitutional review of subparagraph 8 of Article 44-7 Section 1 and Section 3 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. with an ordinary court. However, the motion was denied, and the complainants filed a constitutional complaint in this case with the Constitutional Court.

Subject Matter of Review

The provision under constitutional review in this case is subparagraph 8 of Article 44-7 Section 1 and Section 3 (hereinafter jointly referred to as the "present provisions") of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (amended by Act No. 9119, Jun. 13, 2008, and hereinafter the "Information Communications Network Act").

Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (amended by Act No. 9119, Jun. 13, 2008)

Article 44-7 (Prohibition on Circulation of Unlawful Information)

(1) No one may circulate information falling under any of the following subparagraphs through an information and communications network:

8. Information with a content that commits an activity prohibited by the National Security Act

(3) The Korea Communications Commission shall order a provider of information and communications services or a manager or an operator of an open message board to reject, suspend, or restrict handling of information under paragraph (1) 7 through 9, if the information falls under all the following subparagraphs:

Summary of the Decision

1. Void for Vagueness

The "information with a content that commits an activity prohibited by the National Security Act" refers to information committing acts that satisfy the elements of a crime set forth in Article 3 or 12 of the National Security Act or information that constitutes the means, target or the act itself that comprise the elements of a crime. The present provisions merely provide that information which contains the acts prohibited under the National Security Act should be prevented from circulation by simply considering the contents of the information, and do not address the issue of whether an inaction of not deleting posted information by the manager or operator violates the National Security Act. For this reason, it can be concluded that the present provisions are not so unclear as to hamper the predictability of offenders or enable arbitrary execution of administrative agencies, and are therefore not inconsistent with the principle of void for vagueness.

2. Freedom of Press

The telecommunications network, particularly the Internet, provides promptness, extensiveness and duplicability of a whole new level compared to the existing communication tools, and it is highly likely that ineffective regulation of such anti-state activities posing a threat to national safety as circulating "information with a content that commits an activity prohibited by the National Security Act" will rapidly spread the threat to national safety and people's life and freedom. Therefore, the legislative purpose to ban circulation of such information has good reason.

The decision on whether an activity constitutes an anti-state activity that jeopardizes national safety is left to the legislature as the people's

representative body, and the present provisions are not in excessive violation of the freedom of press given the following: 1) the information with a content that commits an activity prohibited by the National Security Act is "in itself an evidently illegal and socially harmful expression," 2) the present provisions do not impose criminal punishment on those who wrote and circulated the information, but merely orders removal of the information through request for correction, refusal to handle certain information, etc., 3) service providers, etc. are held criminally accountable only when they fail to implement the request for correction by the Korea Communications Standards Commission and the order of the Korea Communications Commission, 4) the present provisions provide for the possibility of appeal and the opportunity of statement, and 5) there is possibility for judicial review for further examination.

3. Separation of Powers Principle

The order of the Korea Communications Commission to refuse, suspend or restrict handling of information is an administrative action that can be appealed by means of administrative litigation calling for judicial review, and the action itself is not a court judgment or a judicial action. This, therefore, is not against the principle of separation of powers that vests judicial power in courts.

32. Case on Constitutionality of Concurrent Sentence for Separate Charges including an Election Crime

[26-2(A) KCCR 505, 2013Hun-Ba208, September 25, 2014]

In this case, the Court decided that Article 21 of the Community Credit Cooperatives Act, which disqualifies one from being an executive of a community credit cooperative if he or she is charged with an election crime and sentenced to a fine of at least 1 million won, is incompatible with the Constitution as it does not have a provision ordering separate proceedings and sentencing for an election crime in case it is merged with an additional charge and the two are jointly heard as concurrent crimes.

Background of the Case

(1) The complainant was elected as the Chairperson of the ○○ Community Credit Cooperative, but was fined 2 million won as a concurrent sentence for an election crime under the Community Credit Cooperatives Act (prescribed by Article 85 Section 3) and defamation under the Criminal Act (2012 gojeong 4318, Seoul Central District Court).

(2) With the appeal of the abovementioned case pending in the Supreme Court (2013Do6465), the complainant filed a motion requesting a constitutional review of subparagraph 8 of Article 21 Section 1 and Article 21 Section 2 of the Community Credit Cooperatives Act, alleging that they do not provide for separate proceedings and sentencing for concurrent crimes that merge an election crime with another crime (hereinafter the "separate sentencing provision") and are therefore unconstitutional. As this motion was denied, the complainant filed the constitutional complaint with this Court.

Subject Matter of Review

The issue under review is the constitutionality of Article 21 of the Community Credit Cooperatives Act (amended by Act No. 10437, March 8, 2011) (hereinafter the "present provision"), which does not allow for separate sentencing for each crime when it is merged with an election crime under the same Act. The provision at issue is set out below:

Provision at Issue

Community Credit Cooperatives Act (Amended by Act. No. 10437, March 8, 2011)

Article 21 (Disqualifications for Executives)

(1) None of the following persons shall be an executive of a credit cooperative: Provided, That subparagraph 16 shall not apply to a full-time director under Article 18 (3):

(subparagraph 1 through 7 omitted)

8. A person in whose case three years have not passed since his/her imprisonment or punishment by a fine more than one million won was completely executed or exempted, as declared by a court, for committing a crime under Article 85 (3);

(subparagraph 9 through 18 omitted)

(4) A credit cooperative or the Federation may request the chief of a police station having jurisdiction over its main office to give it necessary assistance, such as inquiries about criminal records falling under paragraph (1) 3 through 11, in order to ascertain whether executives or candidates for executives have disqualifications under paragraph (1), and the chief of the relevant police station shall give it an answer about the result thereof.

Community Credit Cooperatives Act (Wholly Amended by Act. No. 8485, May 25, 2007)

Article 21 (Disqualifications for Executives)

(2) Where a ground under paragraph (1) is found or arises, the relevant executive shall retire from office automatically.

(3) An act in which an executive who retired from office pursuant to paragraph (2) had been involved before his/her retirement shall not lose its effect.

Summary of the Decision

1. Insofar as the present provision does not provide for separate sentencing for concurrent crimes, courts are unable to separate the proceeding on concurrent crimes involving an election crime prescribed by the Community Credit Cooperatives Act either by analogically applying Article 18 Section 3 of the Public Official Election Act or applying Article 300 (Separate or Joint Oral Proceedings) of the Criminal Procedure Act. As a result, a concurrent sentence should be made in accordance with Article 38 of the Criminal Act that provides for weighted punishment, which could be interpreted that the entire sentence is attributed to charges of an election crime under the Community Credit Cooperatives Act and that the disqualification of a credit cooperative executive should inevitably be based on this interpretation. Therefore, the present provision is not against the principle of void for vagueness.

2. The present provision does not have a separate sentencing provision, and, consequently, courts have no choice but to hand down a concurrent sentence for concurrent charges involving an election crime without separate proceedings and to disqualify one from being an executive by attributing the whole sentence to the election charge. By doing so, the present provision is imposing excessive restriction that is more than necessary to achieve the legislative purpose. In particular, if the statutory punishment for the other crime merged with the election crime is imprisonment only or the minimum statutory punishment is at least 2 million won in fines (at least 1 million won should be fined even when allowing for discretionary mitigation), one gets to be disqualified

to become an executive of a credit cooperative regardless of the gravity of crime or criminal liability that actually should serve as the ground for disqualification. This significantly unreasonable state evidently constitutes an excessive restriction that cannot be tolerated under the Constitution. In this sense, the present provision breaches the rule against excessive restriction and infringes on the occupational freedom of executives or those aspiring to be executives of credit cooperatives.

3. There being no separate sentencing provision, one can lose his or her position as an executive if he or she receives a concurrent sentence of at least 1 million won in fines or imprisonment for an election crime merged with another crime, although a person can be sentenced to a fine less than 1 million won when he or she is tried for a minor election crime alone. For this reason, the present provision may result in discrimination without reasonable grounds of those tried and punished on charges of concurrent crimes that involve election crimes from those who are charged and punished for an individual crime, and this is also against the principle of equality provided in the Constitution.

4. The present provision violates the Constitution and should, in principle, be held unconstitutional. However, its unconstitutionality lies in the legislative inaction to order separation of sentencing in dealing with election crimes and other crimes together, so the legislature will have to amend the present provision and devise a separate sentencing provision for concurrent crimes in removing the unconstitutionality.

Yet, if the present provision is struck down and thus invalidated immediately or is suspended from application, there will be no applicable provision to disqualify offenders of election crimes provided in the Community Credit Cooperatives Act, which in turn will give rise to an unacceptable legal vacuum. Therefore, it is necessary to maintain the present provision until the legislature amends them in accordance with this Court’s decision.

33. Declaration of Area as Non-Smoking Case

[26-2(A) KCCR 609, 2013Hun-Ma411 · 546 (Consolidated), September 25, 2014]

In this case, the Court held inadmissible the constitutional complaint challenging the constitutionality of Article 9 Section 5 of the National Health Promotion Act, which authorizes local governments to declare certain areas within their jurisdiction as non-smoking zones by ordinance, and decided that Article 9 Section 4 of the same Act providing that the owner, occupant, or manager of a public facility shall designate the whole area of such facility as a non-smoking area was not in violation of the Constitution.

Background of the Case

A. 2013Hun-Ma411

The complainant lodged a constitutional complaint in this case, arguing that the fundamental rights of smokers were violated by subparagraph 23 of Article 9 Section 4 of the National Health Promotion Act, which stipulated that the owner, occupant, or manager of an online game facility should designate its entire establishment as a non-smoking place.

B. 2013Hun-Ma546

The complainant of this case filed a constitutional complaint on grounds that a) Article 9 Section 4 of the National Health Promotion Act, which requires the owner, occupant or manager of a public facility to designate the whole area of such facility as non-smoking zone not only breaches the principle of legality but also violates the fundamental rights of smokers, and, specifically, the provision's subparagraph 26 is inconsistent with the form of delegated legislation as well as the rule against blanket delegation, and b) Article 9 Section 5 of the same Act

infringes on the fundamental rights of smokers as it allows local governments to declare certain establishments within their jurisdiction as non-smoking areas.

Subject Matter of Review

The matter under review in this case is whether Article 9 Section 4 of the National Health Promotion Act (amended by Act No. 10781, Jun. 7, 2011) (hereinafter the "Non-Smoking Area Provision") and Article 9 Section 5 of the same Act (amended by Act No. 10327, May 27, 2010) (hereinafter the "Designation Provision") violate the fundamental rights of the complainants. The provisions at issue are as follows:

National Health Promotion Act (amended by Act No. 10781, Jun. 7, 2011)

Article 9 (Measures for Anti-Smoking)

(4) The owner, occupant, or manager of any of the following facilities for public use shall designate the whole area of such facility as a non-smoking area. In such cases, the owner, occupant, or manager may install signs indicating non-smoking areas and smoking areas for smokers, and the standards, methods, etc. for the installation of signs indicating non-smoking areas and smoking areas shall be prescribed by Ordinance of the Ministry of Health and Welfare:

1. Office buildings of the National Assembly;
2. Office buildings of the Government and local governments;
3. Office buildings of courts under the Court Organization Act and institutions affiliated to such courts;
4. Office buildings of public institutions under the Act on the Management of Public Institutions;
5. Office buildings of local public enterprises under the Local Public Enterprises Act;
6. Schools under the Early Childhood Education Act and the Elementary and Secondary Education Act (including school buildings,

playgrounds, and whole premises);

7. School buildings of schools under the Higher Education Act;

8. Medical institutions under the Medical Service Act and public clinics, public health and medical care centers, and public health branch clinics under the Regional Public Health Act;

9. Day care centers under the Infant Care Act;

10. Facilities for youth activities, such as youth training centers, youth training establishments, youth cultural halls, specialized youth facilities, youth camps, youth hostels, and facilities for juveniles under the Juvenile Activity Promotion Act;

11. Libraries under the Libraries Act;

12. Children's amusement facilities under the Act on the Safety Control of Children's Amusement Facilities;

13. Private teaching institutes for school curriculum and private teaching institutes with a total floor area of not less than 1,000 square meters, among private teaching institutes under the Act on the Establishment and Operating of Private Teaching Institutes and Extracurricular Lessons;

14. Waiting areas, boarding areas, and pedestrian underpasses of airports, passenger wharfs, railroad stations, bus terminals, and other transportation-related facilities, and charged transports with a capacity of not less than 16 passengers for transporting passengers or cargoes;

15. Buses for transporting children under the Motor Vehicle Management Act;

16. Office buildings, factories, and complex buildings with a total floor area of not less than 1,000 square meters;

17. Places of public performance under the Public Performance Act with not less than 300 seats;

18. Superstores established and registered pursuant to the Distribution Industry Development Act and shopping malls in an underpass, among shopping malls under the aforesaid Act;

19. Tourist lodging facilities under the Tourism Promotion Act;

20. Sports facilities under the Installation and Utilization of Sports

Facilities Act with a capacity of not less than 1,000 spectators;

21. Social welfare facilities under the Social Welfare Services Act;

22. Public baths under the Public Health Control Act;

23. Juvenile game providing businesses, general game providing businesses, businesses providing Internet computer game facilities, and combined distribution and game providing businesses under the Game Industry Promotion Act;

24. Rest restaurants, general restaurants, and bakeries with a serving area not smaller than the area specified by Ordinance of the Ministry of Health and Welfare, among food service businesses under the Food Sanitation Act;

25. Comic-book rental businesses under the Juvenile Protection Act;

26. Other facilities or institutions specified by Ordinance of the Ministry of Health and Welfare.

National Health Promotion Act (Amended by Act No. 10327, May 27, 2010)

Article 9 (Measures for Anti-Smoking)

(5) When deemed necessary for preventing damage of smoking and for improving health of residents, local governments may designate a certain area as a non-smoking area within their respective jurisdiction where many people gather or pass by.

Summary of the Decision

A. Designation Provision

It is the discretion of local governments to decide which area will be designated as a non-smoking place, so the consequence of a fundamental rights violation arises only when a certain area is declared non-smoking by the competent local government. Therefore, the complaint challenging the constitutionality of the Designation Provision fails to satisfy the directness requirement for violation of fundamental rights and is thus

inadmissible.

B. Non-Smoking Area Provision

1. Void for Vagueness

The scope of regulation under the Non-Smoking Area Provision is very broad, and even the same types of public facilities may vary from each other depending on whether they are inside a building or exists as an independent establishment with outdoor areas. Therefore, the necessary level of smoking regulation should differ by a range of factors, including the characteristics, location, structure, purpose and main users of the facility. This considered, it is virtually impossible, given the lawmaking techniques, to specify in law the scope of smoking ban applied to every single case.

In addition, when the legislative purpose of the Non-Smoking Area Provision to promote public health through strict ant-smoking policies is taken into consideration, it is construed that the smoking ban on the facility set forth in each subparagraph is eventually applied to the entire geographical scope of the facility as an independent unit. For smokers, it would not be difficult to interpret the scope of smoking prohibition applied to individual facilities, and the Non-Smoking Area Provision is therefore not in violation of the principle of void for vagueness.

2. Form of delegated legislation and rule against blanket delegation

Subparagraph 26 of the Non-Smoking Area Provision that allows for additional designation of other facilities or institutions as non-smoking areas by Ordinance of the Ministry of Health and Welfare is a form of delegated legislation as provided in Article 95 of the Constitution. This delegation was put in place out of the need for the Health and Welfare Ministry to determine which facilities require a smoking ban based on factors such as social circumstances, and it is fully predictable that

facilities where there is a major need to improve public health would be listed as non-smoking areas under the Ministry's Ordinance. For this reason, it cannot be said that subparagraph 26 of the Non-Smoking Area Provision failed to meet the required form of delegated legislation, or that it violated the rule against blanket delegation.

3. General right to freedom of action

Before the Non-Smoking Area Provision came into force, the Court, on August 26, 2004 in 2003Hun-Ma457, upheld Article 7 of the Enforcement Decree of the former National Health Promotion Act (amended by Ordinance No. 243, Ministry of Health and Welfare, Apr. 1, 2003 and later amended by Ordinance No. 324, Ministry of Health and Welfare, Jul. 28, 2005), which provides for declaration of the whole or part of public facilities as non-smoking areas.

Although the Non-Smoking Area Provision, compared to when the abovementioned decision was announced, has a broader scope of smoking ban and is more strict about the restriction on smokers' general right to freedom of action, it is not to be considered that the Non-Smoking Area Provision violates smokers' general right to freedom of action because, among others, a) it was introduced to promote public health through a total smoking ban on public places on grounds that it is hard to completely avoid tobacco smoke simply by separating smoking and non-smoking areas as it used to be the case, b) smoking rooms can be installed and c) smoking rate of Korea remains high.

34. Case on Standard for Population Disparity allowed in Division of Electoral District

[26-2(A) KCCR 668, 2012Hun-Ma190 · 192 · 211 · 262 · 325, 2013Hun-Ma781, 2014Hun-Ma53 (consolidated), October 30, 2014]

In this case, the Constitutional Court held that attached Table 1 of Article 25 Section 2 of the Political Official Election Act which designates electoral districts for the National Assembly elections based on 50% population disparity between the most and the least populous districts, although not regarded as an arbitrary designation of electoral districts, infringes on the complainants' right to vote and equality right, violating the equality in the worth of votes.

Background of the Case

Complainants are electors who have registered as residents in the relevant districts. They filed this constitutional complaint to request a review of constitutionality of attached Table 1 of Article 25 Section 2 of the Political Official Election Act, arguing that the Table is made based on the 50% population disparity between the most and the least populous districts and arbitrarily divides some administrative districts and combine them with other districts, thereby infringing on the complainants' right to vote and equality right.

Provisions at Issue

The subject matter of this case is whether the parts of the attached Table 1 of Article 25 Section 2 of the Political Official Election Act where the complainants' domiciles are located, including "Daejon Metropolitan City, Dong(East)-Gu Electoral District", "Gyonggi Province, Suwon City, Electoral District C", "Gyonggi Province, Yongin City, Electoral District A", "Gyonggi Province, Yongin City Electoral District

B", "South Chungcheong Province, Cheonan City, Electoral District A", "South Chungcheong Province, Cheonan City, Electoral District B", "North Chungcheong Province, Cheongju City, Sangdang-Gu Electoral District", "Seoul Metropolitan City, Gangnam-Gu, Electoral District A", "Seoul Metropolitan City, Gangseo-Gu, Electoral District A" and "Incheon Metropolitan City, Namdong-Gu, Electoral District A" (hereinafter, the entire parts of the attached Table 1 of Article 25 Section 2 of the Political Official Election Act is referred as the "Entire Electoral District Table at Issue"; the aforementioned parts of the Table 1 as the "Relevant Parts of Electoral District Table at Issue"; and the four electoral districts including "Gyonggi Province, Suwon City, Electoral District C", "Gyonggi Province, Yongin City, Electoral District A", "Gyonggi Province, Yongin City Electoral District B", and "South Chungcheong Province, Cheonan City, Electoral District A", against which some of the complainants purport to be arbitrary division of electoral districts as the "Four Electoral Districts at Issue") infringe on the complainants' fundamental rights and details are as follows:

Public Official Election Act (revised by Act No. 11374, February 29, 2012) ② The names and districts of the constituencies for the National Assembly members shall be shown in attached Table 1.

Names of Electoral Districts	Election Areas
Seoul Metropolitan City (No. of Election Districts: 48)	
Gangseo-Gu Electoral District A	Deungchon 2-dong, Hwagokbon-dong, Hwagok 1-dong, Hwagok 2-dong, Hwagok 3-dong, Hwagok 4-dong, Hwagok 6-dong, Hwagok 8-dong, Woojangsan-dong, Balsan 1-dong,
Namdong-Gu Electoral District A	Shinsa-dong, Nonhyon 1-dong, Nonhyon 2-dong, Apgujeong-dong, Chongdam-dong, Samsung 1-dong, Samsung 2-dong, Yoksam 1-dong, Yoksam 2-dong, Dogok 1-dong, Dogok 2-dong

Names of Electoral Districts	Election Areas
Incheon Metropolitan City(No. of Election Districts: 48)	
Namdong-Gu Electoral District A	Guwol 1-dong, Guwol 2-dong, Guwol 3-dong, Guwol 4-dong, Ganseok 1-dong, Ganseok 2-dong, Ganseok 4-dong, Namchonnorim-dong, Nonhyon 1-dong, Nonhyon 2-dong, Nonhyungojan-dong
Daejon Metropolitan City(No. of Election Districts: 48)	
Dong-Gu Electoral District	All areas around Dong-gu
Gyonggi Province(No. of Election Districts: 48)	
Suwon City Electoral District C	Hanggoong-dong, Ji-dong, Wooman 1-dong, Wooman 2-dong, Ingye-dong, Maegyo-dong, Maesan-dong, Godung-dong, Hwaseo 1-dong, Hwaseo 2-dong, Seodun-dong
Yongin City Electoral District A	Pogok-Eup, Mohyon-Myon, Namsa-Myon, Edong-Myon, Wonsam-Myon, Bakam-Myon, Yangji-Myon, Jungang-dong, Yoksam-dong, Yurim-dong, Dongbu-dong, Mabuk-dong, Dongbak-dong
Yongin City Electoral District B	Singal-dong, Yongduk-dong, Gugal-dong, Sangal-dong, Giheung-dong, Seonong-dong, Gusung-dong, Sangha-dong, Bojung-dong, Sanghyun 2-dong
North Chungcheong Province (No. of Election Districts: 48)	
Cheonju City Sangdang-Gu Electoral District	All areas around Sangdang-Gu
South Chungcheong Province (No. of Election Districts: 48)	
Cheonan City Electoral District A	Mokchun-Eup, Poongse-Myon, Gwangduk-Myon, Book-Myon, Sungnam-Myn, Susin-Myon, Byongchun-Myon, Dong-Myon, Jungang-dong, Munsung-dong, Wonsung 1-dong, Wonsung 2-dong, Bongmyon-dong, Ilbong-dong, Sinbang-dong, Chungryong -dong, Sinan-dong, SSangyong 2-dong,

Names of Electoral Districts	Election Areas
Cheonan City Electoral District B	Sungwhan-Eup, Sunggeo-Eup, Jiksan-Eup, Yipjang-Myon, Sungjung 1-dong, Sungjung 2-dong, SSangyong 1-dong, SSangyong 3-dong, Baesoek-dong, Busung -dong

Summary of the Decision

1. Whether the Relevant Parts of Electoral District Table at Issue violate the equality in the worth of votes

Our Court has presented 50% disparity in population standard between the most and the least populous districts in consideration of the local representativeness of the National Assembly members, population disparity between city and rural areas, developmental imbalance, etc. (see 2000Hun-Ma92, October 25, 2001). But, given the following facts, we think that now it is more desirable to change the standard of population disparity allowed under the Constitution to the limit of 33⅓% deviation in population and the maximum permissible population ratio between the most populous and least districts should be 2:1.

(1) If we apply the standard of 50% disparity in population, the worth of one person's vote, for example, could be 3 times more than that of another person's vote, which is an excessive inequality in the worth of votes. Moreover, under the unicameral system, it can possibly be expected that, with the 50% disparity standard, the number of votes acquired by an assembly member elected in a less populous area are less than those acquired by an assembly member defeated in a more populous area, which is never desirable from the perspective of representative democracy.

(2) Even though the local representativeness of the National Assembly members is an important factor to be considered in the formation of the National Assembly, this cannot take priority over the equality in the worth of votes from which the principle of sovereignty germinates. Particularly, considering the current situation where the local autonomy system has firmly entrenched, the need to sacrifice the constitutional principle of the equality in the worth of votes is less than before.

(3) The more the permissible limit of population disparity is relaxed, the more the area of imbalance in representativeness can emerge, which could cause a side effect of intensifying the local political party system. Specifically, such an imbalance can be detected even within the rural areas sharing similar conditions, possibly resulting in hampering reasonable development in the rural areas and thereby disturbing balanced development of national land.

(4) Considering the facts that the next election will be held after one and a half year, and the National Assembly, in delineating the constituencies for the National Assembly elections, can receive various supports from the Constituency Demarcation Committee for the National Assembly Elections composed of professionals, although it is not a standing committee (Article 24 of the Public Official Election Act), practical difficulties in adjustment of electoral districts cannot be the reason for relaxing the limit of population disparity.

(5) Finally, as research on foreign legislation and case law shows that the permitted standard of population disparity has been stricter in many countries, we cannot delay making a stricter standard for the population disparity any more.

(6) Therefore, the parts of “Gyonggi Province, Yongin City, Electoral District A”, “Gyonggi Province, Yongin City Electoral District B”, “South Chungcheong Province, Cheonan City, Electoral District A” and

"Incheon Metropolitan City, Namdong-Gu, Electoral District A" in the Entire Electoral District Table at Issue, where the population disparity between the most populous and least districts is more than 33⅓%, violate the right to vote and the equality right of the complainants who are living in the aforementioned election districts.

2. Whether the Four Electoral Districts at Issue amount to arbitrary division of electoral districts

The main reason for the National Assembly, in delineating the boundaries of the Four Electoral Districts at Issue, to divide some parts of administrative districts and combine them with other districts is that it is hard to find any other alternatives for narrowing the population disparity between the districts, which seems sufficiently reasonable. Also, as the administrative district map shows that the divided districts are geographically located near the combined districts, there seems no big difference in living conditions, transportation or educational environment among the districts. We also cannot come up with any clear evidence that the new demarcation of electoral districts by the National Assembly shows its clear intention to discriminate some electors who reside in specific areas against other electors or such a demarcation evidently results in de facto discrimination against those electors. Moreover, the National Assembly's constituency demarcation itself different from the proposal suggested by the Constituency Demarcation Committee for the National Assembly Elections or the consequential discordance between the Electoral District Table for the elections of the local constituency members of the National Assembly elections and that for the elections of the members of local government councils cannot be reasons to conclude that the Four Electoral Districts at Issue deviate from the acceptable boundary of legislative discretion.

Therefore, the Four Electoral Districts at Issue are not arbitrary demarcation of electoral districts, departing from the boundary of legislative discretion.

3. Inseparability of the Electoral District Table and the need to render a decision of nonconformity to the Constitution

Within the Electoral District Table, all districts are connected with each other so that a single change in one district may cause sequential changes in other districts. In this regard, electoral districts in the Electoral District Table as a whole are inseparable and should be considered as a single entity. Therefore, if one part of the Electoral District Table is considered unconstitutional, the Entire Electoral District Table at Issue should also be considered unconstitutional. But, the decision of simple unconstitutionality of the Entire Electoral District Table at Issue, if rendered in this situation where the National Assembly election has already been held based on the Entire Electoral District Table at Issue, may bring about legal vacuum of inexistence of the Electoral District Table for the elections of the local constituency members of the National Assembly on which the next reelection or vacancy election, if any, should be based on. Therefore, we render a decision of nonconformity to the Constitution, ordering temporary application of the Entire Electoral District Table at Issue until the legislation revises it by December 31, 2015.

Summary of the Dissenting Opinion by Three Justices

We think that, at this juncture where the surrounding situation has not undergone a dramatic change since our Court reviewed the constitutionality of constituency demarcation based on the limit of 50% disparity in population between the most and the least populous districts in 2000Hun-Ma92, etc. case, the aforementioned standard should be maintained.

First, as the economic gap and population disparity between city and rural areas have yet to be narrowed down, the reasons for protecting the representativeness of local interests are still relevant. Also, there exist some hindrances to be overcome in the Public Official Election Act,

such as prohibition of administrative district changes and fixation of the number of the National Assembly members.

Considering other factors such as the difference in the roles of the National Assembly and the local government councils, financial independence rate of each local government, etc., the local representativeness of the National Assembly members is still as important as the equality in the worth of votes. And if the limit of 33 ⅓% deviation in population is applied, most parts of the Entire Electoral District Table at Issue should be readjusted. In this case, it seems evident that only the number of the National Assembly members who represent cities will relatively increase compared to the number of National Assembly members who represent rural areas where the local representativeness is more urgently required.

Different from countries where the bicameral system is in operation, our country, adopting the unicameral system, should provide a system that takes into consideration of the local representativeness of the National Assembly members as it is required that the local interests should also be represented in the single National Assembly. For this, the only solution is to relax the permissible limit of population disparity.

As such, among the electoral districts whose population disparity is found to be impermissible under the Constitution by the majority opinion as it exceeds the limit of 33⅓% deviation in population, no electoral districts go beyond the limit of 50% disparity in population between the most and the least populous districts. Therefore, the Entire Electoral District Table at Issue does not infringe on the complainants' right to vote or the equality right.

35. Case on the Act on the Aggravated Punishment, Etc. of Specific Crimes

[26-2(A) KCCR 703, 2014Hun-Ba224, 2014Hun-Ka11 (consolidated), Novermber 27, 2014]

In this case, the Constitutional Court held that Article 10 of the Act on the Aggravated Punishment, Etc. of Specific Crimes that stipulates that crimes prescribed by Article 270 (Crimes of Counterfeiting Currency) of the Criminal Act shall be punished by capital punishment, imprisonment for life or imprisonment for more than five yearsviolates the fundamental principles of the Constitution, such as human dignity and the principle of equality, and is against the legitimacy and balance of penal system.

Introduction of Case

A. 2014Hun-Ba224

The petitioner was charged with the crime that used fifteencounterfeit 50,000-won bills made with a color printer and drawing paper at convenience stores and restaurants on February 6, 2014. While his trial was pending, the petitioner filed the motion to request a constitutional review of Article 10 of the Act on the Aggravated Punishment, Etc. of Specific Crimes, which was eventually deniedon April 18, 2014. Subsequently, the petitioner filed this constitutional complaint on May 23, 2014.

B. 2014Hun-Ka11

The petitioner was sentenced to two years and six months in prison, on December 11, 2013, for the crimes of counterfeiting six 50,000-won bills and thirty 10,000-won bills made with a laptop computer and

multifunction printer to purchase tobaccoand others, together with Hwang OO, Choi OO and Choi OO. The petitioner filed the motion to request a constitutional review of Article 10 of the Act on the Aggravated Punishment, Etc. of Specific Crimes while his appellate procedure was pending on April 17, 2014. Busan High Court requested a constitutional review of this case, accepting the aforementioned motion, on July 9, 2014.

Subject Matter of Review

The subject matter of review is whether the part of Article 207 Section 1 and 4 of the Criminal Act of Article 10 of the Act on the Aggravated Punishment, Etc. of Specific Crimes (hereinafter, "AAPSC") (revised by Act No. 10210 on March 31, 2010) (hereinafter, the "instant provision") violates the constitution or not. The substance of the provision at issue is as follows:

Provision at Issue

Act on the Aggravated Punishment, Etc. of Specific Crimes (revised by Act No. 10210 on March 31, 2010)

Article 10 (Aggravated Punishment of Currency Forgery) Any person who commits a crime as provided in Article 207 of the Criminal Act shall be punished by capital punishment, by imprisonment for life or by imprisonment for not less than five years.

Summary of Decision

The instant provision provides the equivalent criminal elements as stipulated in Article 207 Section 1 and 4 of the Criminal Act(hereinafter, the "criminal provision"), while adding the 'capital punishment' and increasing the maximum period of imprisonment from 2 years to 5

years. Even though the instant provision, which is a special provision, should be applied to a case, a prosecutor may indict for the violation of the Criminal Act provision, implying that the choice of applicable law may cause serious imbalances in penal system. In principle, a special provision should include criminal elements stipulated by a general provision in addition to other aggravated elements. The instant provision, also, should have included additional aggravated elements, in addition to the elements under the Criminal Act provision. Nonetheless, the instant provision does not stipulate such additional aggravated elements, suggesting that the choice of applicable law is solely within the discretion of a prosecutor, which may cause confusion within lawenforcement. It could lead to disadvantages of the people and be abused in the investigation procedure. Accordingly, the instant provision clearly lacks the justification and balance of criminal punishment system as a special provision, thereby violating the fundamental principle of the Constitution that promotes human dignity and value and infringing the principle of equality.

36. Dissolution of Unified Progressive Party Case

[26-2(B) KCCR 1, 2013Hun-Da1, December 19, 2014]

This case involving the dissolution of political parties is the first of its kind in the Korean constitutional history, in which the Court decided to disband the Unified Progressive Party and strip its lawmakers of parliamentary seats, on grounds that the Party's objectives and activities violate the basic democratic order.

Background of the Case

1. The Unified Progressive Party, or the UPP (the "Respondent," headed by Chairperson Lee ○-Hee), was created on December 13, 2011 by a merger of the Democratic Labor Party (DLP), the People's Participation Party (PPP), and the "Alliance for the Creation of New Progressive Party," whose establishment was led by the members who defected from the New Progressive Party (NPP).

2. The UPP won 13 seats (seven local constituency seats, six proportional representative seats) at the 19th parliamentary election held on April 11, 2012. Immediately after, however, internal conflict occurred in a series of events, including the illegitimate proportional primary, violence at the UPP's central committee, and the controversy over the expulsion of lawmakers Lee ○-Ki and Kim Jae-yeon. Former members of the PPP and the NPP also defected from the UPP in September 2012. Meanwhile, lawmaker Lee ○-Ki of the UPP was indicted on charges including plotting treason on September 25, 2013.

3. The Government of the Republic of Korea (the "Petitioner"), following the deliberation and decision by a Cabinet meeting on November 5, 2013, filed a petition on the same day requesting dissolution of the Respondent and removal of its lawmakers from office, arguing that the Respondent's objectives and activities violate the basic

democratic order.

Subject Matter of Review

The subject matter of review in this case is whether the Respondent's objectives and activities violate the basic democratic order, whether the Respondent should be disbanded, and whether the lawmakers affiliated with the Respondent should be stripped of their seats pending dissolution of the Respondent.

Major Decision of the Case

1. The Constitutional Court's jurisdiction over political party dissolution

The authority of the Constitutional Court to review the motion requesting dissolution of political parties was introduced by the third constitutional amendment, which is a product of the contemplation of our modern history where a progressive opposition party was disbanded by a unilateral administrative action by the Government. In light of the South Korean history this mechanism emerged as a procedure to protect political parties. Hence, the existence and activities of all political parties are being guaranteed to the utmost, and even if a party appears to be denying and aggressively attacking the basic democratic order, it is protected by the Constitution to the largest possible extent insofar as it engages in forming public political opinions. Thus, the party cannot be disbanded simply by a regular Executive action; it can be excluded from party politics only when the Constitutional Court finds it unconstitutional and decides that it needs to be disbanded. However, this jurisdiction over political party dissolution is also needed as an institutional arrangement to prevent a political party from attacking, seriously damaging, or even abolishing our democratic system and thereby rendering it meaningless.

2. Requirements to dissolve a political party

Article 8 Section 4 of the Constitution provides that, “if the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court.” The issue here is precisely how to interpret this provision in connection with the requirements for initiating adjudication on the dissolution of political parties.

A. Meaning of “objectives and activities of a political party”

“Objectives of a political party” generally refers to the political direction or purpose, or political plans to be practically implemented by a political party. Such objectives are mostly manifested in the official party platform or constitution. But other means, such as official statements by a party’s main figures including the chairperson or party executives, publications such as party journals or propaganda materials, and activities of party members who are influential in the party’s decision-making process or those who are influenced by the party’s ideology, can also be helpful in understanding the party’s objectives. If the real objectives are hidden, they can be unveiled through means other than the party platform.

Meanwhile, “activities of a political party” refer to acts or behaviors by an organ or key officials, members, etc. of a party, which in general are attributable to the party at large.

Considering the structure of the said provision, it is interpreted that the requirement to dissolve a party is met if either the objectives or the activities of a party are in violation of the basic democratic order.

B. Meaning of "basic democratic order"

The idea of the "basic democratic order" stipulated in Article 8 Section 4 of the Constitution, which is founded upon the pluralistic view that believes in the autonomy of reason and presumes that all political opinions have relative truth and rationality, indicates a political order composed of and operated by the democratic decision-making process and freedom and equality that defy all sorts of violent, arbitrary control and respect the majority while caring for the minority. Specifically, the key elements of the basic democratic order specified in the current Constitution are: popular sovereignty, respect for basic human rights, separation of powers, and plural party system.

C. Meaning of "are against"

The conditions for disbanding a political party set forth in Article 8 Section 4 of the Constitution is: "if the objectives or activities of a political party are against the basic democratic order." The "against' herein does not indicate a simple violation or infringement of the basic democratic order; it refers to a situation where the party's objectives or activities have the concrete danger to cause a substantial threat to our basic democratic order such that restricting the party's existence itself is necessary, notwithstanding that it is one of the indispensable elements of a democratic society.

D. Compliance with proportionality principle

Since a forced dissolution of a political party amounts to fundamental restriction on the freedom of political party activities, which is a core political fundamental right guaranteed by the Constitution, the Constitutional Court, before handing down a decision, has to consider: Article 37 Section 2 of the Constitution, the limitations of a legal state in the intrusive exercise of state powers, and the fact that the dissolution of

political parties should be a measure of last resort or subsidiary means. For this reason, even if there is an express provision on the dissolution requirement as provided by Article 8 Section 4 of the Constitution, the Constitutional Court's decision to dissolve a political party can be constitutionally justified only when there are no alternatives other than dissolution to effectively remove the unconstitutionality inherent in the party at issue and where the social interests of the disbanding decision far outweigh its disadvantage, namely the regulation of the freedom of political party activities and a major restriction on the democratic society.

3. The need to consider inter-Korean confrontation as a particularity of the Korean society

The Republic of Korea is proclaimed as a target of attack by its practical enemy North Korea and faces an environment where its Northern neighbor constantly attempts to subvert its current system, and the South Korean basic democratic order ultimately shares the same fate as its nation. Therefore, in this case, which is not irrelevant to the current divided state of the Korean peninsula, we are obliged to contemplate not only the universal principles of constitutionalism but also a number of practical aspects facing our reality, the nation's particular historical circumstances, as well as the unique awareness and legal sentiment shared by the people, all at the same time.

4. Whether the Respondent's objectives and activities contravene the basic democratic order

A. The values or ideological ideal held by the Respondent is "progressive democracy." However, the idea of progressive democracy has been interpreted differently depending on the circumstances of the times, and, in fact, the goals of a political party eventually correspond with the ideological disposition and the direction of the party's leading members. Therefore, in order to identify the true meaning of progressive

democracy advocated by the Respondent, it is necessary that we look beyond the literal sense of the party platform and examine the detailed process of its adoption, as well as the perception about the platform and the direction taken by the members who currently lead the Respondent.

The Respondent was created through a merger between the DLP, the PPP, and the "Alliance for the Creation of New Progressive Party," which is composed of members who defected from the NPP, and the so-called "Jaju (translated as self-reliance) faction," which represents the East Kyeongi Alliance, the Busan Ulsan Alliance, and the Gwangju Jeonnam Alliance that used to be the regional chapters of the "National Alliance for Democracy and Unification of Korea," advocated or supported the introduction of progressive democracy and even led the creation of the Respondent. As the PPP and other countervailing forces defected from the UPP due to events such as the illegitimate proportional primary and the violence at the central committee, the key members of the East Kyeongi Alliance, the Gwangju Jeonnam Alliance, and the Busan Ulsan Alliance who uphold progressive democracy, as well as those who share the same ideological ideal with them (hereinafter the "leading members of the Respondent") have led the party by making decisions according to their policy on major issues, including the selection of party executives. Given their formation process, attitude toward the North, activities, ideological uniformity, etc., the leading members of the Respondent who mostly practiced Juche, a state-imposed system of thought created and implemented by Kim Il Sung, as the guidance ideology within the anti-government National Democratic Revolution Party (hereinafter, "NDRP"), the enemy-benefitting Action and Solidarity for the South-North Joint Declaration (hereinafter, the "Action and Solidarity"), and the pro-North Korean Il-sim group, are followers of North Korea.

Inferring from how they perceive and understand the progressive democracy set forth in the Respondent's platform, the leading members

of the Respondent observe South Korea as a pariah capitalist or an anti-capitalist colony under the control of foreign powers and argue that this contradiction is trampling sovereignty and impoverishing the lives of the people, proposing the “progressive democracy system” as a new alternative as well as an interim stage before transitioning to socialism. The leading members of the Respondent propose national self-reliance (Jaju, or self-reliance), democracy (Minju, or democracy), and national reconciliation (Tongil, or unification) as tasks to be undertaken under the platform, and see that people’s democratic transformation in South Korea is a precondition to implementing the final platform task—achieving socialism through federalism-based unification—and that self-reliance should be first achieved in order to accomplish unification and democracy. They advocate the seizure of power through election and the right of resistance as a way to advance progressive democracy, and claim that, if necessary, the existing free democratic system can be taken over by a new progressive democratic regime through use of force. All considered, the goal of the Respondent’s platform is to primarily achieve progressive democracy through violence and to finally realize socialism through unification.

B. Since Kim Jong Un came to power following the death of his father Kim Il Sung on December 17, 2011, North Korea has been increasing its threat of military provocation against South Korea starting around December 2012. Pyongyang launched a long-range rocket using its ballistic missile capabilities on December 12, 2012; conducted its third nuclear test on February 12, 2013; declared invalid the armistice agreement that ended the Korean War on March 5, 2013; stated that it will go on “No. 1” combat ready posture on March 26, 2013; recommended ambassadors in Pyongyang, foreigners residing in North Korea, etc. to leave North Korea by citing an imminent war on April 5 and 9, 2013; threatened to burn five islands in the West Sea to flames on May 7, 2013 and launched a short-range missile over the East Sea from May 18 to 20, 2013. Meanwhile, the Respondent’s Lee ○-Ki and

other key members of the East Kyeongi Alliance considered the then political landscape as a state of war and, under the lead of Lee ○-Ki, held gatherings to plot treason on May 10 and 12, 2013 with the purpose of sympathizing with North Korea in the event of war and implementing the use of force, including the destruction of state infrastructure, weapons manufacture and seizure, and disturbance of communication. More than 130 people attended the above gatherings, including three out of five lawmakers affiliated with the Respondent and their advisors, central committee members or delegates of the Respondent. In light of the detailed circumstances behind the meetings, the attendees' position and status within the Respondent, and the Respondent's supportive attitude toward this case, we can attribute the said gatherings to the activities of the Respondent.

In addition, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district show that members of the Respondent sought to secure election of candidates of their choice through violent means without any debate or voting process, which undermines democratic principles by distorting the democratic formation of opinions within the party, making the election system void.

C. As reviewed above, the leading members of the Respondent aim to accomplish progressive democracy through violence and to ultimately achieve socialism through unification. They are followers of North Korea, and their idea of progressive democracy is overall the same or very similar to the North's revolutionary strategy against South Korea in almost all respects. At the same time, they defend the position of Pyongyang and deny the legitimacy of South Korea, while calling for revolution in line with the theory of People's Democracy Revolution, a tendency that is clearly shown in the insurrection case.

Given the aforementioned circumstances and the fact that the leading

members of the Respondent are taking control of the Respondent, we can attribute their objectives and activities to those of the Respondent. Considering all this, it can be concluded that the Respondent's true objectives and activities are aimed at initially implementing progressive democracy through use of force and eventually achieving North Korean-style socialism.

D. The North Korean-style socialist regime advocated by the Respondent fundamentally contradicts the basic democratic order in that it takes the political line proposed by the Chosun Workers Party as the absolute good and advocates one-man dictatorship founded on people's democratic dictatorship and leadership theory associated with the party line that focuses on a particular class. The Respondent also contests that violence such as an en masse protest can be used to overthrow the existing free democratic system in order to achieve progressive democracy, which, again, is contrary to the basic democratic order. Meanwhile, the activities of the Respondent, such as the meetings aimed at insurrection, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district, deny the national existence, parliamentary system, and the rule of law in terms of substance. In terms of their means or nature, the activities, which actively resort to violence to serve the Respondent's purpose, are in violation of the ideas of democracy.

Taking into account the details and forms of activities and the disposition of the leading members of the Respondent, as well as the very supportive and protective attitude of the Respondent toward its members' activities, a number of activities of the Respondent reviewed earlier including the gatherings where treason was plotted, are grounded on the actual objectives of the Respondent and are highly likely to be repeated in similar circumstances. Furthermore, the fact that the Respondent admits the possibility of taking over power through violence tells us that many of the Respondent's activities reveal the concrete risk

of inflicting substantial harm to the basic democratic order. In particular, the insurrection case, in which the leading members of the Respondent sympathized with North Korea and discussed specific ways to endanger the existence of South Korea, is a clear demonstration of the Respondent's true objectives, and it exceeds the limits of the freedom of expression and doubles the concrete risk of damage to the basic democratic order.

Consequently, the Respondent's real objectives and the activities based thereon are considered to have generated a concrete risk of causing substantial harm to the basic democratic order of our society, and are thus in violation of the basic democratic order.

5. Whether disbanding the Respondent is compatible with the proportionality principle

The objectives and activities of the Respondent aimed at implementing the North Korean-style socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the government of its southern neighbor; there is no alternative other than dissolution in removing the risk of the Respondent, since criminal punishment of the party's individual members will not be sufficient to eliminate the danger inherent in the entire party; the importance of social interest of safeguarding the basic democratic order and democratic pluralism far outweighs the disadvantage caused by party dissolution, namely the fundamental restraint on the Respondent's freedom to engage in party activities or partial restriction on pluralistic democracy. All these considered, the decision to dissolve the Respondent is an inevitable solution to effectively remove the risk posed to the basic democratic order, and is therefore not in violation of the principle of proportionality.

6. Whether members of a political party shall be removed from seats when the party is dissolved by the Constitutional Court

It is not specified in law whether members of the National Assembly shall lose their seats when their party is dissolved by the Constitutional Court. Yet, the essence of entrusting the Constitutional Court with the power to disband parties lies in protecting the citizens by excluding the parties opposing the basic democratic order from forming political opinions, and it becomes impossible to obtain substantial effectiveness of the decision to dissolve a party unless its members are stripped of their parliamentary membership. For reasons such as the said purpose, once the Constitutional Court decides to dissolve a political party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

Dissenting Opinion of Justice Kim Yi-Su

1. Whether objectives or activities of the Respondent violate the basic democratic order

A. The “people’s sovereignty” asserted by the Respondent does not deny the principle of popular sovereignty itself. It seeks to abolish the status quo in which the sovereignty is exclusively concentrated in certain privileged groups and provide substantial guarantee of sovereign rights to the politically and economically marginalized groups and classes. Additionally, the “independent and self-sufficient economy centered on people’s livelihood” supported by the Respondent proclaims the strengthening of national regulation and coordination designed to exercise democratic control over the market and deliver social welfare and justice; it does not require the denial of private property rights or economic liberties that serve as the economic foundation of the protection of fundamental rights. Furthermore, the “Korean federalism” proposed by the Respondent seems to be based on the idea of a unified

state in transition before achieving de jure unification, but the Respondent's ultimate idea of the unified state is not envisaged in the federalism-based plan for Korea's unification. Other arguments of the Respondent such as the abolition of the National Security Act, etc. are no more than just supporting a certain position about many current issues that have already been fully discussed in society. In other words, the details of "progressive democracy" in the Respondent's platform hardly imply the denial of a certain group's sovereignty and fundamental rights or concur with the North's strategy of unification under communism.

Meanwhile, the Respondent's idea of "progressive democracy" was adopted to the platform before the Respondent succeeded the DLP. When the adoption process is taken into full consideration, it appears that progressive democracy advocated by the Respondent demonstrates the party's propensity for a broad sense of socialism that reflects socialist ideals and values, probably influenced by the models of South American countries such as Venezuela and Brazil. And "election victory empowered by mass struggle" or "unifying strategy in and outside the National Assembly" presented by the DLP are strategic choices to ultimately achieve the assumption of power through election and overcome the limitations of a minor party; they are neither considered a tolerance of violence nor an implementation of North Korea's United Front Tactics, a means to carry out the North's revolutionary strategy against South Korea.

The Petitioner argues that the Respondent or its leading members aspire to the North Korean regime and attempt to overthrow the South Korean government. Yet, considering the entire process of splitting, creating, and re-splitting of party as the DLP evolved into the Respondent, despite the fact that the North Korean policy or position of the Jaju faction within the DLP may have been somewhat isolated from the majority opinion of our society, it can neither be decided that the

political line of the Jaju faction itself is founded upon the pursuit of a North Korean-style socialism based on Juche ideology or unconditional following of North Korea, nor that the increase in the number of those who are supporters or part of the pro- Jaju faction within the Respondent is proof that only the pro-North Korean members of the former DLP remain in the current Respondent. Additionally, the members of the Respondent who can be recognized as members, lower members, or relevant individuals of the anti-government NDRP constitute only a small fraction of the whole party who have been convicted individually or mentioned in rulings as members, and it is hard to conclude that, of those few members, Lee ○-Ki and his supporters are taking control of the Respondent by forming an organization of ideological cohesion. Furthermore, it is difficult to readily determine that the decision-making of the East Kyeongi Alliance, the Gwangju Jeonnam Alliance, and the Busan Ulsan Kyeongnam Alliance, which are alleged by the Petitioner to be leading the Respondent, was controlled by the NDRP or its members; the Alliances do not appear to be acting in unity and solidarity based on shared or supported ideology; and the direct connection between the Respondent and North Korea has by no means been substantiated.

Although the Respondent may attempt to establish an alternative regime or implement structural and radical transformation, it is not to be decided that the Respondent's objectives violate the basic democratic order unless it is concretely proven that the Respondent endorses transformation through violent or other anti-democratic means, or aims at overturning the basic democratic order.

B. The meetings held by Kyeonggi Party, a regional branch of the Respondent, on May 10 and 12, 2013 and the remarks made by Lee ○-Ki and others on these occasions were more than just words because they contain the concrete danger of inflicting substantial harm to the basic democratic order. But the activities were undertaken against the

basic political line of the Respondent at large, and it is not sufficient to reason that the Respondent actively supports such activities or that its political line is affected by the activities. The activities, therefore, cannot be regarded as the responsibility of the entire Respondent.

Meanwhile, it is acknowledged that individual activities of some members of the Respondent, such as the illegitimate proportional primary, violence at the central committee, and public opinion rigging before a primary where two opposition parties presented a unified candidate, undermined the democracy of the Respondent, disregarded the principles of democratic decision-making, and violated a positive law. However, not all members of the Respondent engaged in the said activities in an organized, planned, active, and consistent manner, and aside from the said activities, the Respondent has been engaging in normal activities just like other parties, and sporadic election irregularities or crimes of those associated with political parties have been dealt with by punishing the perpetrator and holding the party in question politically responsible. These considered, it does not suffice to say that the abovementioned activities are founded upon or, reversely, have major impact on the Respondent's own political line and thus entail a concrete danger of actual damage to the basic democratic order.

Therefore, the activities of the Respondent are not in violation of the basic democratic order.

2. Whether the Constitutional Court's decision to disband the Respondent is consistent with the proportionality principle

The interest to be achieved from the decision to disband the Respondent is relatively insignificant compared to the severe damage it may cause to the democracy of our society. Although such a decision should be made very limitedly, confined to cases of urgency as a last resort and subsidiary means, it is in violation of the proportionality

principle given the following: a) if there are forces within the Respondent who attempt to overthrow the South Korean basic democratic order, they can be excluded from making policy decisions through means such as criminal punishment, b) although, in principle, it is most fit to leave the decision of dissolving a party to the political public forum, there already is substantial criticism and refutation about the Respondent in the political public sphere such as local elections, c) disbanding the Respondent may result in a social stigma for the vast majority of its ordinary members, and d) today's reality involving South and North Korea has changed, including the significant gap in national power.

Concurring opinion of Justices Ahn Chang-Ho and Cho Yong-Ho

The Respondent argues, while pointing to the portion of its party platform concerning social democracy, that there is no ulterior motive in progressive democracy other than that suggested in the text itself. However, the progressive democracy advocated by the Respondent is different from social democracy, and it can hardly be said that there is no hidden objective of ultimately pursuing the North Korean-style socialism just because they are promoting the elements that can be implemented in the "current" social democracy. The Respondent claims that "people's sovereignty" is merely a concept designed to represent the interest of a specific class, namely "the people." However, pursuing an ultimate objective of protecting the interest of a certain class while being hostile to the remaining members of society is not consistent with the idea of popular sovereignty, and the people's sovereignty set forth by the leading members of the Respondent seems to imply nothing more than establishing people's sovereignty in a people's democratic state through the people's democratic revolution and the people's democratic dictatorship. As the progressive democratic system advocated by the leading members of the Respondent indicates a society controlled by class dictatorship or "popular dictatorship," which is classified as proletariat dictatorship, the Respondent's primary (or interim) objective

of implementing progressive democracy, as well as its ultimate objective of advancing the North Korean-style socialism, is contrary to the basic democratic order.

In reviewing the federalism-based unification plan endorsed by the Respondent, the term “federalism” can be construed either compatible or incompatible with the basic democratic order depending on one’s proposed objectives and substances. However, the idea of a joint referendum by South and North Korea, as proposed by the leading members of the Respondent, involves only the people and not the conservatives who should be subject to reform, and, in North Korea, the people’s opinions are determined by those of the leader and the Chosun Workers Party working under a socialist regime. For this reason, it cannot be said that the ideas and minds of the entire people are fully reflected even if the constitution and state of a unified Korea is established by a peninsula-wide referendum. The rationale of the leading members of the Respondent for adopting a so-called lower-phase federal unification is not convincing, and their unification plan based on “one people, one state, two systems, and two governments” only appears to be a strategy to eventually realize the North Korean-style socialism.

Appendix

THE CONSTITUTION OF THE REPUBLIC OF KOREA ····· 319

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

※ L.S.H.: Constitution Research Officer Lim Sung-Hee
Y.S.Y.: Constitution Researcher Ye Seung-Yeon
C.S.H.: Constitution Researcher Cho Soo-Hye
C.J.E.: Researcher Choi Ji-Eun

□ Full Opinions

	Title	Translator
1	Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence	Y.S.Y.
2	Case on Prohibition of Using the Name of a Political Party whose Registration has been cancelled	Y.S.Y.
3	Case on Prohibition of Nighttime Access to Online Games by Juveniles	C.J.E.
4	Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union	C.S.H.

□ Summaries of Opinions

	Title	Translator
1	Case on the prior notice of outdoor assembly or demonstration	Y.S.Y.
2	Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence	Y.S.Y.

	Title	Translator
3	Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled	Y.S.Y.
4	Restriction on Contribution under the Public Official Election Act	Y.S.Y.
5	Case on Mutates Mutandis Application of the Statutes and Regulations relating to the Civil Procedure in the Process of Dissolving a Political Party	Y.S.Y.
6	Case on the Prohibition of Nighttime Demonstration	C.S.H.
7	Case on the Provision Forbidding Public Officials from Joining a Political Party and Regulating Political Activities	C.S.H.
8	Case on the Protection Application of North Korean Refugee Involved in Drug Trafficking	C.S.H.
9	Case on the Mandatory Receipt of Credit Cards and the Prohibition of Multiple Pricing	C.S.H.
10	Case on the Permission of Photographing a Suspect under Investigation	C.S.H.
11	Unlawful Distribution or Posting of Documents and Printed Materials Case	C.J.E.
12	Discrimination of Second-Generation Patients of Defoliant Exposure Case	C.J.E.
13	Overseas Electors' Presentation of Passports Case	C.J.E.
14	Prohibition of Adolescents' Nighttime Access to Online Games Case	C.J.E.

	Title	Translator
15	Age Restriction for Voting, Electoral Eligibility, Election Campaigning and Political Party Activities Case	C.J.E.
16	Case on Prohibition of Remunerating Full Time Trade Union Official and Time Off	L.S.H.
17	Case on the constitutionality of provisions of the Single－Parent Family Support Act prohibiting adoption agency from operating 'unmarried mother and child family welfare facility for supporting basic needs'	Y.S.Y.
18	Case on Children 18 years old or over Requesting Survivors' Benefit under the Public Officials Pension Act	L.S.H.
19	Braille-Type Election Campaign Bulletins Case	Y.S.Y.
20	Case on the General Prohibition of Multiple Nationalities	C.S.H.
21	Case on the Constitutionality of Using Water Cannon	C.S.H.
22	Case on the Property Registration and Employment Restriction on Employees of Grade IV or Higher of the Financial Supervisory Service	C.S.H.
23	Case on the Restriction on Religious Assemblies of Pretrial Detainees and Unassigned Inmates	C.S.H.
24	Interim Injunction Case on Refugee's Right to Counsel	C.S.H.
25	Case on restricting voting right of overseas electors	Y.S.Y.
26	Case on Registration of Personal Information of Sexual Offenders	Y.S.Y.

	Title	Translator
27	Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union	C.S.H.
28	Case on the Inheritance of De Facto Marriage Spouse	C.S.H.
29	Case on the Act on Use and Protection of DNA Identification Information	L.S.H.
30	Case on the Allotment of Youth Employment	C.S.H.
31	Removal of Posts Containing Unlawful Information Case	C.J.E.
32	Case on Constitutionality of Concurrent Sentence for Separate Charges including an Election Crime	C.J.E.
33	Declaration of Area as Non-Smoking Case	C.J.E.
34	Case on Standard for Population Disparity allowed in Division of Electoral District	Y.S.Y.
35	Case on the Act on the Aggravated Punishment, Etc. of Specific Crimes	C.S.H.
36	Dissolution of Unified Progressive Party Case	C.J.E.