CONSTITUTIONAL COURT DECISIONS

2022

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2022 to December 31, 2022 by the Constitutional Court of Korea.

This volume contains the full texts of the Court's decisions in three cases, including the *Case on Request for Communications Data by Investigative Agencies*, and the summaries of the Court's decisions in 17 cases, including the *Case on National Assembly Act Provision Providing for Closing of Intelligence Committee Meetings to Public.* The contents of this volume are also available on the English website of the Court.

I hope that this volume will enhance understanding of the constitutional adjudication in Korea and become a useful resource for many foreign readers and researchers. Lastly, I would like to thank all those who made possible the publication of this work.

October 31, 2023

Park Jongmun
Secretary General
Constitutional Court of Korea

EXPLANATION OF ABBREVIATIONS & CODES

- Case Codes
  - Hun-Ka: constitutionality case referred by ordinary courts according to Article 41 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-Da: case involving adjudication on the dissolution of a political party
  - Hun-Ra: case involving adjudication on dispute regarding the competence of governmental agencies filed according to Article 61 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-Ba: constitutionality case filed by individual complainant(s) in the form of a constitutional complaint according to Article 68 Section 2 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” indicates a constitutionality case referred by an ordinary court, the docket number of which is No. 2, filed in the year of 1996.

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I. Full Opinions

1. Case on Annulment of Judgments

[2014Hun-Ma760, 2014Hun-Ma763 (consolidated), June 30, 2022]

Complainants

1. N.J. (2014Hun-Ma760)
   Represented by Attorneys Jeong Soon-chul and Kim Jeong-won
2. L.Y. (2014Hun-Ma763)
   Represented by Attorney Kim Dong-jin

Respondents

1. Supreme Court
2. Gwangju High Court

Decided

June 30, 2022

Holding

1. The part "judgment contrary to the binding effect of a decision of unconstitutionality of a statute" of "judgments of the courts" of the main clause of Article 68, Section (1) of the Constitutional Court Act (amended by Act No. 10546, April 5, 2011) is in violation of the Constitution.

2. The Gwangju High Court's (Jeju) 2013Jae-No2 decision on November 25, 2013 and the Supreme Court's 2013Mo2593 decision on August 11, 2014 violated Complainant N.J.'s right to trial, and therefore are annulled.

3. The Supreme Court's 2013Mo2645 decision on August 20, 2014 violated Complainant N.J.'s right to trial, and therefore is annulled.

4. This Court dismisses the remaining claims of Complainants.

1. Case on Annulment of Judgments

Reasoning

I. Case Overview

A. *2014Hun-Ma760*

1. Complainant N.J. was sentenced to four years in prison and a forfeiture of 152.65 million KRW for an Act on the Aggravated Punishment, Etc. of Specific Crimes violation (bribery) on November 25, 2010, by the Jeju District Court, based on the fact that from around February 1, 2003, he had received bribes in connection with his duties as a public official after he had been appointed as a member of the Jeju Special Self-Governing Province Integrated (Disaster) Impact Assessment and Review Committee (Jeju District Court 2009Go-Hap5 judgment). The appellate court sentenced him to two years in prison with labor by applying Article 129, Section (1) of the Criminal Act (Gwangju High Court (Jeju) 2010No107 judgment, May 4, 2011), and the appeal was rejected (Supreme Court 2011Do6347 judgment, September 29, 2011), confirming the appellate judgment.

Pending the appeal, he filed a petition to request constitutional review, arguing that it would be unconstitutional if a member of the Jeju Special Self-Governing Province Integrated (Disaster) Impact Assessment and Review Committee was interpreted to fall under the definition of “public official” in Article 129, Section (1) of the Criminal Act and Article 2, Section (1) of the former “Act on the Aggravated Punishment, Etc. of Specific Crimes.” After the petition was rejected, he filed a constitutional complaint in accordance with Article 68, Section (2) of the Constitutional Court Act and, in the 2011Hun-Ba117 decision on December 27, 2012, the Court decided that the interpretation that an appointed member among the Jeju Special Self-Governing Province Integrated Impact Assessment and Review Committee members in Article 299, Section (2) of the former “Special Act on the Establishment of Jeju

Special Self-Governing Province And The Development of Free International City" (before amendment by Act No. 8566 on July 27, 2007) constitutes a "public official" in Article 129, Section (1) of the Criminal Act (enacted by Act No. 293 on September 18, 1953) is unconstitutional," which means in this case, the Court made a decision of limited unconstitutionality (hereinafter referred to as the "Decision of Limited Unconstitutionality").

2. Complainant N.J. asked for a retrial of the above appellate judgment pursuant to Article 75, Section (7) of the Constitutional Court Act after the Decision of Limited Unconstitutionality, but the request was rejected (Gwangju High Court (Jeju) 2013Jae-No2 decision, November 25, 2013) and the re-appeal against it was also rejected (Supreme Court 2013Mo2593 decision, August 11, 2014).

3. In response, Complainant N.J., on September 5, 2014, filed a petition for review on limited unconstitutionality, asserting that the main clause of Article 68, Section (1) of the Constitutional Court Act is unconstitutional to the extent that "judgments of the courts" in the same provision was interpreted to include the judgment that infringed on the fundamental rights of citizens by applying the statute which was held limitedly unconstitutional by the Court. At the same time, he filed a constitutional complaint to overturn the Supreme Court's 2011Do6347 judgment which rejected the appeal against the appellate court's ruling; Gwangju High Court's (Jeju) 2013Jae-No2 decision that denied the retrial; and the Supreme Court's 2013Mo2593 decision rejected the re-appeal.

B. ***2014Hun-Ma763***

1. On February 8, 2010, Complainant L.Y. was sentenced to imprisonment of six years with a forfeiture of 303 million KRW for an Act on the Aggravated Punishment, Etc. of Specific Crimes violation (bribery) by "accepting bribes related to his duties as a public official while he was appointed and worked as a member of the Jeju Special

Self-Governing Province Integrated (Environmental) Impact Assessment and Review Committee from March 7, 2005 to March 6, 2007" and for the crime of accepting bribes (Jeju District Court 2008Go-Hap126, 2008Go-Hap138, 2009Go-Hap9 (consolidated)). The appellate court reversed the judgment of the lower court on October 20, 2010, sentencing him to five years in prison and 433 million KRW in forfeiture (Gwangju High Court (Jeju) 2010No13), and the appeal was rejected (Supreme Court 2010Do14891 judgment, February 24, 2011), confirming the appellate court's decision. However, after the Decision of Limited Unconstitutionality on the constitutional complaint filed by Complainant N.J. (Constitutional Court 2011Hun-Ba117), he requested a retrial against the appellate judgment in accordance with Articles 75, Section (6) and Article 47, Section (4) of the Constitutional Court Act, but the request was rejected (Gwangju Court (Jeju) 2013Jae-No1 decision, November 26, 2013) and the re-appeal was also rejected (Supreme Court 2013Mo2645 decision, August 20, 2014).

2. In response, on September 11, 2014, Complainant L.Y. filed the constitutional complaint in this case seeking the annulment of the Gwangju High Court (Jeju) 2010No13 judgment and the Supreme Court 2013Mo2645 decision, along with the confirmation of the unconstitutionality of Article 75, Section (7) of the Constitutional Court Act and Article 420, Item 5 of the Criminal Procedure Act.

II. Subject Matter of Review

A. Complainant N.J. argues that it will be unconstitutional if the part "judgments of the courts" in the main clause of Article 68, Section (1) of the Constitutional Court Act (amended by Act No. 10546 on April 5, 2011) is interpreted to include the judgment that infringed on the fundamental rights of citizens by applying the statutes and regulations declared limitedly unconstitutional by the Court. However, the main

reason he argues the part is unconstitutional is that the courts violated his right to trial as they did not allow the retrial and rejected the re-appeal even though this Court, whose decision is naturally binding on all State agencies, made a decision of limited unconstitutionality on that part. This is to the effect that, despite the part "excluding judgments of the courts" in the main clause of Article 68, Section (1) of the Constitutional Court Act, a constitutional complaint by which he seeks to annul the judgments of the courts should be allowed. Therefore, the Court considers that his complaint is about the part "judgments of the courts" in the main clause of Article 68, Section (1) of the same Act.

B. Complainant L.Y. demands this Court to review Article 75, Section (7) of the Constitutional Court Act and Article 420, Item 5 of the Criminal Procedure Act, as his fundamental rights will be violated if the part "upholding" in the former law is interpreted not to include the Constitutional Court's decision of limited unconstitutionality and if the part "when clear evidence is newly found" among prescribed reasons in the latter law is understood not to include "when the Constitutional Court finds limitedly unconstitutional the relevant provisions the courts applied to convict the person, after the judgment of guilt becomes final." However, because Article 75, Section (7) of the Constitutional Court Act is only applied to a party whose constitutional complaint was upheld by the Court and who requests a retrial pursuant to Article 68, Section (2) of the same act, Article 75, Section (7) of the Constitutional Court Act is not directly related to Complainant L.Y. as he asked for a retrial to revoke his conviction pursuant to Article 75, Section (6) and Article 47, Section (4) of the Constitutional Court Act as a statutory penal provision lost its effect retroactively due to a decision of unconstitutionality. Therefore, the abovementioned provision is excluded from the subject matter of review in this case. In addition, the claim relating to Article 420, Item 5 of the Criminal Procedure Act is about the judgment of the court that denied the retrial as it did not deem a decision of limited unconstitutionality to be a reason to reopen the procedures. Since he is

separately seeking the annulment of the judgment of the court that denied the retrial, the claim against the abovementioned provision is excluded from the subject matter of review in this case.

C. Therefore, the subject matter of review is whether 1) the part of the main clause of Article 68, Section (1) of the Constitutional Court Act (amended by Act No. 10546, April 5, 2011) (In 2016Hun-Ma33 decision on 28 April 2016, this Court removed the unconstitutional part by deciding that it was unconstitutional if the abovementioned part "judgments of the courts" was interpreted to include the judgment that infringed upon fundamental rights of citizens by applying the statutes and regulations declared unconstitutional by this Court. Thus, to clarify that the part invalidated by the Constitutional Court's 2016Hun-Ma33 decision was excluded from the instant provision, this is hereinafter referred to as the "Provision Prohibiting Constitutional Complaint against Judgment"), 2) the Gwangju High Court's (Jeju) 2013Jae-No2 decision on November 25, 2013 that rejected the retrial requested by Complainant N.J.; the Supreme Court's 2013Mo2593 decision on August 11, 2014 that rejected his re-appeal; and the Supreme Court's 2013Mo2645 decision on August 20, 2014 that rejected re-appeal requested by Complainant L.Y. against the appellate judgment rejecting the retrial (hereinafter collectively referred to as the "Retrial Rejection Decisions") and 3) the Supreme Court's 2011Do6347 judgment on September 29, 2011 that confirmed the judgment of conviction by rejecting the retrial of Complainant N.J. and the Gwangju High Court's (Jeju) 2010No13 judgment on October 20, 2010 that held that Complainant L.Y. was guilty (these judgments hereinafter collectively referred to as the "Judgments of Guilt") violate Complainants' fundamental rights respectively. The provision at issue (underlined) and the related provisions are as follows:

Provision at Issue

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

Article 68 (Grounds for Request)

(1) Any person whose fundamental rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power, excluding judgments of the courts, may request adjudication on a constitutional complaint with the Constitutional Court: Provided, That if any remedial process is provided by other statutes, no one may request adjudication on a constitutional complaint without having exhausted all such processes. (Emphasis added.)

Related Provisions

Constitutional Court Act (amended by Act No.12597 on May 20, 2014)

Article 47 (Effect of Decision of Unconstitutionality)

(1) Any decision that a statute is unconstitutional shall bind courts, other State agencies, and local governments.

(2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made.

(3) Notwithstanding Section (2), any statute or provision thereof relating to criminal punishment shall lose its effect retroactively: Provided, That where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the decision was made.

(4) In cases referred to in Section (3), a retrial may be requested with respect to a conviction based on the statute or provision thereof decided as unconstitutional.

(5) The Criminal Procedure Act shall apply *mutatis mutandis* to the retrial referred to in Section (4).

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

Article 75 (Decision of Upholding)

(1) A decision to uphold a constitutional complaint shall bind all State agencies and local governments.

(6) In cases referred to in Section (5) and where a constitutional complaint prescribed in Article 68, Section (2) is upheld, Articles 45 and 47 shall apply *mutatis mutandis.*

(7) Where a constitutional complaint prescribed in Article 68, Section (2) is upheld and when the court's case related to the constitutional complaint has already been decided by final judgment, the party may request a retrial of the case before the court.

III. Summary of Arguments of Complainants

This Court's decision of unconstitutionality of a statute binds courts and other government agencies, and it, of course, includes a decision of limited unconstitutionality.

After Complainants received final convictions, this Court declared unconstitutional the penal provision that was the basis of the convictions; nonetheless, the courts did not allow the retrials of Complainants as they denied the binding force of a decision of limited unconstitutionality and rejected their retrials, which violated Complainants' rights including the right to trial. Therefore, the judgments of the courts should be annulled by a constitutional complaint pursuant to Article 68, Section (1), and the Judgments of Guilt that are the original judgments should be, too, quashed for a swift and effective remedy of the fundamental rights of Complainants.

IV. Review

A. *Issue of the Case*

The issue of this case is whether, in cases where Complainants, respectively, requested retrials against the judgments of conviction pursuant

to Article 75, Section (7) and Article 75, Section (6) and Article 47, Section (4) of the Constitutional Court Act after this Court held that penal provision was limitedly unconstitutional in a constitutional complaint in accordance with Article 68, Section (2) of the Constitutional Court Act (hereinafter "the Act" regardless of the versions of amendment), Complainants' fundamental rights were violated (i) by the Retrial Rejection Decisions that denied the retrials against the judgments of conviction by applying the penal provision on the grounds that a decision of limited unconstitutionality by this Court is not a decision of unconstitutionality, (ii) by the Judgments of Guilt that convicted Complainants before the Decision of Limited Unconstitutionality, and (iii) by the Provision Prohibiting Constitutional Complaint against Judgment that excludes judgment of a court from the subject of a constitutional complaint.

B. ***Power of Control over Statutes and Its Effects***

1. ***Power of Judicial Review of Statutes***

(a) The Constitution confers power to conduct judicial review of statutes on this Court (Articles 107 and 111 of the Constitution). This Court exercises the power to conduct judicial review granted by the Constitution through (i) constitutional review upon the request of courts (Article 107, Section (1) and Article 111, Section (1), Item 1 of Constitution; and Article 41, Section (1) of the Act), (ii) a constitutional complaint filed by a complainant whose petition to request constitutional review of a statute is denied by the court (Article 111, Section (1), Item 5 of Constitution and Article 68, Section (2) of the Act), and (iii) a constitutional complaint that seeks rights remedy against a law that infringes on fundamental rights, in accordance with the procedures established by the Act (Article 111, Section (1), Item 5 of the Constitution and Article 68, Section (1) of the Act).

(b) Where the question of constitutionality of a statute is relevant to

the judgment of a case, the court handling the case shall, *sua sponte* or on petition of a party, request the Constitutional Court to review the constitutionality of the statute (Article 41, Section (1) of the Act). The Constitutional Court shall make a decision of unconstitutionality if a statute or statutory provision that is requested to be reviewed is unconstitutional (*see* Article 45 of the Act).

Meanwhile, under Article 68, Section (2) of the Act, a party whose petition to request constitutional review of a statute is denied by the court may challenge in the Constitutional Court the constitutionality of the statute. That is, while the main clause of Article 68, Section (1) of the Act excludes judgments of the courts from the subject of a constitutional complaint, it opens a way for this Court to review the constitutionality of a statute that is relevant to a case by allowing the party to directly challenge in this Court its constitutionality when there is suspicion that the court applies an unconstitutional statute in the party's case and that such court is not requesting constitutional review of that statute. In that not a court but an individual seeks Court adjudication of the constitutionality of the statute, the Act views such action as a constitutional complaint in form, but like constitutional review of a statute under Article 41 of the Act, a constitutional complaint under Article 68, Section (2) of the Act amounts to a concrete judicial review in the sense that it seeks Court adjudication of "the constitutionality of a statute."

A constitutional complaint against a statute as provided for in Article 68, Section (1) of the Act, too, is a way to remedy the infringed rights of the party from one perspective, but as the nature of establishing objective constitutional order is highlighted in that the constitutionality of the statute is reviewed, a constitutional complaint under Article 68, Section (1) of the Act is actually not different from concrete judicial review that is conducted through constitutional review under Article 41 of the Act and through a constitutional complaint under Article 68, Section (2) of the Act (*see* Constitutional Court 91Hun-Ma21, etc., March 11, 1991).

Consequently, when a statute is decided unconstitutional in constitutional complaints brought under Article 68, Section (2) of the Act and Article 68, Section (1) thereof, this Court must uphold the constitutional complaints in the form of a decision of unconstitutionality of the statute.

2. *Binding Force of Decision of Unconstitutionality of Statute*

Since all State agencies are bound by the Constitution, and this is enforced through constitutional proceedings, a decision of unconstitutionality of a statute, the result of exercising the power of judicial review afforded to the Court by the Constitution, binds all State agencies, including courts, and local governments (*see* Constitutional Court 96 Hun-Ma172, etc., December 24, 1997).

Article 47, Section (1) of the Act prescribes that "Any decision that a statute is unconstitutional shall bind courts, other State agencies, and local governments," and Article 75, Section (6) thereof stipulates that when a constitutional complaint under Article 68, Section (2) of the Act is upheld, Article 47 shall apply *mutatis mutandis*. In addition, Article 75, Section (1) of the Act sets forth that "A decision to uphold a constitutional complaint shall bind all State agencies and local governments." These three provisions clearly provide that decisions of unconstitutionality of statutes made through constitutional review, constitutional complaints under Article 68, Section (2) of the Act, and constitutional complaints against statutes as provided for in Article 68, Section (1) of the same act bind all State agencies, including courts, and local governments.

C. *Binding Force of Decision of Limited Unconstitutionality as Control over Statutes*

Whilst reviewing constitutionality of a statute, when there is possibility

of different interpretations of the statute, this Court may first judge which interpretation ultimately conforms to the Constitution the most within the extent that general interpretation is allowed and then make a decision of limited unconstitutionality by establishing the limit of unconstitutionality with the intent that it is unconstitutional if the law applies beyond the limited and narrow constitutional interpretation. This is not just interpreting the statute in light of the Constitution, but reviewing the constitutionality thereof based on constitutional norms. A decision of limited unconstitutionality, a result of this Court's performing constitutional interpretation of a statute whilst reviewing the constitutionality of the statute, does not bring about changes to the text of the law, but is a decision of partial unconstitutionality, meaning that some part of a statutory provision which is applied to specific areas is unconstitutional. The decision of limited unconstitutionality rests with the competence of the Court, which has the power of judicial review (*see* Constitutional Court 89Hun-Ka104, February 25, 1992; Constitutional Court 96Hun-Ma172, etc., December 24, 1997).

Therefore, a decision of limited unconstitutionality is also "a decision of unconstitutionality of a statute" that has the binding force pursuant to Article 47, Section (1) of the Act; and not only when a decision of limited unconstitutionality is made in constitutional review proceedings in accordance with Article 14 of the Act but also when a constitutional complaint in accordance with Article 68, Section (1) of the Act and a constitutional complaint under Article 68, Section (2) of the Act are upheld in the form of a decision of limited unconstitutionality because this Court finds unconstitutionality of the statute, these decisions are considered to have binding force on all State agencies, including courts, and local governments (Article 47, Section (1) and Article 75, Sections (1) and (6) of the Act).

D. *Review of Constitutionality of Provision Prohibiting Constitutional Complaint against Judgment*

1. *Judgments of Courts Against Binding Force of Decision of Unconstitutionality on Statute*

(a) The Constitution confers on the Court the power of judicial review of statutes (Articles 107 and 111 of the Constitution). An unconstitutionality decision on a statute, the result of exercising the power of judicial review afforded to the Court by the Constitution, binds all State agencies, including courts, and local governments. Therefore, a court judgment denying the binding effect of an unconstitutionality decision on a statute is, in itself, not only contrary to the binding effect of the Court's decisions but also frontally violative of the Constitution's determination conferring on the Court the power of judicial review of statutes.

(b) This Court needs to ultimately review such judgment again in order to protect the supremacy of the Constitution and to restore the power of judicial review granted to this Court by the Constitution, although the main clause of Article 68, Section (1) of the Act excludes "judgments of the courts" from the subject of a constitutional complaint. To this end, the Court should make a decision of unconstitutionality that removes the part "judgment contrary to the binding effect of a decision of unconstitutionality of a statute" from the scope of "judgments of the courts" in the main clause of Article 68, Section (1) of the Act, in order that a constitutional complaint against such judgments may be allowed as an exception.

2. *Scope of Decision of Limited Unconstitutionality regarding Provision Prohibiting Constitutional Complaint against Judgment*

(a) In the Constitutional Court's 96Hun-Ma172 decision on December

24, 1997, this Court held limitedly unconstitutional Article 68, Section (1) of the former Act prior to amendment by Act No. 10546, on April 5, 2011, stating that "Article 68, Section (1) of the Act would be unconstitutional if the phrase 'judgments of the courts' in the main clause of Article 68, Section (1) of the Constitutional Court Act was interpreted to include the 'judgment that has infringed the fundamental rights of the citizens through the application of statutes and regulations declared unconstitutional by the Court.'" Later, the Court also rendered to the same effect a decision of limited unconstitutionality of the phrase "judgments of the courts" in the main clause of Article 68, Section (1) of the Act amended by Act No. 10546 on April 5, 2011. In holding so, the Court severed the unconstitutional part and since then has considered constitutional the Provision Prohibiting Constitutional Complaint against Judgment, the substance of which was reduced to exclude the unconstitutional part (*see* Constitutional Court 2015Hun-Ma940, May 26, 2016; Constitutional Court 2015Hun-Ma 861, etc. August 30, 2018; Constitutional Court 2018Hun-Ma1093, June 28, 2019; and Constitutional Court 2020Hun-Ma271, etc., March 25, 2021).

(b) The fundamental purport of the above decisions is that the supremacy of the Constitution should be protected, and the power of judicial review of statutes conferred on this Court by the Constitution should be restored by this Court's ultimate re-review of a court judgment that is contrary to a binding decision of the Court and infringes the fundamental rights of the citizens. However, as explained above, a decision of conditional unconstitutionality, as a result of judicial review of a statute, means that some part of a statutory provision which is applied to a particular area is unconstitutional. In the case of a decision of limited unconstitutionality, because it is binding upon all State agencies, including courts, and all local governments only as to a particular part of a statutory provision which the Court holds to be excluded from application, the portion invalidated by the prior decision of limited unconstitutionality (2016Hun-Ma33) is confined to the part of

"judgments of the courts" in the main clause of Article 68, Section (1) of the Act referring to the "judgment that has infringed the fundamental rights of the citizens through the application of statutes and regulations declared unconstitutional by the Court." Therefore, to remove the "judgment contrary to the binding effect of a decision of unconstitutionality of a statute" portion from the scope of application of prohibition on constitutional complaints against judgments as prescribed by the main clause of Article 68, Section (1) of the Act, such portion of the Provision Prohibiting Constitutional Complaint against Judgment needs to be rendered unconstitutional by a separate decision.

3. *Sub-conclusion*

All in all, the part "judgment contrary to the binding effect of a decision of unconstitutionality of a statute" of the Provision Prohibiting Constitutional Complaint against Judgment is in violation of the Constitution.

E. *Review of Retrial Rejection Decisions*

1. *Binding Effect of Decision of Limited Unconstitutionality*

(a) In the 2011Hun-Ba117 decision on December 27, 2012, this Court ruled "the interpretation that an appointed member among the Jeju Special Self-Governing Province Integrated Impact Assessment and Review Committee members in Article 299, Section (2) of the former 'Special Act on the Establishment of Jeju Special Self-Governing Province And The Development of Free International City' (before amendment by Act No. 8566 on July 27, 2007) constitutes a 'public official' in Article 129, Section (1) of the Criminal Act (enacted by Act No. 293 on September 18, 1953) is unconstitutional," and made a decision of limited unconstitutionality that left the text of the statute intact but limited and removed some areas the law applied to.

1. Case on Annulment of Judgments

It is undeniable that the authority to interpret and apply laws in a concrete case constitutes the essence of judicial power. Nonetheless, it cannot be said, merely because the text of a statutory provision did not change and the Court referred to the invalidated unconstitutional part of that provision by using the word "interpretation," that a decision of limited unconstitutionality, a result of judicial review of a statute, amounts to control over courts' exercise of statutory interpretation and application in concrete cases, as opposed to judicial control of the statute.

(b) The Decision of Limited Unconstitutionality did not review whether a particular interpretation and application of the penal provision by the courts in concrete cases was right or wrong but was a decision of partial unconstitutionality, declaring some part of the penal provision unconstitutional and invalid. The reason that the Decision of Limited Unconstitutionality specifically limited the scope of the decision of unconstitutionality was that the Court believed it was necessary, in rendering a decision of unconstitutionality on the penal provision, to minimize disruption to legal stability caused by the retroactivity of that decision, and to clearly establish the scope of such decision, which is binding on all State agencies, including courts. Furthermore, removing the exact unconstitutional part from the penal provision was judicial restraint on legislative actions and an expression of deference towards the legislature.

Accordingly, the Decision of Limited Unconstitutionality, as a decision of partial unconstitutionality, constitutes a decision of unconstitutionality of a statute; and in accordance with Article 75, Section (6) and Article 47, Section (3) of the Act, of a "public official" in Article 129, Section (1) of the Criminal Act (enacted by Act No. 293 on September 18, 1953), the part of an appointed member among the Jeju Special Self-Governing Province Integrated Impact Assessment and Review Committee members in Article 299, Section (2) of the former "Special Act on the Establishment of Jeju Special Self-Governing Province And

The Development of Free International City" (before amendment by Act No. 8566 on July 27, 2007) became invalid retroactively. Also, the Decision of Limited Unconstitutionality binds courts, other State agencies, and local governments pursuant to Article 75, Section (6) and Article 47, Section (1) of the Act.

2. ***Whether Retrial Rejection Decisions Are Judgments of Courts Subject to Constitutional Complaint as Exception***

The Retrial Rejection Decisions denied the binding force of the Decision of Limited Unconstitutionality for the reason that "A decision of limited unconstitutionality that leaves a provision intact but announces unconstitutional the interpretation and application of particular content of the provision may not be granted the effect of a decision of unconstitutionality prescribed by Article 47 of the Act. In turn, a decision of limited unconstitutionality does not bind courts and cannot be the cause of a retrial." Since this judgment denied the binding effect of the Decision of Limited Unconstitutionality, as a decision of partial unconstitutionality, granted in accordance with Article 76, Section (6) and Article 47, Section (1) of the Act, the Retrial Rejection Decisions constitute a "judgment contrary to the binding effect of a decision of unconstitutionality of a statute." In conclusion, regarding the Retrial Rejection Decisions, a constitutional complaint that seeks the annulment of the Retrial Rejection Decisions is exceptionally allowed.

3. ***Whether Right to Trial Was Infringed***

(a) Article 27, Section (1) of the Constitution sets forth that "All citizens shall have the right to be tried in conformity with statutes by judges qualified under the Constitution and statutes," confirming the natural principle of the rule of law that means statutes bind courts and guaranteeing a "right to trial in conformity with statute," that is, a right to receive trial as provided by substantive statute and in accordance with

procedures established by procedural statute (*see* Constitutional Court 90Hun-Ba 25, June 26, 1992; Constitutional Court 90Hun-Ba35, July 9, 1993).

(b) Article 75, Section (7) of the Act stipulates that "Where a constitutional complaint prescribed in Article 68, Section (2) of the Act is upheld and when the court's case related to the constitutional complaint has already been decided by final judgment, the party may demand a retrial of the case before the court." Here, it confers on the party the right to request a retrial, and "Where a constitutional complaint is upheld" includes where this Court makes a decision of limited unconstitutionality. Moreover, Article 47, Sections (3) and (4) of the Act state that any statutory provision relating to criminal punishment shall lose its effect retroactively, and in such a case, a retrial may be requested with respect to a conviction based on the provision decided as unconstitutional. In doing so, those sections of Article 47 allow an already convicted person to demand a retrial when there is a decision of unconstitutionality on the provision. Article 75, Section (6) of the Act sets out that "Where a constitutional complaint prescribed in Article 68, Section (2) is upheld," Article 47 shall apply *mutatis mutandis*. Here, "Where a constitutional complaint is upheld" includes where this Court makes a decision of limited unconstitutionality.

Thus, the Retrial Rejection Decisions that denied the binding force of the Decision of Limited Unconstitutionality and did not acknowledge it as a reason for retrials are violative of Complainants' right to trial.

4. *Sub-Conclusion*

As the Retrial Rejection Decisions are the "judgments that are contrary to the binding effect of a decision of unconstitutionality of a statute," a constitutional complaint is allowed. Furthermore, because the Retrial Rejection Decisions infringed Complainants' right to trial guaranteed by the Constitution, they must be annulled pursuant to Article 75, Section

(3) of the Act.

F. ***Review of Judgments of Guilt***

The Judgments of Guilt were finalized before this Court made the Decision of Limited Unconstitutionality regarding whether an appointed member among the Jeju Special Self-Governing Province Integrated Impact Assessment and Review Committee members in Article 299, Section (2) of the former "Special Act on the Establishment of Jeju Special Self-Governing Province And The Development of Free International City" (before amendment by Act No. 8566 on July 27, 2007) constituted a public official in Article 129, Section (1) of the Criminal Act (enacted by Act No. 293 on September 18, 1953), which applied to the Judgments of Guilt.

Any statutory provision relating to criminal punishment shall retroactively lose its effect by a decision of unconstitutionality (Article 47, Section (3) of the Act). In our country, where a separate system of constitutional adjudication procedures is established by Constitution and statute to review constitutionality of statutes, all laws are presumed constitutional until this Court announces their unconstitutionality. Thus, if there is a suspicion of unconstitutionality of a statute, a court may request the Court to review its constitutionality and may temporarily withhold its application, but may not refuse to apply it. Against this backdrop, before a decision of unconstitutionality, judges' applying the law is institutionally guaranteed to be legitimate. Therefore, a judgment that is based on a statute that has never been announced unconstitutional by this Court cannot be called an illegal exercise of government power and thus be subject to a constitutional complaint merely because after the judgment, a decision of unconstitutionality on the statute is made (*see* Constitutional Court 99Hun-Ma461, etc., February 22, 2001). The same is true when penal provisions become invalid retroactively due to a decision of unconstitutionality by this Court. In such a situation, the

only remedy is retrial.

For the same reason as the above, Article 75, Section (7) of the Act states that "Where a constitutional complaint prescribed in Article 68, Section (2) is upheld and when the court's case related to the constitutional complaint has already been decided by final judgment, the party may request a retrial of the case before the court," and although Article 47, Section (3) acknowledges the retroactivity of an unconstitutionality decision on a statutory provision relating to criminal punishment, Section (4) of the said article provides by way of retrial before a court a remedy for a final and conclusive judgment of conviction based on a statutory provision held unconstitutional.

As a consequence, the Judgments of Guilt made prior to the Decision of Limited Unconstitutionality are not deemed contrary to the binding force of a decision of unconstitutionality of a statute, and thus, the claim against these judgments are nonjusticiable because they are not the exceptional judgments that are a subject of a constitutional complaint.

V. Conclusion

Therefore, as set forth in Holding, the part "judgment contrary to the binding effect of a decision of unconstitutionality of a statute" of the Provision Prohibiting Constitutional Complaint against Judgment is unconstitutional, the Retrial Rejection Decisions are annulled as violative of the right of Complainants to trial, and the remaining claims of Complainants are dismissed as nonjusticiable. This decision was made with a unanimous opinion of participating Justices.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison

2. Case on Request for Communications Data by Investigative Agencies

[2016Hun-Ma388, 2022Hun-Ma105, 2022Hun-Ma110, 2022Hun-Ma126 (consolidated), July 21, 2022]

Complainants

The same as listed in Appendix 1

Respondents

The same as listed in Appendix 2

Decided

July 21, 2022

Holding

1. The part of Article 83, Section (3) of the Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010) relating to "a request for communications data from a prosecutor, the head of an investigative agency (including the head of a military investigative agency), or the head of an intelligence and investigative agency to collect information for investigation, execution of a sentence, or prevention of harm to the guarantee of national security" does not conform to the Constitution. The above statutory provision continues to apply until the legislature amends it by December 31, 2023.

2. The claim of Complainants listed in Appendix 3 and Appendix 4 against acts of acquiring communications data and that of Complainants Y.B., P.H., S.S., K.J., and J.M. are dismissed.

Reasoning

I. Overview of the Case

A. *2016Hun-Ma388*

1. Complainants are users of the telecommunications service provided by telecommunications business operators, Companies A, B, and C.

2. In accordance with Article 83, Section (3) of the Telecommunications Business Act, Respondents asked Companies A and B to provide for investigation the "name, resident registration number, address, phone number, date of subscription" of Complainants J.S., K.J., C.Y., K.M., H.J., A.H., P.C., Y.S., and L.G. described in Appendix 3, and the above telecommunications business operators provided Complainants' communications data as described in Appendix 3 to Respondents. Through this, Respondents obtained the communications data of Complainants listed in Appendix 3 from May 21, 2015, to March 4, 2016.

In addition, Respondents, prosecutors belonging to prosecutors' offices at each level, and the heads of investigative agencies requested Companies A, B, and C to provide communications data of Complainants other than those listed in Appendix 3 and obtained their communications data.

3. In response, on May 18, 2016, Complainants filed the constitutional complaint in this case against Article 83, Section (3) of the Telecommunications Business Act which stipulates when a prosecutor, the head of an investigative agency including the head of a prosecutor or military investigative agency, or the head of an intelligence investigation agency (hereinafter referred to as "the investigative agency et al.") requests the telecommunications business operator to provide communications data, the telecommunications business operator may comply with the request, while Complainants listed in Appendix 3 filed

the constitutional complaint in this case against acts of acquiring communications data. Complainant K.M. filed the constitutional complaint in this case, adding, in addition to his claim against the abovementioned Article 83, Section (3), a claim against the proviso of Article 83, Section (4) of the Telecommunications Business Act, which prescribes that if there is an urgent reason, the head of the investigative agency et al. may request, without resorting to writing, telecommunications business operators to provide communications data.

B. ***2022Hun-Ma105***

1. On December 23, 2021, Complainant asked Company B, a telecommunications business operator, to confirm whether or not his communications data had been provided to an investigative agency, and on December 27, 2021, Company B confirmed that Complainant's communications data containing his name, resident registration number, address, phone number, subscription date, and termination date were given to the *** District Prosecutor's Office three times between February 23, 2021 and June 28 of the same year.

2. In response, on January 25, 2022, Complainant filed the constitutional complaint in this case, asserting that Article 83, Section (3) of the Telecommunications Business Act, which prescribes that telecommunications business operators may furnish users' personal information at the request of the investigative agency et al. violated the principle of warrant and infringed upon his fundamental rights.

C. ***2022Hun-Ma110***

1. Complainant's communications data, specifically his name, resident registration number, address, phone number, subscription date, and termination date, were supplied to the investigative agency et al., such as a district prosecutor's office and a police station, four times between

February 23 and November 8 in 2021.

2. In response, on January 26, 2022, Complainant filed the constitutional complaint in this case, arguing that Article 83, Section (3) of the Telecommunications Business Act, which sets forth that telecommunications business operators may provide users' personal information at the request of investigative agencies, violated the rule against excessive restriction, rule of clarity, and principle of warrant and, thus, infringed upon his fundamental rights.

D. *2022Hun-Ma126*

1. Complainants are people who use the telecommunications service provided by telecommunications business operators, Companies A, B, and C.

2. Complainants became aware of the fact that Respondents had acquired their communications data as described in Appendix 4, and filed the constitutional complaint in this case on January 28, 2022, alleging that their right to informational self-determination, etc. are infringed both by Respondents' communications data acquisition activities listed in Appendix 4 and by Article 83, Section (3) and the proviso of Article 83, Section (4) of the Telecommunications Business Act, which are the legal basis of the acquisition.

II. Subject Matter of Review

A. *2016Hun-Ma388*

1. Complainants J.S. et al. are challenging the constitutionality of the communications data acquisition activities listed in Appendix 3.

2. Furthermore, Complainants are also challenging the constitutionality

of the whole of Article 83, Section (3) of the Telecommunications Business Act. However, in this case, the investigative agency et al. asked the telecommunications business operators to provide Complainants' communications data for an investigation, and subsequently, the operators provided the investigative agency et al. with the communications data which contained Complainants' personal information at their request (the investigative agency et al.'s acquiring communications data through their "request for provision of communications data" and telecommunications service providers' "provision of communications data" is hereinafter referred to as "the act of acquisition of communications data"). Thus, the subject matter of review is limited to the part of Article 83, Section (3) of the Telecommunications Business Act relating to "a request for communications data from a prosecutor, the head of an investigative agency (including the head of a military investigative agency), or the head of an intelligence and investigation agency." Complainants also argue that the legislative inaction that the Telecommunications Business Act did not establish ex-post notification procedures violates the Constitution, but this is a challenge to the failure of Article 83, Section (3) of the Telecommunication Business Act to establish ex-post notification to users—in other words, a challenge to insufficient and incomplete legislation. As such, since Complainants ultimately dispute the constitutionality of Article 83, Section (3) of the Telecommunications Business Act, the legislative inaction thereof is not included in the subject matter of review.

3. Meanwhile, Complainant K.M. argues that if Article 83, Section (3) of the Telecommunications Business Act is unconstitutional, then the proviso of Article 83, Section (4) of the Telecommunications Business Act is also unconstitutional, and the above provision should be declared unconstitutional by expanding the scope of a decision of unconstitutionality pursuant to Article 45 of the Constitutional Court Act. Since this is not an independent argument against the constitutionality of the proviso of Article 83, Section (4) of the Telecommunications Business Act,

however, it is not included in the subject matter of review.

4. On that account, the subject matter of review is whether each act of acquisition of communication data of Complainants listed in Appendix 3 and the part of Article 83, Section (3) of the Telecommunications Business Act (wholly revised by Act No. 10166 on Mar. 22, 2010) relating to "a request for provision of communications data from a prosecutor, the head of an investigative agency (including the head of a military investigative agency), or the head of an intelligence and investigative agency to collect information for investigation, execution of a sentence, or prevention of harm to the guarantee of national security" infringe on the fundamental rights of Complainants.

B. *2022Hun-Ma105*

Complainant is challenging the constitutionality of the whole of Article 83, Section (3) of the Telecommunications Business Act, but as he is a person whose communications data were provided to a prosecutor, the subject matter of review is limited to the part relating to Complainant. Therefore, the subject matter of review is whether the part of Article 83, Section (3) of the Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010) concerning "a request for provision of communications data from a prosecutor to collect information for investigation" violates the fundamental rights of Complainant.

C. *2022Hun-Ma110*

Complainant is challenging the constitutionality of the whole of Article 83, Section (3) of the Telecommunications Business Act, but as his communications data were furnished to prosecutors and police, the subject matter of review is limited to the part relating to Complainant. Therefore, the subject matter of review is whether the part of Article 83, Section (3) of the Telecommunications Business Act (wholly revised by

Act No. 10166 on March 22, 2010) concerning "a request for provision of communications data from a prosecutor or the head of an investigative agency to collect information for investigation" infringes on the fundamental rights of Complainant.

D. ***2022Hun-Ma126***

Complainants are challenging the constitutionality of each act of acquisition of communications data described in Appendix 4 and the constitutionality of Article 83, Section (3) and the proviso of Article 83, Section (4) of the Telecommunications Business Act. However, Complainants are those whose communications data have been provided to investigative agencies such as prosecutors or *** Agency. Thus, the subject matter of review is limited to the part of Article 83, Section (3) of the Telecommunications Business Act relevant to Complainants. Since Complainants made no independent argument against the constitutionality of the proviso of Article 83, Section (4) of the Telecommunications Business Act, the proviso thereof is excluded from the subject matter of review. Therefore, the subject matter of review is whether each act of acquisition of communications data of Complainants listed in Appendix 4 and the part of Article 83, Section (3) of the Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010) concerning "a request for provision of communications data from a prosecutor or the head of an investigative agency to collect information for investigation" violate the fundamental rights of Complainants.

E. ***Sub-conclusion***

As a consequence, the subject matter of review in this case is whether each act of acquiring communications data of Complainants listed in Appendix 3 and Appendix 4 (hereinafter referred to as the "Act of Acquiring of Communications Data") and the part of Article 83, Section

(3) of the Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010) concerning "a request for provision of communications data from a prosecutor, the head of an investigative agency (including the head of a military investigative agency), or the head of an intelligence and investigative agency to collect information for investigation, execution of a sentence, or prevention of harm to the guarantee of national security" (hereinafter referred to as the "Act Provision") infringe on the fundamental rights of Complainants.

The provision at issue and related provisions are as follows:

Provision at Issue

Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010)

Article 83 (Protection of Confidentiality of Communications)

(3) A telecommunications business operator may comply with a request for the perusal or provision of any of the following data (hereinafter referred to as "provision of communications data") from a court, a prosecutor, the head of an investigative agency (including the head of a military investigative agency, the Commissioner of the National Tax Service, and the Commissioner of a Regional Tax Office; hereinafter the same shall apply) or the head of an intelligence and investigation agency, to collect information for trial, investigation (including the investigation of a violation committed by means of a telephone, the Internet, etc. among the offenses prescribed in Article 10 (1), (3) and (4) of the Punishment of Tax Offenses Act), execution of a sentence, or prevention of harm to the guarantee of national security:

1. Names of users;
2. Resident registration numbers of users;
3. Addresses of users;
4. Phone numbers of users;

5. User identification word (referring to the identification codes of users used to identify the rightful users of computer systems or communications networks);
6. Dates on which users subscribe or terminate their subscriptions. (Emphasis added.)

Related Provisions

Former Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010, and before amended by Act No. 17347 on June 9, 2020)

Article 83 (Protection of Confidentiality of Communications)

(4) The request for provision of communications data under Section (3) shall be made in writing (hereinafter referred to as "Written Request for Provision of Data"), which states a reason for such request, relation with the relevant user and the scope of necessary data: *Provided*, That where it is impossible to make a request in writing due to an urgent reason, such request may be made without resorting to writing, and when such reason disappears, a Written Request for Provision of Data shall be promptly filed with the telecommunications business operator.

Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010)

Article 83 (Protection of Confidentiality of Communications)

(5) Where a telecommunications business operator provides communications data according to procedures under Sections (3) and (4), he or she shall retain the ledgers prescribed by Presidential Decree, which contain necessary matters, such as records indicating that communications data are provided, and the related materials, such as a Written Request for Provision of Data.

(7) A telecommunications business operator shall, in accordance with the methods prescribed by Presidential Decree, notify details

entered in the ledgers under Section (5) to the head of a central administrative agency whereto a person requesting the provision of communications data under Section (3) belongs: *Provided*, That where a person who requests the provision of communications data is a court, the relevant telecommunications business operator shall notify the Minister of the National Court Administration thereof.

Former Telecommunications Business Act (amended by Act. No 11690 on March 23, 2013, and before amended by Act. No. 14839 on July 26, 2017)

Article 83 (Protection of Confidentiality of Communications)

(6) A telecommunications business operator shall report on the current status, etc. of provision of communications data, to the Minister of Science, ICT and Future Planning twice a year, in accordance with methods prescribed by Presidential Decree, and the Minister of Science, ICT and Future Planning may check whether the details of a report submitted by a telecommunications business operator are correct and the management status of related materials under Section (5).

Former Telecommunications Business Act (wholly revised by Act No. 10166 on March 22, 2010, and before amended by Act. No. 16019 on December 24, 2018)

Article 94 (Penalty Provisions)

Any of the following persons shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 200 million won:

5. A person who provides communication data, and a person who receives communications data, in violation of Article 83 (3).

Telecommunications Business Act (amended by Act No. 17352 on June 9, 2020)

Article 104 (Administrative Fines)

(5) Any of the following persons shall be subject to an administrative

fine not exceeding 10 million won.

13. A person who fails to retain related materials or retains false materials in violation of Article 83 (5).
14. A person who fails to notify details of the ledgers which include the provision of communications data, etc. to the head of a central administrative agency, in violation of Article 83 (7).

III. Arguments of Complainants

A. *2016Hun-Ma388*

1. *Arguments on Justiciability*

(a) The Act of Acquiring Communications Data as an *in rem* investigation on Complainants' communications data conducted by the investigative agency et al., unilaterally in a superior position, is a *de facto* exercise of power, and as the investigative agency et al. are State agencies, which can cause a chilling effect that the telecommunications business operators would be disadvantaged if they do not respond to their request, the Act of Acquiring Communications Data amounts to an exercise of governmental power subject to a constitutional complaint.

(b) Even where the investigative agency et al. acquire communications data in accordance with the Act Provision, the users whose information has been provided will not know about the investigative agency et al.'s request for provision of communications and telecommunications business operators' provision of such data, and there is no way to challenge the act of acquisition of communications data itself. Therefore, the Act Provision expects an act of execution, but it falls under the case where there is no remedy procedure for the act of execution or no possibility of expecting remedies of rights, and thus the directness of infringement of fundamental rights must be acknowledged. In addition,

although it is true that some Complainants' complaints were filed one year after the date of the act of acquisition of communications data, where they were unaware of the fact that their communications data were submitted to the investigative agency et al. due to a lack of ex-post notification procedures, etc., the limitation period for filing should be judged based on whether 90 days have expired from the date of actual knowledge.

2. *Arguments on Merits*

(a) Although the act of acquisition of communications data by the investigative agency et al. under the Act Provision constitutes a compulsory measure subject to the principle of warrant, the Act of Acquiring Communications Data by Respondents was carried out without a warrant. In addition, in the case of Complainants J.S. et al. listed in Appendix 3, the acts of acquisition of their communications data were performed without a reason specified by the Act Provision, and in particular, the investigative agency obtained the communications data of Complainant L.G. seven times. Respondents argue that they obtained the communications data to achieve the purpose of the investigation because there were records of phone conversations between Complainants and the suspect or person of interest, but they did not prove anything about whether the act of acquisition of communications data of Complainants was indispensable.

Therefore, the Act of Acquiring Communications Data is in violation of the principle of warrant and the rule against excessive restriction and infringes on the right to informational self-determination of Complainants J.S. et al. listed in Appendix 3.

(b) The act of acquisition of communications data pursuant to the Act Provision amounts to a compulsory measure as the investigative agency et al. conducted it in a superior position, and thus the Act Provision in effect permits search and seizure without a warrant. What's more, the

act of acquisition of communications data can be carried out in an extensive and broad manner, targeting virtually all the citizens, and the Act Provision does not only very broadly and vaguely set forth the reasons for the investigative agency et al. to request the provision of communications data, but also does not have any procedures such as notifying users that their telecommunications business operator has supplied their communications data at the request of the investigative agency et al. Therefore, the Act Provision violates the rule against excessive restriction, rule of clarity, and principle of warrant, infringing on the right to informational self-determination of Complainants.

B. ***2002Hun-Ma105***

As the Act Provision allows an investigative agency to obtain communications data that can identify the user's personal details, without a warrant, in a simple way, it is in violation of the confidentiality of communications and the principle of warrant.

C. ***2022Hun-Ma110***

The Act Provision prescribes the objectives of personal information collection and the scope of the affected in an overly broad manner and does not establish *ex-ante* or *ex-post* judicial controls. Even though personal information has been provided to an investigative agency, nevertheless, the Act Provision does not have a procedure to notify individuals who are the subjects of the information and permits indiscriminate acquisition of personal information by the investigative agency. Therefore, the Act Provision violates the right to informational self-determination and confidentiality of communications and is contrary to the rule against excessive restriction, rule of clarity, and principle of warrant.

D. *2022Hun-Ma126*

1. *Act of Acquiring Communications Data*

(a) The Act of Acquiring Communications Data was an exercise of governmental power by Respondents, in a superior position, against Complainants listed in Appendix 4 through the telecommunications business operators, and this is a *de facto* exercise of power which already terminated, which in turn makes it highly likely for a court to deny justiciable interests. In this sense, the exception to the requirement of exhaustion of prior remedies is recognized. In addition, considering the importance of personal information protection and the practice of reckless information acquisition by an investigative agency through telecommunications business operators, the need for a constitutional explanation is acknowledged.

(b) Since the act of acquisition of communications data by an investigative agency is conducted without consent of the data subject in the absence of *ex-ante* or *ex-post* judicial control or even *ex-post* notification, it should be considered a compulsory criminal investigation to which the principle of warrant applies. Therefore, the Act of Acquiring Communications Data of Complainants listed in Appendix 4 is not only against the principle of warrant, but also against their right to informational self-determination and is also against the principle of due process of law as the data subject was not guaranteed to participate in the process of the investigative agency's acquiring communications data nor were there remedy procedures under which Complainants are notified of such acquisition and may challenge it.

2. *Act Provision*

(a) The Act Provision is so broad in its purposes and the scope of affected that it enables investigative agencies to indiscriminately collect

personal information. Unlike the fact that strict regulation is in place for obtaining communications data through communications data restriction measures, searches and seizures, requests for provision of communications confirmation data, etc., the Act Provision allows an investigation agency to obtain information without any judicial controls, which is inconsistent with the aforementioned legal system. In addition, even though less restrictive means are available, such as subjecting the acquisition of communications information to judicial controls, notifying the data subject of the acquisition thereof, and limiting the scope of the affected and the purposes of the collection, the Act Provision excessively infringes upon the confidentiality of communications and right to informational self-determination.

(b) Although it is beyond dispute that the Act Provision should clarify its legal basis by specifying in detail actors, purposes, the affected, scope, etc., of the collection, storage, and use of personal information, it describes the reasons for the request of provision and the possibility for a telecommunications business operator to reject the request in an unclear way, violating the rule of clarity. Furthermore, it is against the principle of due process of law as it does not establish any measures to ensure procedural appropriateness, such as *ex-ante* or *ex-post* judicial controls or *ex-post* notification. It also violates systematic legitimacy by making it unclear whether the act of furnishing communications data falls under an investigation, while the Act Provision distinguishes communications data from communications confirmation data and regulates communications data in the Telecommunications Business Act, which does not fit its legislative objectives. Furthermore, it is contrary to the principle of statutory reservation by enacting the law without a notification procedure to the data subject, which is key to the right to informational self-determination.

IV. Assessment on Justiciability

A. *Claim against Act of Acquiring Communications Data*

Article 68, Section (1) of the Constitutional Court Act provides that "any person whose fundamental rights are infringed due to exercise or non-exercise of the governmental power" may file a constitutional complaint. Here, "governmental power" refers to the sovereign operation of all State agencies and public organizations that exercise legislative, executive, and judicial powers, and their exercise or non-exercise creates direct legal effects on rights and duties of the citizens and puts a complainant's legal status in an unfavorable position (*see* Constitutional Court 2010Hun-Ma439, August 23, 2012; Constitutional Court 2016Hun-Ma483, Aug 30, 2018).

Upon examination, the Court finds that the request for provision of communications data from the investigative agency et al. pursuant to the Act Provision falls under a non-compulsory criminal investigation and that the Act of Acquiring Communications Data was enabled as the telecommunications business operators, which are not a public authority but a private entity, voluntarily supplied the data in response to Respondent's request for provision of communications data of Complainants listed in Appendix 3 and Appendix 4. The Telecommunications Business Act stipulates that a telecommunications business operator may comply with a request for provision of communications data from the investigative agency et al., granting telecommunications business operators the authority to legally furnish users' communications data in response to requests from the investigative agency et al., and leaving whether to furnish the communications data at the discretion of telecommunications business operators while not specifying the duty for telecommunications business operators to cooperate. Additionally, there is no legal provision at all on compulsory measures in the case a telecommunications business operator does not respond to the request for the provision. There is no hierarchy

between Respondents and telecommunications business operators, and the operators would not suffer any legal disadvantages for not following Respondent's request for the provision. Even if the operators feel psychological pressure due to the request from the investigative agency et al., this is only an indirect and factual, not a legal, disadvantage. Even if operators had not complied with the request of the investigative agency et al. and Respondents had obtained communications data by getting a search and seizure warrant, it would not have caused any disadvantages to the business of the operators (*see* Constitutional Court 2010Hun-Ma439, August 23, 2012).

Therefore, the Act of Acquiring Communications Data does not amount to the exercise of governmental power, which is the subject of a constitutional complaint under Article 68, Section (1) of the Constitutional Court Act, and for this reason, the claim against the acts of acquisition of communications data of Complainants listed in Appendix 3 and Appendix 4 is non-justiciable.

B. ***Claim against Act Provision***

1. ***Assessment on Directness***

In order for a statute or a statutory provision to be subject to a constitutional complaint, the statute itself must result in restrictions on freedom, imposition of duties, or deprivation of rights or legal status without a subsequent, concrete act of execution by the statute or the statutory provision (*see* Constitutional Court 2017Hun-Ma1299, December 27, 2019). However, where there is a specific act of execution but no remedy for it; where a remedy exists but there is no possibility it works, forcing a complainant whose fundamental rights were violated to make a detour to an unnecessary procedure (*see* Constitutional Court 96Hun-Ma48, August 21, 1997); or where the content of the legal norm directly changes the citizens' rights or decisively determines the citizens' legal status

before the act of execution, fixing the citizens' rights in the state of being determined to the extent that it will not be influenced by the existence or content of the execution itself (*see* Constitutional Court 2003Hun-Ma337, August 26, 2004), the requirement of directness to fundamental rights infringement is exceptionally acknowledged.

As the Act Provision presumes the investigative agency et al.'s requesting a telecommunications business operator to provide communications data, the investigative agency et al.'s making the request itself does not bring about the effect of restraining the fundamental rights of the telecommunications service users. The user's fundamental rights are inhibited only when a telecommunications business operator, which is not a public authority but a private entity, supplies the user's communications data to the investigative agency, et al., in response to their request. In other words, in order for the Act Provision to restrict fundamental rights in a concrete way, the telecommunications business operator, which is not a public authority but a private entity, should voluntarily furnish the communications data, which constitutes an essential element. However, it is unclear whether there are direct measures to oppose the Act of Acquiring Communications Data. Moreover, since a user is not the direct respondent of the investigative agency et al.'s request for provision of communications data, it is highly likely that the user will not find any remedies through other procedures.

In addition, Complainants assert that allowing the investigative agency et al. to ask telecommunications business operators to provide telecommunications data without a warrant while there is no *ex-post* notification procedure does not conform to the Constitution, and the Act Provision seems to affect the legal status of Complainants by means of the law itself, at least as for the violation of the principle of warrant and principle of due process of law.

Therefore, we recognize the directness of the Act Provision to fundamental rights infringement. 2010Hun-Ma439, the decision made on

August 23, 2012, where in a different view, this Court held that the part of Article 54, Section (3) of the former Telecommunications Business Act (wholly revised by Act No. 9919 on January 1, 2010, and prior to amended by Act No. 10166 on March 22, 2010) relating to "when the request for provision of communications data from the head of an investigative agency is received," which was the legal basis for the request for the provision and the provision of communications data, did not meet the requirement of directness to the fundamental rights violation, is overruled to the extent that the previous one conflicts with this decision.

2. ***Assessment on Time Limit for Filing Complaint***

(a) The adjudication on a constitutional complaint under Article 68, Section (1) of the Constitutional Court Act shall be requested within 90 days after the cause of action is known and within one year after the cause occurs (Article 69, Section (1) of the Constitutional Court Act). However, to allow the filing of a complaint despite the expiration of the filing period if there is a justifiable ground for the expiration is the interpretation consistent with the objectives of a constitutional complaint and with the proviso of Article 20, Section (2) of the Administrative Litigation Act, which is applied *mutatis mutandis* by Article 40 of the Constitutional Court Act. Here, a "justifiable ground" means the case where it is reasonable in terms of social norms to allow a delayed request for adjudication, considering various circumstances, including the cause of the expiration of the filing period. It includes reasons for objective causes beyond reasonable controls, such as force majeure and other unavoidable circumstances, reasons comparable to them, and reasons for the failure to satisfy the time limit requirement even if the complainant exercises ordinary care (*see* Constitutional Court 2001Hun-Ma39, December 20, 2001).

(b) The cause of action, or the infringement upon fundamental rights by the Act Provision, arose when the investigative agency et al. acquired

the communications data of Complainants from the telecommunications business operators, and Complainants became aware of the cause of action at the time when the telecommunications business operators gave them the notice of the provision of their communications data.

Nonetheless, as the Telecommunications Business Act does not adopt procedures to notify users when a telecommunications business operator furnishes communications data to the investigative agency et al., there is no way for users to know whether their communications data were submitted to the investigative agency et al. unless they ask the operator for the information of current status of provision of personal information to a third party in accordance with Article 35, Section (1) of the "Personal Information Protection Act."

In this case, some Complainants filed the complaint after one year had elapsed from the time the investigative agency et al. obtained the communications data, but as the Telecommunications Business Act does not implement an *ex-post* notification procedure under which Complainants would become aware of the provision, Complainants were not negligent nor responsible for not recognizing that the cause of action, or the fundamental rights violation, had occurred. Therefore, although some Complainants filed the complaint after one year had elapsed from the date on which the cause of action, or the fundamental rights infringement, had occurred, justifiable grounds for the delay should be acknowledged.

However, Complainants Y.B., P.H., S.S., K.J., and J.M. in 2016Hun-Ma388 received the notice of the provision of their communications data by the telecommunications business operators and filed the complaint after 90 days had elapsed from the date on which the cause of action, or the violation of their fundamental rights, arose. Since there are no justifiable grounds for the delay, they failed to satisfy the time limit requirement for filing, and their complaint is, thus, non-justiciable.

3. Sub-conclusion

Accordingly, Complainants' claim against the acts of acquisition of communications data described in Appendix 3 and Appendix 4 is non-justiciable. Complainants Y.B., P.H., S.S., K.J., and J.M.'s claim is also non-justiciable, and complaints of the other Complainants against the Act Provision are justiciable.

V. Assessment of the Merits

A. *System for Investigative Agency et al. to Request Provision of Communications Data under Telecommunications Business Act*

1. The provision allowing a demand for submission of relevant data to be made to a person providing telecommunications service for investigation needs was first introduced in Article 82, Section (2) of the Public Telecommunications Business Act that was enacted by Act No. 3686 on December 30, 1983. When the Public Telecommunications Business Act was wholly revised by Act No. 4394 on August 10, 1991, whose name was changed to the Telecommunications Business Act, Article 54, Section (3) of the same act stipulated "when related authorities ask for perusal or submission of documents regarding telecommunication service for investigation needs in writing, then telecommunication business operator or the one entrusted with partial treatment of telecommunication service under Article 12 of the same act may accede to the demand." However, at that time, the act did not distinguish communications data and communications confirmation data.

It was Article 54, Section (3) of the Telecommunications Business Act amended by Act No. 6230 on January 28, 2000 that allowed the investigative agency et al. to ask telecommunications business operators to provide communications data distinct from communications confirmation

data. Since then, in the process of several amendments, a requester of communications data has been extended to include the court, the head of the National Tax Service, the head of a regional tax office, etc., and trials and investigations on some penalty cases under the Tax Crime Punishment Act have been added as a new reason for requesting communications data. Later, the Telecommunications Business Act was wholly revised by Act No. 10166 on March 22, 2010, and the same article found its place in Article 83 as of now.

2. The request to provide communications data is mainly made in the early stage of an investigation to identify a suspect and victim of a crime. The Act Provision endows the investigative agency et al. with the authority to request a telecommunications business operator to give communications data without taking a separate procedure such as obtaining a warrant or court permission, while it grants the operator the authority to legally provide users' communications data in response to a request from the investigative agency (*see* Constitutional Court 2010Hun-Ma439, August 23, 2012), in order to promote speedy and efficient investigation and information gathering activities by the investigative agency et al. and to prevent further crimes.

When the investigative agency et al. make a request for provision of communications data, it shall be made in writing (hereinafter referred to as "Written Request for Provision of Data"), which states reasons for such request, relevancy to the user, and the scope of necessary data. *Provided*, That where the urgency of the situation makes it impossible to make a request in writing, such request may be made other than in writing, and when such reason ceases to exist, a Written Request for Provision of Data shall be submitted to the telecommunications business operator without delay (Article 83, Section (4) of the Telecommunications Business Act). Where a telecommunications business operator gives communications data, it shall retain the ledgers which contain the necessary information, such as records indicating that communications data were provided and the related materials, including a Written Request for Provision of Data

(Article 83, Section (5) of the Telecommunications Business Act), and the ledgers on provision of communications data shall be kept for one year (Article 53, Section (1) of the Enforcement Decree of Telecommunications Business Act).

A telecommunications business operator shall report on the current status, etc. of the provision of communications data, to the Minister of Science and ICT twice a year, within 30 days after the end of each half year (Article 83, Section (6) of the Telecommunications Business Act and Article 53, Section (2) of the Enforcement Decree of Telecommunications Business Act) and shall establish and maintain a department dedicated to the affairs related to users' communications confidentiality (Article 83, Section (8) of the Telecommunications Business Act and Article 53, Section (3) of the Enforcement Decree of Telecommunications Business Act).

3. The Telecommunications Business Act does not have procedures to notify provision of communications data to the users, who are the subjects of communications data provided to the investigative agency et al., or separate measures for users to challenge the act of acquisition of communication data. However, under Article 35, Section (1) of the "Personal Information Protection Act" and Article 41, Section (1) of the "Enforcement Decree of Telecommunications Business Act," users may ask to peruse the information of the "current status of provision of personal information to third parties."

B. *Summary of Issues*

1. The right to informational self-determination, as the right of a data subject to decide for himself or herself when, to whom, and to what extent information about him or her will be known and used, is guaranteed as a general right to personality derived from the first sentence of Article 10 of the Constitution, and as secrecy and freedom of privacy under Article 17 of the Constitution. In principle, activities such as investigation,

collection, storage, processing, and use of personal information constitute restrictions on the right to informational self-determination (*see* Constitutional Court 2010Hun-Ma153, December 27, 2012; Constitutional Court 2016Hun-Ma483, August 30, 2018). A user's name, resident registration number, address, phone number, ID, and date of subscription or termination, provided by the telecommunications service operator to the investigative agency et al. upon the request of the government agencies, corresponds to the personal information that can identify Complainants; thus, the Act Provision restricts the right to informational self-determination.

2. Complainants argue that it is against the principle of warrant to allow the investigative agency et al. to acquire communications data from telecommunications business operators without judgment of a court, despite the fact that the act of acquiring communications data under the Act Provision virtually equates to a search and seizure. Therefore, the issue is whether the Act Provision violates the principle of warrant.

3. Since Complainants assert that the meaning of "harm to the guarantee of national security" in the Act Provision is ambiguous and thus violates the rule of clarity, whether the Act Provision violates the rule of clarity is also the issue.

4. Complainants contend that the Act Provision violates not only the rule against excessive restriction but also the principle of due process of law since it defines, in an overly extensive and broad way, the objectives of the collection of personal information and the scope of people whose communications data may be requested and since it does not adopt procedures under which notification is made after the provision of the data. As Complainants allege violation of the rule against excessive restriction and the principle of due process of law for practically the same reason, the claim against the extensive and broad restrictions on personal information due to the provision of communications data will be judged by the adjudication on whether the rule against excessive

restriction is violated; and the claim on the lack of procedures to notify the provision of communication data will be judged by the adjudication on whether the principle of due process of law is violated.

5. In addition, Complainants assert that the Act Provision does not limit the scope of "investigation" and of "execution of a sentence"; that it violates the rule of clarity because the words "investigation," "trial," "execution of a sentence," etc. in it are, by themselves, not sufficient to make it clear when the investigative agency et al. can make a request for provision of communications data or whether a telecommunications business operator can reject the request therefor; that it is against the systematic legitimacy to prescribe communications data in the Telecommunications Business Act, whose legislative purpose does not fit those data, and at the same time to not clearly provide whether the act of acquisition of communications data is an investigation; and that the Act Provision infringes the principle of statutory reservation because it does not establish procedures to notify the data subject. All these arguments of Complainants are not substantially different from the argument that the Act Provision violates the rule against excessive restriction due to its extensive regulation, and the principle of due process of law due to the absence of procedures of notification to users. Thus, we will review these issues together while determining whether the rule against excessive restriction or principle of due process of law is violated.

6. Consequently, the question is whether the Act Provision does not conform to the principle of warrant, the rule of clarity, the rule against excessive restriction, and the principle of due process of law, thereby violating Complainants' right to informational self-determination, and these issues are carefully examined in the following paragraphs.

C. *Whether Principle of Warrant under Constitution Is Violated*

Article 12, Section (3) of the Constitution stipulates that "warrants issued by a judge through due procedures upon the request of a

prosecutor shall be presented in cases of arrest, detention, seizure or search," and Article 16 of the supreme law prescribes that "in case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented," which indicates that the principle of warrant is guaranteed at the constitutional level. The principle of warrant adopted by the Constitution is that compulsory measures such as arrests, detentions, and searches and seizures in relation to criminal procedures must be carried out with a warrant issued by a judge whose status is guaranteed by judicial independence. Therefore, the essence of the principle of warrant under the Constitution is that a warrant must be issued by a neutral judge based on his or her concrete judgments in order to conduct compulsory disposition that restrains fundamental rights such as arrest, search, and seizure (*see* Constitutional Court 2010Hun-Ma672, May 31, 2012).

Upon examination, the Court finds that the Act Provision only sets forth that a telecommunications business operator may "comply with the request" while granting the investigation agency et al. the authority to ask the operator for the provision of communications data. It imposes on the telecommunications business operator no obligation to accede to or cooperate with the request for provision of communications data from the investigative agency et al., and does not put measures in place to compel the provision of communications data by the operator. Thus, the request for provision of communications data pursuant to the Act Provision falls under a non-compulsory criminal investigation, which does not involve coercive force, and the principle of warrant does not apply to the act of acquisition of communications data by the investigative agency et al. Hence, the Act Provision conforms to the principle of warrant under the Constitution.

D. *Whether Rule of Clarity Is Violated*

The rule of clarity, an expression of the rule of law, is basically

necessitated for all laws restricting fundamental rights. Whether a legal norm is clear or not depends on whether it provides predictability through fair notice so that the persons subject to it can understand the meaning of the statute and on whether the legal norm explains its meaning sufficiently enough for the relevant agencies not to arbitrarily interpret or enforce it. In other words, what matters is whether predictability and exclusion of arbitrary law enforcement are guaranteed. Since the meaning of a legal norm is specified by the interpretation that comprehensively considers not only the text but also the legislative objectives, intent, and history, the systematic structure of a legal norm, etc., whether a legal norm violates the rule of clarity hinges on whether such interpretation method gives standards of interpretation that help to reasonably understand the meaning of the legal norm (*see* Constitutional Court 2014Hun-Ba405, April 27, 2017; Constitutional Court 2012Hun-Ma191, June 28, 2018).

Complainants maintain that the meaning of "harm to the guarantee of national security" in the Act Provision is unclear and violates the rule of clarity. Yet the "guarantee of national security" is a concept that involves the existence of the State and the maintenance of the basic order of the Constitution; in turn, it can be understood as national independence, territorial integrity, proper functions of the Constitution and laws, and maintenance of State institutions established by the Constitution (*see* Constitutional Court 89Hun-Ka104, February 25, 1992; Constitutional Court 2011Hun-Ba358, September 25, 2014). Any "harm" to the guarantee of national security represents creating a risk to the guarantee of national security; so, in the end, "harm to the guarantee of national security" can be interpreted into a case that can cause danger to the existence of the State or the basic order of the Constitution.

In particular, Article 83 of the Telecommunications Business Act serves to protect the confidentiality of communications, and Sections (1) and (2) of the same article state that no person shall divulge the confidentiality of communications carried by telecommunications business

operators, and no person who is engaged in telecommunications services shall divulge a third party's confidential information with respect to communications obtained in the course of performance of his or her duties. In light of the objectives of Article 83 of the Telecommunications Business Act, providing for strict protection of the confidentiality of communications, "information collection aimed at preventing any harm to the guarantee of national security" is interpreted as the minimum information collection necessary to achieve the purpose of preventing danger to the existence of the State, or to the basic order of the Constitution.

Therefore, as a person with sound common sense and a general sense of justice can fully predict what the Act Provision intends, it is not violative of the rule of clarity.

E. *Whether Rule against Excessive Restriction Is Violated*

1. *Legitimacy of Purpose and Appropriate Means*

In modern society, the rapid development of information and communications technology makes it possible for third parties to extensively collect, store, process, and make use of various types of personal information including personal details, regardless of the intent or awareness of data subjects. Such information can be significant for the investigative agency et al. to collect and preserve information, to locate and secure the suspected, to execute sentences, and to prevent harm to the guarantee of national security (*see* Constitutional Court 2012Hun-Ma191, etc., June 28, 2018). In particular, the use of mobile phones and the Internet has become commonplace, which enables the investigative agency et al. to quickly secure information that can identify individuals through telecommunications business operators that offer these services. In addition, such data are utilized in the early stage of criminal investigation or information collection.

As such, the Act Provision permits the investigative agency et al. to obtain the user's communications data by making a request for the provision of communications data to a telecommunications business operator so as to promote promptness and efficiency in investigations, execution of sentences, or activities to guarantee national security activities, thereby contributing to the discovery of substantive truth, the proper exercise of the authority of the State to impose criminal penalties, and the guarantee of national security; consequently, we recognize the legitimacy of its legislative purpose. In addition, acquiring users' communications data, if necessary, through the investigative agency et al.'s request for provision of communications data to the telecommunications business operator is an appropriate means to achieve the above purposes; thus, the appropriateness of the means is recognized, too.

2. *Least Restrictive Means*

(a) Necessity and Limitations of Provision of Communications Data

Communications data serve as a very valuable clue in a criminal investigation. The number of subscriptions to mobile communications services in Korea exceeds that of registered residents, and with the expansion of high-speed Internet networks and the spread of smartphones, the use of communications devices in Korea is incomparable to that of the past, and the significance of communications data in investigations is growing. In view of the change of the direction of investigation to reduce dependence on *in personam* investigations and to secure objective evidence through *in rem* investigations, it is necessary to permit the investigative agency et al. to acquire communications data through telecommunications business operators. In particular, in some criminal cases, promptly obtaining communications data is essential to averting additional crimes and to defending the public interest. Although, in some way, it is unavoidable for the investigative agency et al. to acquire communications data through telecommunications business operators,

their acquisition of personal information without the consent of data subjects should be strictly limited to cases necessary to serve the public interest.

(b) Scope of Data Subject to Provision of Communications Data

The Act Provision limits the scope of information that the investigative agency et al. can request to furnish.

In general, it is natural for people to share basic information such as names and job titles in their social life for the purpose of identification or communication, and the State also needs to amass and utilize such information in order to properly perform its functions. Unless such information plays a role as an identifier to get access to other dangerous information or is used to extract the whole or partial personality of an individual by combining it with other pieces of personal information, it is difficult to say that such information itself is always subject to strict protection (*see* Constitutional Court 2003Hun-Ma282, July 21, 2005; Constitutional Court 2016Hun-Ma483, Aug 30, 2018)

The communications data asked for under the Act Provision are mainly used to identify a suspect and a victim of a crime in the early stage of an investigation. The information acquired by the investigative agency et al. through the request for provision of communications data includes the user's "name, resident registration number, address, phone number, ID, or date of subscription or termination," and it is the information very basic to identify suspects or victims and, if necessary, to contact them, which means the minimum, basic information unavoidable to obtain for investigation or maintenance of national security. In particular, in the initial stage of an investigation, there is a great need to discover whether a crime is actually committed and to narrow down the scope of those involved by receiving information that can identify suspects or victims.

Certainly, it is understandable that phone numbers, addresses, etc.

necessitate considerable protection in that such information, in the event of its leakage or abuse, can give access to personal information whose subject does not want to reveal. Furthermore, as resident registration numbers are information that can act as a connector that integrates other pieces of personal information, they also need special protection. However, at the same time, promptness and accuracy are also required when the investigative agency et al., identify a suspect or a victim for investigation, execution of a sentence, and prevention of harm to the guarantee of national security, and it is inevitable to ascertain a phone number, address, or resident registration number in order to quickly conduct an investigation without needless investigation or additional information acquisition on a person with the same name. Particularly, considering that phone numbers or addresses themselves do not directly contain the personal information or personality of the individual, just including phone numbers, addresses, and resident registration numbers cannot be seen as an excessive restriction.

(c) Reasons for Request for Provision of Communications Data

The Act Provision limits the reasons for which the investigative agency makes the request for provision of communications data to "information collection for investigation, execution of a sentence, or prevention of any harm to the guarantee of national security."

First of all, when there is a suspicion of a crime, an investigation is carried out by an investigative agency to confirm whether a crime has actually been committed, to locate and secure the suspected, and to collect and preserve evidence. In light of the recent tendency of the investigation to minimize human rights violations in the process of the investigation, by reducing *in personam* investigations and expanding *in rem* investigations in the early stage of an investigation, communications data are acknowledged to be necessary as they are of help not to cause unnecessary misunderstanding and anxiety that a person is a target of an investigation whilst they serve to identify who are related to the users of

the communications data and to decide whether to be used in an investigation. In addition, the Telecommunications Business Act first prescribes the general duty to protect communication secrets handled by telecommunications business operators in Article 83, Sections (1) and (2), and then the request for provision of communications data as an exception in Section (3) of the same article. This indicates that the Act intends that under the premise of strictly protecting communications privacy, personal communications data can be provided to the investigative agency et al., only in exceptional cases, in a limited manner. Therefore, the act of acquisition of communications data for investigation is permitted only within the minimum range necessary for the identification of a suspect or a victim or the collection and discovery of evidence in a situation where there are reasonable grounds for a suspicion of crime.

Next, with regard to communications data for the execution of a sentence, the execution of a sentence means executing a sentence when the sentence is imposed by judgment of a court, etc. While most of the decisions contain information about the defendant against whom a sentence is executed, if the defendant flees after the sentence is finalized, it is necessary to acquire communications data of the defendant or people around him or her to secure him or her. Therefore, communications data for the execution of a sentence is allowed only within the minimum extent necessary to execute a sentence.

On the other hand, Complainants argue that it is excessive to permit the request for provision of communications data even for simple information collection to prevent harm to the guarantee of national security. However, “harm to the guarantee of national security” does not mean minor violations of public order or criminal acts, but an act that poses a danger to the existence of the State or the basic order of the Constitution. In this regard, it is essential to quickly identify those involved in such act and prevent any harm in advance. Thus, we acknowledge the necessity for the request of the provision of communications data to the minimum

extent necessary to collect information for the purpose of preventing any harm to the guarantee of national security.

(d) *Ex-ante and Ex-post* Management of Communications Data

The Act Provision is mainly used to "identify" those involved in a crime at the initial stage of investigation or information collection. Although the Telecommunications Business Act does not ask for a user's consent in advance, nor a court's permission, in consideration of the promptness and secrecy required in the early stage of such investigation or information collection, it manages communications data by regulating the ways to request the provision of communications data, or by mandating reports on the current status of the provision of communications data.

First of all, the request for provision of communications data pursuant to the Act Provision shall be made in writing, which states a reason to request the data, its relevancy to the user, and the scope of necessary data (main clause of Article 83, Section (4) of the Telecommunications Business Act). Where it is impossible to make a request in writing due to urgency, such request may be made other than in writing, and when such reason is resolved, a Written Request for Provision of Data shall be promptly filed with the telecommunications business operator (proviso to Section (4) of the same article). When a telecommunications business operator provides communications data, it shall retain a ledger containing necessary matters such as the provision of the communications data and related data such as Written Requests for Provision of Data (Article 83, Section (5) of the same act). Also, the operator shall report on the current status of the provision of communications data to the Minister of Science and ICT twice a year, and the Minister thereof may check the management status of ledgers and requests for data provision, etc. and whether the details of a report submitted by a telecommunications business operator are correct (Section (6) of the same Article). A telecommunications business operator shall notify the head of a central administrative agency whereto a person requesting the provision of

communications data belongs of the fact of the provision of communications data (main text of Article 83, Section (7)).

In addition, with respect to the acquired communications data, an investigative agency shall keep the secret known to him or her in the course of the investigation in accordance with Article 198, Section (2) of the Criminal Procedure Act. Also, the staff of National Intelligence Service Korea shall not divulge secrets learned in the course of performance of their duties pursuant to Article 17, Section (1) of the National Intelligence Service Personnel Act, and if they reveal, they shall be punished for the offense of divulgence of official secrets (Article 127 of the Criminal Act).

(e) Therefore, in light of these considerations, the Act Provision does not violate the least restrictive means, as it ensures that the request for provision of communications data by the investigative agency et al. is made to the minimum extent necessary to achieve the purpose of information collection, such as investigation.

3. Balance of Interests

The personal information provided to the investigative agency et al. pursuant to the Act Provision is limited to the most basic information necessary to identify an individual, such as his or her name, and does not include any sensitive information. Furthermore, the reasons for requesting the provision of communications data are limited to information collection for investigation, execution of a sentence, or prevention of harm to the guarantee of national security. Therefore, taking into account the public interest, such as the necessity for prompt and efficient investigation, the execution of a sentence, the discovery of substantive truth, the proper exercise of the State's punitive authority, and the guarantee of national security, all of which are to be achieved by the Act Provision, it is hard to say that restricted private interest outweighs the public interest of the provision of communications data to

the investigative agency, et al. under the Act Provision. The Act Provision satisfies the test of balance of interests.

4. Sub-conclusion

Therefore, it does not seem that the Act Provision infringes on Complainants' right to informational self-determination by violating the rule against excessive restriction.

F. *Whether Principle of Due Process of Law Is Violated*

1. The principle of due process of law of Article 12 of the Constitution applies not only to criminal proceedings but also to all State actions. Important procedural requests that also derive from the principle of due process of law include properly notifying the party and giving him or her opportunities to submit his or her opinions, relevant data, etc. However, what procedures are specifically required by this principle and to what extent should be decided individually by comparing various factors, such as the nature of the matter regulated, the rights and interests of the parties concerned, the value to be enhanced by the implementation of the procedures, the efficiency of State action, the cost of the procedures, the opportunity for objection, etc. (*see* Constitutional Court 2014Hun-Ma1178, April 26, 2018).

2. If a request for provision of communications data is made pursuant to the Act Provision, a user, or the data subject of the communications data, will not be given advance notice of the making of the request, and where a telecommunications business operator provides communications data to the investigative agency et al., it will not separately notify users of the provision; thus unless he or she separately demands the telecommunications business operator to let him or her peruse the information of the provision of communications data in accordance with Article 35, Section (1) of the Personal Information Protection Act, the

user will never know whether his or her communications data have been submitted to the investigative agency et al. However, the notification to the party is very important in that it is a prerequisite for the party to confirm restrictions on his or her fundamental rights and to dispute its legitimacy. Therefore, it is not permitted to ignore the constitutional procedural request just owing to the necessity to promote promptness and confidentiality of activities such as investigation or information collection.

Given the need for efficient investigation, prompt and covert information collection, etc., it can be said that the request for provision of communications data under the Act Provision should not be notified to the user, or the data subject, in advance of the provision of the data requested. However, after the investigative agency et al. have acquired the communications data, it is possible to notify the acquisition of communications data to the user to the extent that it does not interfere with information collection purposes, such as investigation. By notifying the acquisition of communications data by the investigative agency et al., users would check whether both the request of provision and provision of communications data were made in accordance with lawful procedures, or whether the communications data were used in accordance with the purpose of the provision. If they found any illegal or unfair act of the investigative agency et al., they could control the illegal or unfair use of their personal information by taking appropriate remedy procedures.

If concerns exist that such notification causes difficulties in investigation or information collection activities, or that it violates others' fundamental rights, such concerns can be resolved to some extent by the following means: by carving an exception to notification for cases with a high probability of crime that establish objective reasons, such as evidence destruction, escape, etc.; by requiring, in principle, to inform about communications data acquisition within a certain period after the acquisition, while, if there are special reasons, such as the need for

security maintenance, mandating notice be given of such acquisition within a certain period after investigation or information collection activities are completed; or by requiring to give notice of the fact that a request for provision of communications data and the requested provision were made, while allowing not to inform about the specific reason for the request when the disclosure of the specific reason for the request is likely to infringe the fundamental rights of others. Nevertheless, the Act Provision does not adopt any notification procedure, keeping the user, or the data subject, from being aware of the fact that his or her personal information was provided to the investigative agency et al., and seizing the opportunity of controlling his or her personal information.

Certainly, in accordance with Article 35, Section (1) of the "Personal Information Protection Act," the user can demand the telecommunications business operator to let him or her peruse the details of the provided communications data. However, in such case, the user can inspect the details of the communications data provided for one year prior to the request (Article 53, Section (1) of the Enforcement Decree of the Telecommunications Business Act). The information that can be perused through this procedure includes what is recorded and stored by the telecommunications business operator in the communications data provision ledger, i.e., the "date of the provision, requesting institution, reason for request, details of the provision, etc." (Article 83, Section (5) of the Telecommunications Business Act.) Moreover, the reason for the request is conventionally described as "Article 83, Section (3) of the Telecommunications Business Act"; so it makes it difficult for users to know the exact reason their information was provided. Since in most cases, without special reasons, the citizens do not suspect that their communications data have been provided to the investigative agency et al., and just because some active data subjects can inspect the details of the provided communications data through the "Personal Information Protection Act," such procedure cannot be substituted for *ex-post* notification procedures under statutes and regulations.

3. Therefore, the Act Provision that does not provide for *ex-post* notification procedures for the acquisition of communications data violates the principle of due process of law and thus infringes on Complainants' right to informational self-determination.

G. *Necessity for Constitutional Nonconformity Decision*

In principle, if a law is in violation of the Constitution, it must be declared unconstitutional. However, if there is a concern that removing a statutory provision from the legal order through a decision of unconstitutionality would cause a legal vacuum or confusion, this Court may make a decision of nonconformity, ordering the provisional application of the unconstitutional provision (*see* Constitutional Court 2018Hun-Ma927, August 28, 2020; Constitutional Court 2020Hun-Ma895, January 27, 2022).

The Act Provision is unconstitutional not because the acquisition of communication data *per se* does not conform to the Constitution but because it fails to establish *ex-post* procedures to give notice of the acquisition thereof; so, if we rendered a decision of simple unconstitutionality on the Act Provision, and it lost its effect immediately, there would exist no legal grounds for the acquisition of communications data, creating a legal vacuum. Therefore, instead of declaring the Act Provision simply unconstitutional, we deliver a decision of nonconformity and order that it continues to be applied until its amendment. The Legislature shall revise the Act Provision as soon as possible, at the latest by December 31, 2023.

VI. Conclusion

In conclusion, as the claim against the Act of Acquiring Communications Data and the claims of Complainants Y.B., P.H., S.S., K.J., and J.M. are

non-justiciable and the Act Provision does not conform to the Constitution, the Court makes a decision of nonconformity and concludes, at the same time, that the Act Provision continues to apply on a temporary basis until the Legislature amends the provision by the deadline of December 31, 2023, as set forth in the Holding. This decision was made with a unanimous opinion of participating Justices, except Justices Lee Suk-tae, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison, who filed a concurring opinion as to the Act of Acquiring Communications Data in this case, as set forth in VII below, and Justice Lee Jongseok, who filed a concurring opinion on the Act Provision, as set forth in VIII below.

VII. Concurring Opinion of Justice Lee Suk-tae, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison on the Act of Acquiring Communications Data

We agree with the conclusion that the claim against the Act of Acquiring Communications Data is non-justiciable, but we believe that this Court should recognize the Act of Acquiring Communications Data as an exercise of governmental power but dismiss the claim against it for lack of justiciable interest. Our concurring opinion is as follows:

A. First, we examine whether the Act of Acquiring Communications Data constitutes an exercise of governmental power that is subject to a constitutional complaint.

The investigative agency et al.'s request under the Act Provision for provision of communications data is a way of a non-compulsory criminal investigation. As such, when considering the textual structure of the Act Provision alone, it seems that a telecommunications business operator voluntarily determines whether it will provide the requested communications data. However, if the investigative agency et al., having investigative power, which is the governmental power, ask a

telecommunications business operator to furnish communications data, the request itself greatly burdens the operator. Furthermore, if the operator does not accede to the request, the investigative agency et al. may obtain the communications data of users by executing a search and seizure warrant, and this can interfere with the business of the operator, which makes it less likely for the operator to deny the request for provision while bearing such burden.

Even though the Act of Acquiring Communications Data *in personam* was performed not on Complainants listed in Appendix 3 and Appendix 4, the users of the telecommunications service, but rather directly on the telecommunications business operators, the Act of Acquiring Communications Data *in rem* was directed at the communications data of the above Complainants, inhibiting Complainants' fundamental rights, not those of telecommunications business operators. Thus, this Court should judge whether the Act of Acquiring Communications Data caused direct legal effects on rights and duties of the citizens and constituted an exercise of governmental power that put Complainants' legal relations or status in an unfavorable position, in consideration of the above Complainants, who are users, and not in consideration of the telecommunications business operators. Nonetheless, as the Act of Acquiring Communications Data was conducted, regardless of the will of the above Complainants, who are data subjects, there was no room for those Complainants to intervene in preventing the telecommunications business operators from providing the data and the legal status of Complainants became disadvantaged upon the investigative agencies' acquisition of their communications data.

As a consequence, the Act of Acquiring Communications Data constitutes a *de facto* exercise of power as being an *in rem* investigation of communications data, personal information of Complainants listed in Appendix 3 and Appendix 4, by Respondents in a superior position (*see* dissenting opinion by Justices Kim Jong-Dae, Song Doo-Hwan, and Lee Jung-Mi, Constitutional Court 2010Hun-Ma439, August 23, 2012), and

so is an exercise of governmental power subject to a constitutional complaint.

B. Next, we examine whether the claim against the Act of Acquiring Communications Data is recognized as having a justiciable interest.

Since the Act of Acquiring Communications Data had already been finished, the subjective justiciable interest of the Act of Acquiring Communications Data did not exist when Complainants filed the constitutional complaint. As a constitutional complaint functions not only as a guarantee for a remedy of subjective rights but also as a guarantee for constitutional order, a justiciable interest is recognized when a violation of the same type is likely to be repeated in the future, and the constitutional clarification on it is crucial, and therefore we will review this matter (*see* Constitutional Court 2009Hun-Ma527, December 29, 2011; Constitutional Court 2016Hun-Ma263, August 30, 2018).

As the Act of Acquiring Communications Data was conducted pursuant to the Act Provision, similar infringements on fundamental rights are likely to be repeated because the Act Provision exists. Moreover, Complainants listed in Appendix 3 and Appendix 4 complained of the Act Provision as well as the Act of Acquiring Communications Data, but when considering the purpose of their complaint, what they ultimately challenge is the constitutionality of the Act Provision that allows the investigative agency et al. to acquire communications data of users without their consent by requesting telecommunications business operators to provide the communications data. Thus, taking together, *inter alia*, the purport of the argument of the above Complainants and the effectiveness of remedies for rights, there is no actual gain in recognizing a separate justiciable interest with respect to the claim against the Act of Acquiring Communications Data, since the claim against the Act Provision is acknowledged as justiciable and proceeds to the merits (*see* Constitutional Court 2016Hun-Ma263, August 30, 2018).

In conclusion, we hold that Complainants listed in Appendix 3 and

Appendix 4 do not have a protectable justiciable interest in their claim against the Act of Acquiring Communications Data, and thus such claim is non-justiciable.

VIII. Concurring Opinion of Justice Lee Jongseok on the Act Provision

I believe that the Act Provision is contrary not only to the rule of due process of law but also to the rule against excessive restriction. The reasons for my opinion are explained below.

A. *Legitimacy of Legislative Purpose and Appropriateness of the Means*

The Act Provision allows an investigative agency et al.'s acquisition of communications data of users, if necessary, by requesting a telecommunications business operator to provide the data thereof so as to promote speedy and effective investigation, execution of a sentence, and preventive actions to ensure national security and to contribute to the discovery of substantive truth, and proper exercise of the State's punitive authority and national security; thus, the legitimacy of its legislative purpose and appropriateness of the means are acknowledged.

B. *Least Restrictive Means*

1. The State plays various roles as a producer and distributor of public information and as a protector of personal information. Communications data are less sensitive than communication confirmation data, but due to the recent advance in big data, one might obtain intimate and essential information of users by combining such information. Consequently, the investigative agency et al.'s securing of personal information via communications data should be limited to the minimum extent necessary,

and objective control procedures should be established.

2. First, the Act Provision sets forth the reasons for requesting the provision of communications data in an overly comprehensive and broad way.

The rapid advance of information and communications technology has increased the risk that various information including personal details can be accumulated, used, or revealed by third parties, regardless of data subjects' will or awareness. Against this backdrop, if the investigative agency et al. are allowed to acquire extensive communications data through telecommunication business operators, which hold information of numerous users in an intensive way, they can possess a huge amount of information rapidly and make use of derived information by analyzing the collected information, which may lead to significant restrictions on right to informational self-determination of individuals, as data subjects, but also on individuals' freedom of privacy and communications. Thus, the acquisition of communications data by the investigative agency et al., through the request for provision of communications data, should be restrictively allowed under strict parameters, and this is all the more so when considering the fact that the investigative agency et al. make the request of the provision of communications data without a warrant or prior authorization by a judge.

However, the Act Provision sets forth as requirements very broad grounds, i.e., collecting information for investigation, execution of a sentence, or prevention of harm to the guarantee of national security.

An investigation is an activity conducted to discover the truth of the allegation, to identify a criminal, and to collect and preserve evidence when there is a suspicion of crime. As the types of crimes become diverse, the subjects of investigation are continuously increasing, resulting in broadening the scope of investigation. Also, since there is an indistinct line between the preliminary investigation phase and the pre-investigation phase, it is, in fact, possible that all activities of the

investigation agency et al. will fall within the scope of "investigation" in the Act Provision. Furthermore, the information collection to prevent harm to the guarantee of national security has a wider area coverage. "Information collection" literally means acquiring information, and its scope is very wide as its period, start and end dates, etc., are not identified. In addition, execution of a sentence shall be carried out after the judgment has become final except as otherwise provided by statute (Article 459 of the Criminal Procedure Act), and as a written decision states most of the information of a defendant whose sentence is to be executed, an acknowledgment of a need to request communications data for execution of a sentence would be limited to cases where, *inter alia*, the defendant flees after his or her sentence becomes final so it is necessary to secure his or her person. However, the Act Provision raises the possibility of abuse by the investigative agency et al., through the broad requirement of "in the case that it is necessary to execute a sentence."

As for the investigative agency et al.'s request for provision of communications data, they should be required to make the request in minimum, necessary cases where those data are necessary to achieve the purpose of a trial or investigation by the investigation agency et al. Such cases should be confined, *inter alia*, to those where it is necessary to investigate a crime that is considered grave given the statutory sentence therefor, etc. (significance of a crime); where exceptionally speedy investigation is needed to prevent a crime, or additional one (urgency); where other measures make it impossible or cause significant difficulties to conduct an investigation; where it is hard to execute a sentence due to the failure to secure the defendant; or where there is a realistic probability that serious harm to the guarantee of national security will be inflicted. Moreover, as the investigative agency et al. can acquire necessary communications data via a search and seizure under the Criminal Procedure Act, limiting the scope of the request for communications data, which is allowed as a way of non-compulsory criminal investigation, will

not severely hamper “information collection for investigation, execution of a sentence, or prevention of harm to the guarantee of national security.”

3. What’s more, communications data that the investigative agency et al. acquire, in accordance with the Act Provision, serve as an identifier to get access to other information or involve a risk of becoming sensitive personal information when combined with other personal information.

Among communications data provided to the investigative agency et al., names, addresses, phone numbers, IDs, or dates of subscription and termination *per se* may not be sensitive information. However, when that information is combined or analyzed with other communications metadata, it can evolve into information that details individual activity, social relationships, personal and political preference, etc. in a concrete way, beyond mere information that the content of personal communications delivers. In particular, as resident registration numbers, which can be called a master key, contain a huge amount of information, which is much more than just identifying individuals, they can serve as a connector to other sensitive information. If the Act Provision is mostly utilized to identify a suspect or a victim at the early stage of investigation or information collection, the acquisition of communications data such as names, dates of birth, addresses, and phone numbers of users will suffice to achieve its purpose.

4. Additionally, the Act Provision does not have direct rules about an *ex-post* management system of the communications data acquired by the investigative agency, et al., including retention period or disposal procedures.

The entities that may obtain the communications data of users under the Act Provision are a prosecutor, the head of an investigative agency (including the head of a military investigative agency), or the head of an intelligence and investigation agency, which herein includes executive departments vested with judicial police power, such as the Ministry of Justice, Ministry of Employment and Labor, and Ministry of Food and

Drug Safety. In a situation like this, despite a broad range of communications data collectors under the Act Provision, the Telecommunications Business Act does not have provisions for *ex-post* management of the acquired communications data, including their retention period or disposal procedure, and each collector deals with the affairs in accordance with their own practices.

In particular, today, because information can unlimitedly be stored through computing processing and be combined with other information, almost all the data regarding individuals can be aggregated and accumulated. In this situation, the leakage of communications data may wreak unexpected havoc. Furthermore, as such information can be stored without time limitations, it is undeniable that the information, if continuously amassed, can be abused, unlike the purpose of the Act Provision. Consequently, introducing clear procedural provisions regarding the retention and disposal steps of the acquired communications data and establishing strict controls are the minimum safeguards of fundamental rights with which the information can be collected and used to a necessary minimum extent. Nevertheless, the Act Provision entrusts the investigative agency et al. with storing and disposing of the collected information without any procedural controls, exposing personal data of citizens to the risk of being abused by the investigative agency et al.

5. Taking into account the abovementioned considerations, the Act Provision does not satisfy the least restrictive means test because it allows the investigative agency et al. to make the request for the information that can amount to sensitive information for extensive and broad reasons and because it lacks a mechanism for *ex-post* management of data, such as their retention period or disposal procedures.

C. *Balance of Interests*

Considering that if derivative information is combined with the communications data that are furnished to the investigative agency et al.

pursuant to the Act Provision, this poses the risk of allowing access to intimate personal information and that the communications data acquired by the investigative agency et al. may extensively be collected and used for a long time, the Act Provision, which allows communications data to be provided to the investigative agency et al. regardless of the will of data subjects, imposes significant restrictions on self-determination on personal information. The same is true when considering the public interest of guaranteeing a speedy and effective investigative or intelligence act, which the Act Provision intends to achieve. In conclusion, the Act Provision violates the principle of balance of interests as well because the private interest it restricts outweighs the public interest it intends to defend.

D. *Sub-conclusion*

Therefore, not only does the Act Provision violate the principle of due process of law by failing to establish *ex-post* notification procedures, but also it violates the rule against excessive restriction for the reasons set forth above.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison

3. Case on Compelling Attendance at Religious Ceremonies in Korea Army Training Center

[2019Hun-Ma941, November 24, 2022]

Complainants

1. K.H. (attorney-at-law)
2. J.H. (attorney-at-law)
3. J.E. (attorney-at-law)
4. J.J. (attorney-at-law)
5. P.J. (attorney-at-law)

Respondent

Head of the Korea Army Training Center

Decided

November 24, 2022

Holding

The Court confirms that the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center infringed the freedom of religion of Complainants and thus was unconstitutional.

Reasoning

I. Overview of the Case

Complainants are persons with a law license who were admitted to the 8th Bar Examination on April 26, 2019; they all do not have a religion. On May 30, 2019, they entered the Korea Army Training Center in

Nonsan, South Chungcheong Province, and were assigned to Regiment 25, Company 4, Platoon 3 (public-service advocacy platoon). They received basic military training until June 27, 2019, and assumed the office of public-service advocate on August 1, 2019.

At around 8:30 a.m. on Sunday, June 2, 2019, in the first week of basic military training, J.D., a squad commander of the Korea Army Training Center, said to trainees, “Choose and attend one of the religious ceremonies held in the Korea Army Training Center—Protestant, Buddhist, Catholic, or Won Buddhist.” In response, Complainants went to the squad commander, expressing their desire not to attend any religious ceremonies because they did not have a religion. The above squad commander then said, to the effect, “Even though you don’t have a religion, try attending it once as an experiment. If your mind doesn’t change after reconsideration, come by again to explicitly express your desire not to attend.” Thereafter, Complainants did not again manifest their desire not to attend and attended the religious ceremonies conducted at religious facilities in the Korea Army Training Center.

On August 23, 2019, Complainants filed the constitutional complaint in this case, arguing that the June 2, 2019 conduct by Respondent of requiring them to attend religious ceremonies held at religious facilities in the Korea Army Training Center had infringed their freedom of religion and had violated the principle of separation of religion and politics.

II. Subject Matter of Review

The subject matter of review in this case is whether the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center infringed the freedom of religion of Complainants (such conduct hereinafter referred to

as the “Requiring of Attendance”). The related provisions read as follows:

Related Provisions

Framework Act on Military Status and Service (amended by Act No. 16034 on December 24, 2018)

Article 15 (Protection of Religious Life)

(1) A commander shall guarantee soldiers’ right to religious life to the extent of not adversely affecting the relevant military unit in the performance of its duties.

(2) A soldier who is obliged to reside in barracks may attend any religious ceremony conducted at a religious facility or other place designated by his/her commander (such facility or place hereinafter referred to as “Religious Facility”), and where he/she intends to attend a religious ceremony outside of Religious Facility, he/she shall obtain his/her commander’s permission therefor.

(3) All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will.

III. Arguments of Complainants

The Requiring of Attendance is an authoritative factual act. Although it has already been terminated, since there is a risk of recurrence and since it is a matter of significance requiring constitutional clarification, the claim in this case is justiciable.

Because the Requiring of Attendance had a missionary purpose, the legitimacy of its purpose cannot be recognized, and compelling attendance at a religious ceremony amounts to an unreasonable and unfair means. Not adopting less restrictive alternatives, such as allowing exceptions for not attending religious ceremonies, fails to satisfy the least restrictive means test. Compelling attendance at a religious ceremony fails to satisfy the balance of interests test, because of its adverse effect upon the public

interest, which is a breakdown in military discipline. Therefore, the Requiring of Attendance violated the rule against excessive restriction, thus infringing the negative freedom of religious activity of Complainants, and violated the principle of separation of religion and politics as provided in Article 20, Section (2) of the Constitution.

IV. Assessment of Justiciability

A. *Subject of Constitutional Complaint*

A factual act of an administrative agency is divided into two types, a "non-authoritative factual act," which refers to a non-binding act of providing information, including warnings, recommendations, and implicit notice, or a non-binding act of mere administrative guidance intending to produce factual effects through noncompulsory cooperation; and an "authoritative factual act," which is unilaterally forced by an administrative agency having a superior status. Between these, the authoritative factual act amounts to an exercise of governmental power which is subject to a constitutional complaint. Generally, whether an act amounts to a governmental power exercise subject to a constitutional complaint should be decided individually, by considering together the specific circumstances in which the act was performed, including the relationship between the competent administrative actor and the aggrieved party; that party's wish, degree of involvement, and attitude as to the factual act concerned; the purpose and progress of the factual act concerned; and whether orders or compulsory means were issued under statutes and regulations (*see* Constitutional Court 2011Hun-Ma429, October 25, 2012; Constitutional Court 2016Hun-Ma503, November 30, 2017).

Respondent was the highest supervisor in the Korea Army Training Center, where Complainants received basic military training. As such, he had a superior status with respect to Complainants' life in the training

center. Respondent, on February 28, 2019, during a weekly situation assessment meeting, reiterated efforts to use faith for military power, so as to enhance the military combat capability through the accommodation for religious activities. Also, the "Guidelines on the Discipline and the Instructions for the Military Life" guarantee choosing religious activities according to one's will, while stating that "one religion for each person" is recommended for cultivation of moral character and reinforcement of mental combat capabilities through chaplaincy activities, and stipulating that "the matter involving the attendance at a religious ceremony and other matters shall be conducted through the chain of command and through those on staff duty or charge of quarters duty."

The Requiring of Attendance was carried out through the squad commander J.D., who led Complainants. Although the day when the Requiring of Attendance occurred was a holiday, Complainants made an inquiry to squad commander J.D. about whether they were allowed not to attend the religious ceremonies. It can be determined that squad commander J.D. delivered an official response reflecting the above guidelines of Respondent. There is no room to find that squad commander J.D. expressed his personal opinion on the basis of his status as an individual, as opposed to a squad commander of the Korea Army Training Center.

Further, the materials Respondent submitted in relation to this case indicate the following facts: the center trainees in this case were encouraged to attend, for experience, any ceremony of the four religions in the first week (fourth day) at the military training center; they were informed that they may, of their accord, attend the ceremonies or take a rest from the second week to the graduation week; and the center trainees who believed in minority religions or had no religion were allowed to not attend the religious ceremonies at their own wish. In addition, the statistics materials Respondent submitted indicate the following facts: in the first week at the training center, everyone attended the religious ceremonies held in the morning, and no one stayed behind, while some

did not attend the religious ceremonies held in the afternoon; and from the second week, both in the morning and afternoon, substantial numbers of trainees did not attend religious ceremonies. With these facts, it can be said that, at least as to the morning religious ceremonies in the first week at the training center, not attending them was in effect not permitted.

Taken together, the above considerations lead us to conclude that the Requiring of Attendance was unilaterally forced upon Complainants by Respondent having a superior status, exceeding the limits of mere administrative guidance such as non-authoritative recommendations and advice that are given in expectation of noncompulsory cooperation of Complainants. As such, the Requiring of Attendance constituted an authoritative factual act, which is subject to a constitutional complaint.

B. ***Protectable Justiciable Interest***

Because Complainants have completed basic military training in the Korea Army Training Center and left the center already, their fundamental rights are no longer limited. Thus, even if the claim of Complainants is upheld, this would not be of help to them in remedying their subjective rights. However, even if a constitutional complaint is not of much help in remedying subjective rights, if there is a risk of recurrence of the violation or if the resolution of the given dispute is a matter critical to the preservation and maintenance of the constitutional order and thus its clarification has significant constitutional implications, the Court may recognize there is a justiciable interest with respect to the constitutional complaint (*see* Constitutional Court 2000Hun-Ma327, July 18, 2002).

It can be recognized that, by holding religious ceremonies, Respondent not only guarantees the freedom of religion of center trainees but further "recommends one religion for each person" to use faith for military power. In this connection, an act as this, which goes beyond recommending

attendance at religious ceremonies such that it practically compels such attendance, would in all likelihood be repeated. Additionally, given the importance of both the protection of freedom of religion, including negative freedom, and the principle of separation of religion and politics, since whether the Requiring of Attendance is constitutionally justified represents a matter whose constitutional clarification is critical to the preservation and maintenance of the constitutional order, there is a justiciable interest with respect to the constitutional complaint in this case.

V. Assessment of Merits

A. *Fundamental Rights Restricted*

Article 20 of our Constitution provides in Section (1) that all citizens shall enjoy freedom of religion, and in Section (2) that no state religion shall be recognized, and religion and politics shall be separated. It thereby affirms both freedom of religion and the principle of separation of religion and politics. Generally, the three facets of freedom of religion are freedom of faith, freedom of religious practice, and freedom of religious assembly and association (Constitutional Court 2000Hun-Ma159, September 27, 2001). Freedom of religion also includes freedom of irreligion (Constitutional Court 2007Hun-Ba131, etc., February 25, 2010) and protects the negative freedom not to hold a faith and attend a religious practice and assembly.

The Requiring of Attendance compelled Complainants to choose and attend one of the four religious ceremonies—Protestant, Buddhist, Catholic, or Won Buddhist—held at religious facilities in the Korea Army Training Center. The religious ceremonies in this case are a religious assembly conducted by each religion (*see* Instructions on Military Chaplaincy Work, Article 2, Item 6) and, as such, are held to enable soldiers of faiths to

attend the religious ceremonies of their religion, thus guaranteeing freedom of religious ceremonies (Framework Act on Military Status and Service [hereinafter referred to as the "Military Service Framework Act"], Article 15, Sections (1) and (2)). In this connection, the religious ceremonies in this case have the nature of religious assemblies in which religious practice is envisaged.

Imposing a religion or faith on others is eventually only possible through external religious actions, i.e. a profession of faith, recitation of prayers, attendance at worship services, etc. Thus, it can be determined that compelling attendance at religious ceremonies held in religious facilities, by itself, limits Complainants' freedom not to hold a faith and attend a religious assembly, irrespective of whether there is an actual change in their state of mind or faith. Therefore, the Requiring of Attendance limits the freedom of religion of Complainants.

B. ***Whether Freedom of Religion Was Violated***

1. ***Whether the Principle of Separation of Religion and Politics Was Violated***

(a) Meaning

The principle of separation of religion and politics, provided by Article 20, Section (2) of the Constitution, describes the separation of religion and politics where there is no interference with or influence upon each other, and means State neutrality to religion. In compliance with this principle, the State should not recognize a privilege for a particular religion and should maintain neutrality toward religion. The religious neutrality of the State is necessary to fully realize freedom of religion, and in this regard, the promotion of a particular religion by the State could constitute an infringement of freedom of another religion or of irreligion (*see* Constitutional Court 2007Hun-Ba131, etc., February 25, 2010).

(b) Freedom of religion in the military

Even as for a soldier, his or her freedom of religion should be guaranteed; religion would have more significant meaning for soldiers, especially when their horrors of death peak, including when casualties occur, in situations where they are mobilized in actual armed conflicts in times of national emergency, such as war and disaster (*see* Constitutional Court 2002Hun-Ba35, March 27, 2003). Further, it can be recognized that, given the continuance of military community life even during the training period in peacetime, religious conviction would also play a positive role in maintaining a sound military life and establishing ethics or values that would control the use of military physical force that could otherwise be unrestrained or abused.

To ensure the fundamental rights of soldiers, whose mission is national defense and citizen protection, the Military Service Framework Act guarantees in Article 15, Sections (1) and (2) the religious life of soldiers to the extent of not adversely affecting the relevant military unit in the performance of its duties. This Act also allows soldiers to attend religious ceremonies held at Religious Facility. However, under the principle of separation of religion and politics, the State may neither promote a particular religion nor interfere with the religious choice of an individual nor require mandatory attendance at a religious ceremony against his or her will to an extent going beyond the guarantee of voluntary and autonomous religious activity for soldiers. This point is expressly affirmed in Article 15, Section (3) of the Military Service Framework Act, which specified the principle of separation of religion and politics in relation to the operation of religious ceremonies in the military.

(c) The Requiring of Attendance

1) Since the beginning of its inception, the military of our country has operated military chaplaincy, and since the 1970s, it has adopted the work guidelines of the “use of faith for military power,” which regards

religious belief as intangible combat capability. Under the current statutes and regulations, the use of faith for military power refers to enhancing intangible combat capability—that is to say, enabling military personnel to complete, through religious work, their assigned duty with heightened faith and views on life and death, the State, and values (Instructions on Military Chaplaincy Work, Article 2, Item 12). Considering that the religious belief of an individual is conducive to building stronger mental strength necessary for the armed services, guaranteeing to the fullest the freedom of religion in the military and encouraging religious activity to the extent of not adversely affecting the relevant military unit in the performance of its duties, serves the purpose of enhancing intangible combat capability involving a soldier's value system or mental strength, which is no less important than tangible combat capability. In this sense, it can be said that such guaranteeing and encouraging reflects the acceptance of a positive social role of religion.

Nevertheless, even if the military chaplaincy and "use of faith for military power," as stated above, are necessary for the enhancement of intangible combat capability, the religious activity in the military cannot depart from the constitutionally affirmed principles of non-establishment of State religion and separation of religion and politics, i.e. from the limits that the State shall be neutral toward all religions.

2) It can be recognized that, as seen above, the religious ceremonies in this case have the nature of religious assemblies in which religious practice is envisaged. The conduct of Respondent in requiring Complainants to attend religious ceremonies constitutes, in itself, compelling of religious practice, which contravenes the express prohibition clause of Article 15, Section (3) of the Military Service Framework Act.

Importantly, it can be noted that the requiring by Respondent of Complainants' attendance at either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony demonstrates that Respondent officially acknowledged and encouraged the four religions and preferred them to

other religions or irreligion. The Court notes in this connection that the constitutional principle of the separation of religion and politics serves the purpose of guaranteeing the diversity laying the foundation of a democratic society. In the context of this principle, the State maintains a neutral position, acknowledging the possibility of eclectic religious convictions, atheism, etc. The conduct of Respondent cannot be permitted under the principle of separation of religion and politics as it amounts to the favorable treatment of particular religions in violation of State neutrality to religion.

Further, even though the Requiring of Attendance was made by Respondent for the eventual, secular purpose of strengthening military forces, such requiring provides the State with an opportunity to reduce religion to nothing more than a means of achieving that purpose, or conversely, offers a religious group an opportunity to interfere with the State power of the military and proselytize or to otherwise exercise influence. Therefore, such requiring leads to the close entanglement between the State and religion. In this respect, enhancing the mental combat skills of a soldier by way of Respondent compelling the soldier's attendance at a religious ceremony against his or her will to an extent going beyond the guarantee of his or her voluntary and autonomous life of faith or religious activity, is in direct contravention of the principle of separation of religion and politics and, thus, infringes freedom of religion.

2. *Whether the Rule against Excessive Restriction Was Violated*

Because the Court can observe that Respondent eventually intended to strengthen the mental combat skills of soldiers by the Requiring of Attendance, there is presumptively room to acknowledge the legitimacy of its purpose. However, compelling attendance at religious ceremonies by a person of no religion, which extends far beyond recognizing and actively embracing the positive aspect of a religious belief autonomously

held by an individual or the positive aspect of his or her voluntary attendance at religious ceremonies, is highly likely to arouse opposition to or resentment against the relevant religions and the military life and create an adverse effect, rather than contributing to the strengthening of mental combat skills necessary for the armed services. Thus, the Court cannot recognize the appropriateness of means of the Requiring of Attendance, which intended to enhance the mental combat skills of soldiers by way of requiring Complainants to attend Protestant, Buddhist, Catholic, and Won Buddhist ceremonies against their will.

Moreover, since Respondent can employ other alternatives, such as general ethics education, than the religious means to strengthen the mental combat skills of center trainees of no religion, the Requiring of Attendance was not an inevitable means to that end and failed to meet the least restrictive means test. Further, attendance at religious ceremonies was imposed on Complainants during their military service by conscription, and it cannot be said in this context that they could have possibly avoided such imposition. Nor can it be said that the infringement of freedom of religion, which already occurred, would be remedied or reduced, even though attendance at religious ceremonies was imposed only in the first week of training and was voluntary from the second week.

Because religion could lie at the very core of the personality of an individual, governmental imposition of religion constitutes a serious infringement of fundamental rights and cannot be afforded a preference to enhance the mental combat skills of soldiers. Therefore, the Requiring of Attendance failed to meet the balance of interests test.

C. *Sub-conclusion*

For this reason, the Requiring of Attendance violated both the principle of separation of religion and politics and the rule against excessive restriction, and thus, infringed the freedom of religion of Complainants.

VI. Conclusion

Accordingly, the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center must be annulled as violative of their freedom of religion, yet, since Respondent's conduct already terminated, the Court renders its decision as set forth in Holding and confirms the unconstitutionality of such conduct in a declaratory sense, so as to avoid a recurrence of the same or a similar violation. This decision was made with a unanimous opinion of participating Justices, except Justices Lee Seon-ae, Lee Eunae, and Lee Youngjin, who filed a dissenting opinion, as set forth in VII below.

VII. Dissenting Opinion of Justices Lee Seon-ae, Lee Eunae, and Lee Youngjin

We believe that Complainants' claim against the Requiring of Attendance is nonjusticiable because this requiring does not constitute an exercise of governmental power which is subject to a constitutional complaint, and because no protectable justiciable interest exists with respect to their claim, and thus, express our dissenting opinion below.

A. *Subject of Constitutional Complaint*

1. The Constitutional Court Act, Article 68, Section (1) prescribes that "Any person whose fundamental rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power" may file a constitutional complaint. Here, "governmental power" means sovereign action by any governmental body and public entity which exercise judicial, executive and legislative power; also, the exercise or non-exercise of the governmental power should have legal effects on a

citizen's rights and duties and consequently cause an unfavorable change in the legal relation and status of complainant (*see* 2017Hun-Ma1384, etc., November 25, 2021).

2. It is true that Respondent, as a superior of Complainants (*see* Military Service Framework Act, Article 25), had a superior status with respect to their life in the training center. However, whether an act amounts to a governmental power exercise subject to a constitutional complaint should be decided, by considering, in addition to the general relationship between the competent administrative actor and the aggrieved party, the specific circumstances in which the particular factual act was performed, including the aggrieved party's wish, degree of involvement, and attitude as to the factual act concerned; the purpose and progress of the factual act concerned; and whether orders or compulsory means were issued under statutes and regulations (*see* Constitutional Court 89Hun-Ma35, May 6, 1994; Constitutional Court 2016Hun-Ma46, etc., April 26, 2018). Not all actions of Respondent constitute authoritative factual acts only by the mere fact that he has a status superior to that of Complainants.

Because Article 15, Section (3) of the Military Service Framework Act expressly states that "All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will." Respondent has no authority to command Complainants to attend religious ceremonies against their will. In this situation, if Respondent recommends attendance at religious ceremonies only in the first week, this does not constitute a command or coercion unless special circumstances exist. The "Guidelines on the Discipline and the Instructions for the Military Life" of the Korea Army Training Center simply indicate that one religion for each person is recommended; nowhere in them do we find that one must inevitably have one religion regardless of one's will, or attend a religious ceremony once or more than once. On the contrary, the guidelines expressly state that "A person who does not attend a religious ceremony shall be guaranteed time for personal care and free time." When looking at the

content of the statement of the squad commander, we find that he simply responded to the desire of Complainants not to attend, saying to the effect, “If your mind doesn’t change after reconsideration, come by again to explicitly indicate your desire not to attend.”; he did not make a categorical order that they attend religious ceremonies by all means. Even if it is possible that Complainants felt burdened to express their desire not to attend, that subjective possibility alone is insufficient to assess the Requiring of Attendance as going beyond a simple recommendation as to be compelling.

Meanwhile, the materials Respondent submitted confirm the fact that all trainees attended religious ceremonies in a morning of the first week while some of them did not attend them in an afternoon thereof, and that starting from the second week, there was a great number of nonattendance. However, attendance status could have been influenced by a number of factors other than a recommendation by Respondent, including the voluntary judgment of trainees or the atmosphere among them. As a matter of fact, when looking at other training groups’ religious ceremony attendance status in the first week, we find the following facts: out of a total of 732 trainees of the 19-16^{h} Training Group (trained from April 18, 2019 to May 16, 2019), which preceded that of Complainants, 579 attended during the day and 44 at night, with the nonattendance of at least 109 and at most 153 trainees; out of a total of 689 trainees of the subsequent 19-28th Training Group (trained from July 18, 2019 to August 14, 2019), 579 attended during the day and 28 at night, with the nonattendance of at least 82 and at most 110 trainees; and out of a total of 679 trainees of the 19-34th Training Group (trained from August 29, 2019 to September 26, 2019), 579 attended during the day and 4 at night, with the nonattendance of at least 96 and at most 100 trainees. As such, it cannot be said that Respondent, by general policy of the Korea Army Training Center, compelled attendance at religious ceremonies in the first week; nor was there a special reason for Respondent to have a different policy for the training group of Complainants.

3. Moreover, when examining whether there was a means of discipline for nonimplementation of the Requiring of Attendance, we find that no notification was provided by Respondent and the squad commander that those not attending religious services would be placed at a certain disadvantage; and that no recognizable material indicates the possibility of adverse treatment in the case of noncompliance with the Requiring of Attendance. Instead, we find that compelling one's attendance at religious ceremonies against one's will constitutes a clearly unlawful activity prohibited by the Military Service Framework Act. Given this context, Complainants were sufficiently able to learn of both the possibility of disadvantage that may be imposed due to nonattendance and the fact that, if imposed, the unlawfulness of such disadvantage can be disputed. In this situation, it cannot be concluded that encouragement of attendance by Respondent had a *de facto* effect of compelling attendance of Complainants.

4. Accordingly, we do not find that the Requiring of Attendance constituted an exercise of governmental power which is subject to a constitutional complaint.

B. *Protectable Justiciable Interest*

1. Even if we do find that the Requiring of Attendance constituted an exercise of governmental power which is subject to a constitutional complaint, Complainants no longer have a protectable justiciable interest in their constitutional complaint, because they already completed basic military training and left the Korea Army Training Center as of June 27, 2019.

2. Moreover, not only does the Military Service Framework Act provide for the obligation of a commander to guarantee soldiers' right to religious life to the extent of not adversely affecting the relevant military unit in the performance of its duties, and provide for the right of a soldier to attend any religious ceremony conducted at Religious Facility designated by his/her commander (*see* Article 15, Sections (1) and (2)),

but this statute, as a result of amendment by Act No. 16034 on December 24, 2018, created an express provision stating that "All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will." (Article 15, Section (3).) Thus, the statute already reflects the fact that compelling one's attendance at a religious ritual against one's will is impermissible as violative of freedom of religion. Therefore, we do not recognize that there is a risk of future occurrence of instances of activity compelling attendance at religious ceremonies in the Korea Army Training Center, or that there is a need for constitutional clarification on that activity.

3. Finally, we conclude that no subjective protectable justiciable interest exists with respect to Complainants' claim in this case and that no exceptional justiciable interest is recognized for constitutional clarification.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison

II. Summaries of Opinions

1. Case on Complete Suspension of the Operation of Kaesong Industrial Complex

[2016Hun-Ma364, January 27, 2022]

In this case, the Court held that a series of acts that composed the measure of completely shutting down the operation of the Kaesong Industrial Complex, including the President of the Republic of Korea's decision to completely shut down its operation on February 10, 2016, and the Minister of Unification's formulation of a plan for withdrawal from the Complex, his release of a statement declaring a complete shutdown of the Complex, and enforcement of such shutdown, are justified under the Constitution and laws, and are not in violation of the principles of due process, prohibition of excessive restriction and legitimate expectations, thereby not infringing upon the freedom of business and the right to property of firms investing in the Complex.

Background of the Case

As North Korea conducted its fourth nuclear test on January 6, 2016, and launched a long-range missile on February 7 of the same year, the President of the Republic of Korea ordered the Minister of Unification on February 8, 2016, to come up with measures to withdraw from the Kaesong Industrial Complex and decided to immediately shut down its operation after consultation with the Standing Committee of the National Security Council on February 10, 2016.

The Minister of Unification set up a detailed plan for withdrawal from the Kaesong Industrial Complex and held consultations with representatives of the Corporate Association of Kaesong Industrial Complex at around 14:00, February 11, 2016. While explaining the decision to suspend the operation of the Complex as well as the background behind the decision,

the Minister 1) announced a complete shutdown of the operation of all factories and businesses in the Complex starting from February 11, 2016; 2) instructed to refrain from entering into the Complex for three days starting from February 11, 2016, and ordered all South Korean nationals residing in the area to return to South Korea; and 3) thereafter notified that he would not accept the approval for visiting the Complex. At 17:00 on the same day, he released a statement declaring a complete shutdown of the Complex. North Korea announced to deport all South Korean residents from the area and freeze all assets therein at around 17:00, February 11, 2016. About 280 South Koreans, including businessmen and workers who remained in the Complex, returned to South Korea by around 23:00, February 11, 2016, and all cooperative projects in the Kaesong Industrial Complex were suspended thereafter.

Complainants, which are enterprises that invested in the Kaesong Industrial Complex (Complainants 1 through 145, hereinafter referred to as "Complainant Investment Companies"), and Complainants, which are domestic enterprises that mainly traded with enterprises investing in the Kaesong Industrial Complex or their affiliates (Complainants 146 through 163, hereinafter referred to as "Complainant Partner Companies"), filed this constitutional complaint on May 9, 2016, arguing that the above decision to completely shut down its operation and the execution thereof infringed upon Complainants' right to property, etc.

Subject Matter of Review

The subject matter in this case is whether a series of actions that led to a complete shutdown of the operation of the Kaesong Industrial Complex (hereinafter referred to as "the suspension measures in this case") infringed upon the fundamental rights of Complainants. Details on these actions are as follows: Respondent President of the Republic of Korea decided to completely shut down its operation on February 10, 2016. In accordance with the order of the President, Respondent Minister

of Unification formulated a detailed plan for withdrawal from the industrial complex; notified representatives of the Corporate Association of Kaesong Industrial Complex at around 14:00, February 10, 2016, to 1) immediately shut down factories and places of business in the Industrial Complex starting from February 11, 2016, and to 2) minimize entrance into the Complex and ordered all South Korean nationals residing in Kaesong to return to South Korea for three days starting from February 11, 2016; and thereafter 3) announced the government's policy to disapprove of the request for approval for entry into the Complex, and released a statement declaring the complete shutdown of the Kaesong Industrial Complex at around 17:00 on the same day. In response, North Korea announced to deport all South Korean nationals residing in the Complex therefrom and freeze all the assets therein at around 17:00, February 11, 2016, and all South Korean businessmen, workers, etc. residing therein had to return to South Korea by around 23:00 on the same day.

Summary of the Decision

1. Whether the request for adjudication by Complainant Partner Companies is admissible

As Complainant Partner Companies are domestic firms that have traded with enterprises that invested in the Kaesong Industrial Complex, etc., they are not the parties directly involved in the suspension measures in this case. Even if they suffered a loss of their operating profits due to the impact of the suspension measures in this case on enterprises that invested in the Complex, etc., this is merely considered an indirect economic interest. As Complainant Partner Companies have no self-relatedness to the suspension measures in this case, their request for constitutional complaint is inadmissible.

2. Whether judicial review on the suspension measures in this case should be excluded

The suspension measures in this case are a measure to respond to the risks caused by North Korea's development of nuclear weapons, and it includes the President's decisions regarding national security. While such a decision requires high political determination, follow-up measures based on the decision restrict Complainant Investment Companies' fundamental rights, such as the freedom of business. With regard to the exercise of state power directly related to restricting people's fundamental rights, it is the fundamental mission of the Constitutional Court as an organization designed to safeguard citizens' fundamental rights to prevent even the act of the President, which requires high-level political considerations, from infringing upon the fundamental rights. Thus, to this extent, the suspension measures in this case may be subject to a constitutional complaint, and therefore, this constitutional complaint cannot be deemed inadmissible for the reason that it is about an act that is not subject to judicial review.

3. Whether the suspension measures in this case are based on the Constitution and laws

The suspension measures in this case are designed to contribute to international agreements for the purposes of maintaining international peace and security, such as the UN Security Council's resolutions imposing sanctions against North Korea to deter it from developing nuclear weapons. Therefore, in accordance with Article 18, Section (1) Item 2 of the "Act on Inter-Korean Exchange and Cooperation" (hereinafter referred to as "Inter-Korean Exchange and Cooperation Act"), it is within the discretion of the Minister of Unification to order a person who carries out a cooperative project to adjust any matter in relation to the details and conditions of the cooperative project or the period of validity for approval, etc. Thus, the measure can be seen as a measure based on the above provision.

Furthermore, the President shall have the responsibility and duty to

safeguard the independence, territorial integrity, and continuity of the State and the Constitution and the duty to sincerely pursue the peaceful unification of the homeland (Article 66(2) and (3) of the Constitution), and the President, as the head of State and the head of the Government, shall direct and supervise the heads of all central administrative agencies (Article 66(1) of the Constitution, Article 11 of the Government Organization Act). Accordingly, the President can make a policy decision to suspend the operation of the Complex as a sanction against North Korea for the purposes of national security, peaceful unification of the homeland, and international cooperation, etc., and is entitled to order the Minister in charge to execute it as prescribed by statutes. Consequently, Article 66 of the Constitution and Article 11 of the Government Organization Act may also serve as the constitutional and legal grounds for the suspension measures in this case in which the President was involved.

Moreover, the detailed measure taken by the Minister of Unification was intended to minimize the risk to life and physical harm to the local residents of South Korean nationality resulting from the decision to suspend its operation. Therefore, in addition to Article 18, Section (1), Item 2 of "Inter-Korean Exchange and Cooperation Act," Article 9(1) of the same Act and Article 10 of the Constitution concerning the State's obligation to protect fundamental rights and Article 15-3 of the Kaesong Industrial Complex Support Act, may, respectively, serve as the legal grounds for the above-mentioned measure.

Therefore, the suspension measures in this case should be seen as a measure consistent with the Constitution and laws.

4. Whether the principle of due process is violated

At issue may be whether the suspension measures in this case can be considered as an important foreign policy or coordination of important policies of each Executive Ministry, which shall be referred to the State

Council for deliberation under Items 2 and 13 of Article 89 of the Constitution.

The President and officials who may refer a bill to the State Council are recognized to have discretion to a certain extent in determining which policy should be regarded as an important policy that requires deliberation by the State Council, and the decision first made by the President and those who exercise such discretion should be respected as long as it is not clearly unreasonable and arbitrary.

A policy related to national security may be considered an important policy due to its relevance to national existence, etc. However, due to the urgent and secret nature of security policy, the National Security Council, which is another constitutional body, may provide a more efficient and appropriate path of decision-making compared to the State Council. The suspension measures in this case are related to national security, and there was a need to swiftly address the issue while keeping the relevant discussion secret as much as possible for the safety of South Korean nationals residing in the Kaesong Industrial Complex. Although the suspension measures in this case were not deliberated by the State Council, the Standing Committee of the National Security Council was held with the participation of key national security institutions. The adjustment order under the Inter-Korean Exchange and Cooperation Act, which served as the legal ground for the suspension measures in this case, does not require a State Council meeting as a preliminary procedural requirement. Therefore, the President's procedural decision to go through consultations with the Standing Committee of the National Security Council instead of deliberation at the State Council cannot be deemed as clearly unreasonable or arbitrary. Thus, even if the President did not go through deliberation by the State Council in making the decision to suspend the operation of the Kaesong Industrial Complex, the decision cannot be said to have erred in not going through the necessary requirements under the principle of due process.

Meanwhile, given the fact that there is no legitimate ground that requires preliminary consultations with the National Assembly in implementing the suspension measures in this case, as well as in light of the nature of the measure, the value to be enhanced by the implementation of the procedure, and the effectiveness of state action, among others, the procedure of collecting opinions from stakeholders cannot be deemed as a necessary requirement under the principle of due process.

Thus, although the suspension measures in this case did not go through the above-mentioned procedure, it cannot be seen as violating the principle of due process and thus infringing upon the freedom of business and the right to property of Complainant Investment Companies.

5. Whether the principle against excessive restriction is violated

The suspension measures in this case are a measure to contribute to the international agreement, which seeks to deter North Korea's attempt to develop nuclear weapons through economic sanctions. Also, it aims to lead to stronger international coordination, ultimately contributing to peace on the Korean peninsula and in the world by imposing unilateral economic sanctions against North Korea as the key state party directly concerned with the North's nuclear crisis. Since it is also designed to secure the safety of South Korean nationals operating businesses in areas related to economic sanctions, it is deemed to have a legitimate purpose. Considering that the suspension of the operation of the Kaesong Industrial Complex is an economic sanction consistent with the international sanctions as a response to North Korea's nuclear development, and it can minimize the number of South Korean nationals who are exposed to North Korea's retaliatory actions through the withdrawal of workers residing in the Kaesong Industrial Complex, the means that are used are appropriate to achieve that purpose.

The suspension measures in this case were adopted based on the

political decision that as it is complexly intertwined with inter-Korean relations, North Korea-U.S. relations, and international relations, a phased suspension alone cannot achieve the purpose of economic sanctions to the same level as a complete suspension, and such a decision is not seen as markedly unreasonable. Amid uncertainties over the change in North Korea's attitude, it is difficult to predetermine the suspension period, and the government's measure to limit the number of persons who can stay in the Complex is seen as a measure of a temporary nature, part of which can be changed according to North Korea's cooperation in taking out the facilities and products produced therefrom. Therefore, the suspension measures in this case satisfy the least restrictive means test.

There has to be a limit to protecting the cooperative projects and assets invested in the Kaesong Industrial Complex due to its distinct regional characteristics and conditions. Statutes related to support for the Kaesong Industrial Complex establish various supports if companies investing in the Complex suffer damage owing to such distinct characteristics. The suspension measures in this case were a measure premised on providing support for damage in accordance with the relevant statutes, and most of the intended support has been actually delivered adhering to the methods as planned. Although the suspension measures in this case incurred sizable damage to Complainant Investment Companies, the President's judgment that there is a need to secure the existence, safety, and continuity of the Republic of Korea by suspending the operation of the Kaesong Industrial Complex as a form of economic sanctions in response to North Korea's nuclear development, cannot be said to have clearly erred. It should be respected as a judgment and a choice made within the scope of discretion granted to the President by the Constitution, and she took political responsibility for her judgment and choice. Therefore, the suspension measures in this case should be seen as fulfilling the requirements of a balance of interests.

Accordingly, the suspension measures in this case do not infringe upon Complainant Investment Companies' freedom of business and right to

property in violation of the principle against excessive restriction.

6. Whether the principle of legitimate expectations and Article 23(3) of the Constitution are violated

The Agreement on Normalization of the Kaesong Industrial Complex, adopted on August 14, 2013, cannot be deemed to have directly given confidence to Complainant Investment Companies regarding the effect and continuity of the Agreement. Also, in light of the past cases, the extent to which the suspension measures in this case infringe upon a legitimate expectation interest is relatively low, and the public interest to be served by the suspension measures in this case are sufficient to justify the damage incurred to such expectations. Therefore, the suspension measures in this case do not violate the principle of legitimate expectations and thus does not infringe the freedom of business and the right to property of Complainant Investment Companies.

Meanwhile, the suspension measures in this case do not restrict an already existing right to concrete property individually and concretely for public necessity, and thus it does not amount to a restriction of private property for public necessity. The operating loss and devaluation of rights such as stocks incurred due to the suspension of business operations in the Kaesong Industrial Complex cannot be deemed to fall within the protection of the right to property under Article 23 of the Constitution. Therefore, even if legitimate compensation for the restriction and damage to the property right has not been paid, the suspension measures in this case cannot be seen as infringing upon the property right of Complainant Investment Companies in violation of Article 23(3) of the Constitution.

2. Case on National Assembly Act Provision Providing for Closing of Intelligence Committee Meetings to Public

[2018Hun-Ma1162, 2020Hun-Ba428 (consolidated), January 27, 2022]

In this case, the Court held unconstitutional the main clause of Article 54-2, Section (1) of the National Assembly Act, which prescribes that a meeting of the Intelligence Committee shall not be open to the public. It reasoned that this main clause violates the principle of open legislative meetings under Article 50, Section (1) of the Constitution.

Background of the Case

1. Case No. 2018Hun-Ma1162

Complainants O.B. et al. submitted an application to Respondent, chairman of the National Assembly Intelligence Committee, to attend the 1st meeting of the bill review subcommittee of the National Assembly Intelligence Committee (hereinafter referred to as the "Meeting"). The responsible National Assembly Secretariat staff member informed the applicants by phone that under a provision of the National Assembly Act, whether to permit the attendance of the Meeting is *per se* not subject to discussion, and thus, no written response will be made to the application.

In response, on December 4, 2018, Complainants O.B. et al. filed the constitutional complaint in this case against Respondent's measure of not opening the Meeting to the public and against the main clause of Article 54-2, Section (1) of the National Assembly Act. They sought confirmation of the unconstitutionality of the measure and main clause, arguing that these two violate both the principle of open legislative meetings under Article 50, Section (1) of the Constitution and their right to know.

2. Case No. 2020Hun-Ba428

Complainant K.H. requested the secretary general of the National Assembly Secretariat to partially disclose the minutes of a committee-of-the-whole meeting of the Intelligence Committee. The secretary general, however, refused to do so for the reason that under, *inter alia*, the main clause of Article 54-2, Section (1) of the National Assembly Act, the requested portion of the minutes corresponds to information not to be disclosed.

In response, Complainant K.H. filed suit seeking annulment of the above non-disclosure decision. While the suit was pending, he petitioned the court to request constitutional review of Article 54-2, Section (1) of the National Assembly Act. Following rejection of the petition, he filed the constitutional complaint in this case on August 24, 2020.

Subject Matter of Review

The subject matter of review in Case No. 2018Hun-Ma1162 is whether both Respondent's denial of Complainants O.B. et al.'s application to attend the Meeting (hereinafter referred to as the "Denial") and the main clause of Article 54-2, Section (1) of the National Assembly Act (amended by Act No. 15620 on April 17, 2018) have infringed the fundamental rights of Complainants O.B. et al.

The subject matter of review in Case No. 2020Hun-Ba428 is whether the main clause of Article 54-2, Section (1) of the National Assembly Act (amended by Act No. 15620 on April 17, 2018) (hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

National Assembly Act (amended by Act No. 15620 on April 17, 2018)

2. Case on National Assembly Act Provision Providing for Closing of Intelligence Committee Meetings to Public

Article 54-2 (Special Case concerning Intelligence Committee)

(1) A meeting of the Intelligence Committee shall not be open to the public; provided, however, that if the Committee holds a public hearing or a confirmation hearing under Article 65-2, it may be open to the public by a decision of the Committee (emphasis added).

Summary of the Decision

1. Whether the Argument against the Denial Is Justiciable

Because the Meeting, which Complainants O.B. et al. had applied to attend, already terminated, their protectable subjective interest extinguished with respect to their argument against the Denial. Because the Court recognizes the justiciability of the Provision at Issue—a legal basis of the Denial—and proceeds to the merits, no justiciable interest exists with respect to their argument against the Denial. Therefore, Complainants O.B. et al.'s argument against the Denial is nonjusticiable.

2. Whether the Provision at Issue Violates the Principle of Open Legislative Meetings

A. The meaning of the principle of open legislative meetings under Article 50, Section (1) of the Constitution

Article 50, Section (1) of the Constitution prescribes in its main clause that sessions of the National Assembly shall be open to the public. Its proviso contains exceptions that the session may be closed to the public "if so decided by a majority vote of the members present, or if the Speaker deems it necessary for the sake of national security." In light of this structure of Article 50, Section (1) of the Constitution, the constitutional principle of open legislative meetings does not mean that

all sessions of the National Assembly should always be open to the public. Rather, it means that specific requirements under the Constitution should be satisfied to close the sessions to the public. Because the proviso of Article 50, Section (1) of the Constitution states, in very specific language, the procedure or permissible ground for closing the National Assembly sessions to the public, the Court notes that exceptions to the principle of open legislative meetings should be recognized strictly.

In light of this consideration, the Court does not find that Article 50, Section (1) of the Constitution permits an absolutely closed meeting that is not open to the public at all. For this reason, it is inconsistent with Article 50, Section (1) of the Constitution to bar any possibility of open meetings by uniformly requiring to close to the public sessions of the National Assembly dealing with particular content, or sessions of particular National Assembly committees.

B. Whether the principle of open legislative meetings is violated

The Provision at Issue requires all meetings of the Intelligence Committee be closed to the public. As a result, it is essentially impossible for citizens to monitor and supervise the activities of the Intelligence Committee. Moreover, one of the conditions permitting closed sessions, as provided in the proviso of Article 50, Section (1) of the Constitution, must be met at every meeting to close it to the public. Although the Provision at Issue was enacted by a majority vote of the members present with a quorum consisting of a majority of the members of the National Assembly, this fact alone does not satisfy the “majority vote of the members present” requirement of the proviso of Article 50, Section (1) of the Constitution. Therefore, the Provision at Issue violates Article 50, Section (1) of the Constitution, and there is no need to proceed to further analysis. Accordingly, the Provision at Issue infringes Complainants’ right to know.

Summary of Dissenting Opinion of Two Justices

1. Whether the Principle of Open Legislative Meetings Is Violated

Article 50, Section (1) of the Constitution is not construed as a provision necessarily requiring that closing of every session to the public follow the procedure of a majority vote of the members present or the procedure of decision-making by the Speaker deeming such closing necessary for the sake of national security. Rather, this section is construed as one allowing an exception to the principle of open legislative meetings if it is observed that the members participating in a session practically reach an agreement to close the session to the public or if it is recognized that such closure is necessary for the sake of national security.

All meetings of the Intelligence Committee need to be closed to the public for the sake of national security. We find it compelling that such closing is determined in the form of statute, which obtains democratic legitimacy by a decision of the plenary session under stricter conditions than a majority vote of the members present. Therefore, the Provision at Issue does not violate the principle of open legislative meetings provided in Article 50, Section (1) of the Constitution.

2. Whether the Rule against Excessive Restriction Is Violated

The Provision at Issue serves the purposes of protecting State secrets and national security. In this connection, it is not feasible in practice to require the opening or closing to the public of the Intelligence Committee's meetings to be decided separately at each meeting by considering the content of the meeting. Moreover, such requirement does not enable the achievement of the Provision at Issue's legislative purposes. In enacting the Provision at Issue, the legislature uniformly determined not to open to the public all meetings of the Intelligence

Committee, which oversees matters relating to the National Intelligence Service. This determination was based on considerations, *inter alia*, of the special situation that our country is currently in a truce with North Korea and of a high need to maintain the confidentiality of the content of the professional duties performed by the National Intelligence Service, including collection, production, and distribution of intelligence on foreign affairs and North Korea. In this respect, we find that the determination of the legislature is not an undue restriction. Further, the public interest in protecting State secrets and contributing to national security significantly outweighs the restraints on the right to know that are imposed by the closing to the public of Intelligence Committee meetings, the closing of which limits information gathering. Therefore, the Provision at Issue also satisfies the balance of interests.

3. Case of Restriction on Returnee Voting during COVID-19

[2020Hun-Ma895, January 27, 2022]

In this case, the Court found that in exceptional circumstances, where a decision to suspend overseas voting was made imminent to the commencement date of or during the overseas voting period and there was no decision to reinitiate it, providing no procedure for an overseas eligible voter (an overseas voter not registered as a resident in Korea) or an overseas absentee voter (an overseas voter registered as a resident in Korea) who returns home to vote after the commencement date of the overseas voting period is considered a pseudo legislative omission, which violates the principle of proportionality and is thus nonconforming to the Constitution.

Background of the Case

Complainant, who was selected as a participant in the WEST (Work, English Study, Travel) Program (Korea-U.S. University Students Training Program) hosted by the Ministry of Education of Korea, served an internship in Los Angeles, the United States, where she made a report of an overseas absentee voter (an overseas voter registered as a resident in Korea) on January 28, 2020, and was planning on voting in Los Angeles during the overseas voting period (from April 1 to April 6, 2020).

On March 30, 2020, however, due to COVID-19, the National Election Commission, under Article 218-29, Section (1) of the Public Official Election Act, made a decision to suspend overseas voting (Notice No. 2020-182) run by overseas election commissions at the Republic of Korea's Embassies in the United States, including the overseas election commission of the Korean Consulate General in Los Angeles, in regards to the 21st National Assembly elections.

Complainant arrived in Korea on April 8, 2020, earlier than scheduled, and on the election day of April 15, 2020, she intended to vote in the polling station near her address, but could not vote as prescribed in

Article 218-16, Section (3) of the Public Official Election Act, which stipulates that one cannot vote in the domestic land on the election day (hereinafter referred to as "Returnee Voting") unless he or she arrived before the date of April 1, 2020, the commencement date of the overseas voting period and reported his or her situation to the commission.

Arguing that Article 218-16, Section (3) and Article 218-29, Section (1) of the Public Official Election Act violated her rights to vote, equality, and pursuit of happiness, Complainant requested a court-appointed counsel on April 14, 2020, and filed a constitutional complaint on June 26, 2020.

Subject Matter of Review

The constitutional complaint of this case is about an argument that states that "in exceptional circumstances where a decision to suspend overseas voting was made imminent to the commencement date of or during the overseas voting period and there was no decision to reinitiate it, providing no procedure for an overseas eligible voter (an overseas voter not registered as a resident in Korea) or an overseas absentee voter (an overseas voter registered as a resident in Korea) (hereinafter collectively referred to as "overseas eligible voter, etc.") who returns home to vote after the commencement date of the overseas voting period is considered a pseudo legislative omission." Thereupon, the subject matter of review in this case is whether the part concerning "an overseas eligible voter, etc. who returns home before the commencement date of the overseas voting period" (hereinafter referred to as "Provision at Issue") of Article 218-16, Section (3) of the Public Official Election Act (amended by Act No.13497 on August 13, 2015) violates the fundamental rights of Complainant.

Provision at Issue

Public Official Election Act (Amended by Act No.13497 on August

13, 2015)

Article 218-16 (Voting Methods of Overseas Election) (3) an overseas eligible voter, etc., who returns home before the commencement date of the overseas voting period prescribed in Article 218-17, Section 1 (1) may cast his or her vote on the election day at the polling station designated by the relevant election commission, after filing a report with the *Gu/Si/Gun* election commission having jurisdiction over his or her address or last domestic address (in cases of a person who does not have the last domestic address, referring to the basic place of registration), accompanied with a document which proves the fact that he or she has returned home before the commencement date of the overseas voting period.

Summary of the Decision

1. Restricted Basic Rights and Standard for Review

Due to the Provision at Issue, Complainant could not vote in the domestic land as she returned home after the commencement date of the overseas voting period for the 21st National Assembly elections; this restricts Complainant's right to vote.

The Provision at Issue does not formally deny the voting right of an overseas eligible voter, etc. itself, but it practically can lead to a situation where his or her voting right is denied. Therefore, whether the Provision at Issue violates the voting right of an overseas eligible voter, etc. is to be reviewed pursuant to the principle of proportionality.

2. Whether Voting Right is Violated

Considering that the Provision at Issue aims to ensure the fairness of voting by preventing plural voting, which refers to a situation where an elector who voted at a polling station in another country exercises his or

her voting right again in the domestic land, it serves a legitimate legislative purpose.

Also, an overseas eligible voter, etc., who resides or stays in a foreign country during the overseas voting period, may cast a vote overseas, so even if there was a decision to suspend overseas voting imminent to the commencement date of or during the overseas voting period and no decision was made to reinitiate it, allowing only those returned home before the commencement date of the overseas voting period to vote is a suitable means for the legislative purpose.

Looking into the current election practice, after the overseas voting period ends, in principle, the competent *Gu/Si/Gun* election commissions receive and confirm envelopes for return of overseas voting on which the voters' registration numbers are attached and compare them with the list of overseas eligible voters, etc.; when all of these are completed, they can verify whether overseas eligible voters, etc. voted overseas or voted more than once. However, overseas voting is held for a period not exceeding six days, from 14 days to 9 days before the election day (Article 218-17, Section (1), Item 1 of Public Official Election Act), so there are at least eight days before the election day since the ending of the overseas voting period, during which an overseas returning officer can send the list of overseas eligible voters who actually voted to the National Election Commission (NEC) or to the *Gu/Si/Gun* election commissions through the NEC and can still verify their voting status before the election day; with the current level of technological advances being taken account, all of these are feasible. In exceptional circumstances where a decision to suspend overseas voting was made imminent to the commencement date of or during the overseas voting period, and there was no decision to reinitiate it, there is still an alternative that allows an overseas eligible voter, etc., who returns home after the commencement date of the overseas voting period, to vote in the domestic land, thereby protecting the fairness of election with his or her right to vote being ensured and plural voting being prevented; the Provision at Issue is

against the rule of the least restrictive means.

Through the Provision at Issue, we aim to accomplish the fairness of voting, which is of the essence. But the fairness of voting has meaning only when an elector's voting right is substantially guaranteed. The restriction on the voting right of Complainant following insufficient and incomplete legislation of the Provision at Issue can never be deemed unimportant, and this certainly is not considered to be trivial compared to the public interest arising from the accomplishment of the Provision at Issue. Thus, the Provision at Issue violates the principle of the balance of legal interests.

Hence, in exceptional circumstances where a decision to suspend overseas voting was made imminent to the commencement date of or during the overseas voting period, and there was no decision to reinitiate it, providing no procedure for an overseas eligible voter, etc., who returns home to vote after the commencement date of the overseas voting period, violates the principle of proportionality, leading up to the violation of the voting right of Complainant.

3. Necessity of Decision of Nonconformity

In case of depriving effects immediately after rendering a decision of simple unconstitutionality on the Provision at Issue, legal grounds that allow an overseas eligible voter, etc. to vote in the domestic land after returning home before the commencement date of the overseas voting period may disappear, causing a legal vacuum. Moreover, in eliminating the status of unconstitutionality in the Provision at Issue, with regards to decisions including what requirements or procedures should be applied for an overseas eligible voter, etc. returning home after the commencement date of the overseas voting period when allowing returnee voting, the discretion lies in the legislature to decide within the decision purpose of the Constitutional Court of Korea.

Instead of rendering a decision of simple unconstitutionality on this

Provision at Issue, we declare nonconformity and order its temporary application until it is amended by the legislature. The legislature should amend the law as soon as possible by December 31, 2023.

4. Case on Real Name Financial Transactions Act that Imposes Criminal Punishment on the Request for Financial Transaction Information

[2020Hun-Ka5, February 24, 2022]

In this case, the Court held that the provisions of the former Act on Real Name Financial Transactions and Confidentiality, which prohibit asking a person working for a financial company, etc. for transaction information, etc. and impose criminal punishment in case of violation, infringe on the general freedom of action, thus are unconstitutional.

Background of the Case

Petitioner was summarily prosecuted for facts charged that he asked S.C., a bank teller, for K.O.'s account number of Bank ***, and therefore, a summary order was issued. He later requested a formal adjudication. Petitioner filed a petition to request a constitutional review of the provisions of the "Act on Real Name Financial Transactions and Confidentiality" while the case was in pending status; the court accepted it and filed the constitutional review in this case.

Subject Matter of Review

The subject matter of review in this case is whether the part in Article 4, Section (1) of the former "Act on Real Name Financial Transactions and Confidentiality" (amended by Act No.11845 on May 28, 2013, and before amended by Act No.16651 on November 26, 2019), "no person may request a person working for a financial company, etc. to provide transaction information, etc." (hereinafter referred to as "Provision of Prohibition in this case") and the same part in Article 6, Section (1) of the "Act on Real Name Financial Transactions and Confidentiality" (amended by Act No.12711 on May 28, 2014, and before amended by

Act No.16651 on November 26, 2019) (hereinafter referred to as "Provision of Punishment in this case") are unconstitutional.

Meanwhile, in regard to Article 4, Section (1) and Article 6, Section (1) of the former "Act on Real Name Financial Transactions and Confidentiality" (amended by No.16651 on November 26, 2019, and before amended by No.17758 on December 29, 2020), which was amended after the act of stating the facts charged in this case, and in regard to Article 4, Section (1) and Article 6, Section (1) of the current "Act on Real Name Financial Transactions and Confidentiality" (amended by Act No.17758 on December 29, 2020), the parts providing that "no person may request a person working for a financial company, etc. to provide transaction information, etc." in Article 4, Section (1) and the parts concerning punishment in case of violation of Article 4 Section 1 in Article 6, Section (1) all stipulate the same without any change in words or phrases; there was revision only in Article 4, Section (1), Item 2, which is the provision for the clue. Thereupon, it is evident that the aforementioned amended provisions will reach the same conclusions as the Provision of Prohibition and Provision of Punishment in this case (all of which are hereinafter referred to as "Provisions at Issue"), so they shall be included in the Provisions at Issue for consistency in the legal order and efficiency of judgment. The Provisions at Issue are as follows:

Provisions at Issue

Former Act on Real Name Financial Transactions and Confidentiality (amended by No.11845 on May 28, 2013, and before amended by No.16651 on November 26, 2019)

Article 4 (Confidentiality of Financial Transactions)

(1) No person working for a financial company, etc. shall provide or reveal information or data concerning the contents of financial transactions (hereinafter referred to as "transaction information, etc.") to other persons unless he/she receives a request or consent in writing from the holder of a title deed (in case of trust, meaning a truster or

beneficiary), and no person may request a person working for a financial company, etc. to provide transaction information, etc. (Proviso omitted; emphasis added.)

Former Act on Real Name Financial Transactions and Confidentiality (amended by No.12711 on May 28, 2014, and before amended by No.16651 on November 26, 2019)

Article 6 (Penalty Provisions)

A person that violates the provisions of Article 3 (3) or (4), Article 4 (1) or (3) through (5) shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 50 million won. (Emphasis added.)

Former Act on Real Name Financial Transactions and Confidentiality (amended by No.16651 on November 26, 2019, and before amended by No.17758 on December 29, 2020)

Article 4 (Confidentiality of Financial Transactions)

(1) No person working for a financial company, etc. shall provide or reveal information or data concerning the contents of financial transactions (hereinafter referred to as "transaction information, etc.") to other persons unless he/she receives a request or consent in writing from the holder of a title deed (in case of trust, meaning a truster or beneficiary), and no person may request a person working for a financial company, etc. to provide transaction information, etc. (Proviso omitted; emphasis added.)

Article 6 (Penalty Provisions) A person that violates the provisions of Article 3 (3) or (4), Article 4 (1) or (3) through (5) shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 50 million won. (Emphasis added.)

Act on Real Name Financial Transactions and Confidentiality (amended by No.17758 on December 29, 2020)

Article 4 (Confidentiality of Financial Transactions) (1) No person working for a financial company, etc. shall provide or reveal information

or data concerning the contents of financial transactions (hereinafter referred to as "transaction information, etc.") to other persons unless he/she receives a request or consent in writing from the holder of a title deed (in case of trust, meaning a truster or beneficiary), and no person may request a person working for a financial company, etc. to provide transaction information, etc. (Proviso omitted; emphasis added.)

Article 6 (Penalty Provisions) A person that violates the provisions of Article 3 (3) or (4), Article 4 (1) or (3) through (5) shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 50 million won. (Emphasis added.)

Summary of the Decision

To keep financial transactions confidential by preventing leakage of financial transaction information, the Provisions at Issue ban the request for financial transaction information from financial institutions without any consent from the holder of a title deed and impose criminal punishment in case of violation in order to guarantee secretive financial transactions. Thereupon, the legislative purpose of the Provisions at Issue is legitimate, and the Provisions at Issue are appropriate means to achieve the purpose.

In light of the roles and importance of financial transactions, the need to guarantee their confidentiality is understandable, but financial transactions are available only through financial institutions. Therefore, financial transactions can be kept confidential simply by imposing criminal punishment on financial institutions and their workers that provide or leak information to others.

The Provisions at Issue consider the act itself of requesting financial transaction information to be criminally punished, but there are circumstances in which the request does not entail wrongdoing that causes social blame, or there is no de facto threat in keeping the financial transaction a secret. Also, depending on specific cases, guilt and responsibility differ

in situations where, for example, no consent is approved from the holder of a title deed, but still, one needs his or her financial transaction information, so he or she requests it from the bank teller instead.

Nevertheless, the Provisions at Issue completely ban requesting financial transaction information no matter what the reason, intention, patterns of behavior, or details of the requested transaction information, etc. and impose criminal punishment in case of violation. This infringes the principle of the least restrictive means, as they exceed the extent of accomplishing the legislative purpose.

It is acknowledged that keeping the financial transaction confidential is an important public interest, but the fact that the Provisions at Issue completely ban the request for financial transaction information no matter what the reason, intention, patterns of behavior, or details of the requested transaction information, and impose criminal punishment in case of violation excessively restricts the general freedom of action compared to the public, thus lacking the balance of legal interests.

The Provisions at Issue infringe on the general freedom of action against the principle of proportionality, and thus are unconstitutional.

Summary of Dissenting Opinion of a Justice

Considering that in some cases, the nature of a crime of a person who requested financial transaction information is more culpable than that of the other one who provided such information, not penalizing the act of requesting transaction information, etc. at all or imposing lighter punishment for those who requested than those who work for a financial company, etc. would rather bring about uneven consequences in certain cases.

Taking into consideration the importance of the protected legal interest, which is keeping the financial transaction confidential, the necessity to protect it, the blamable nature of the behavior of requesting others' transaction information, etc., and the extent of violation inflicted

on the protected legal interest, comprehensive legislative discretion is acknowledged in prohibiting and imposing criminal punishment as seen in the Provisions at Issue. Moreover, the legislator imposing the same sentence for those who provided or leaked the transaction information, etc. and those asking them for transaction information, etc. is not utterly off the extent needed for the function and the purpose of criminal punishment; if violated, justice can impose penalties in proportion to the responsibility of the wrongdoing with the sentencing conditions being taken into account; therefore, the severity of the imposed sentence is not excessive. Real Name Financial Transactions Act allows for exceptions for providing financial transaction information, etc. in certain cases where it is necessary for the public interest; even when it does not fall into the exceptions and if the request for transaction information, etc. does not violate social rules, the illegality may be exempted as it falls under the justifiable act as prescribed in Article 20 of Criminal Law.

The public interest that the Provisions at Issue wish to accomplish is more crucial than the private interest arising from the general freedom of action in freely asking for the financial transaction information of others. Thereupon, the Provisions at Issue do not infringe on the general freedom of action of Petitioner and are not against the principle of proportionality; thus, they are not unconstitutional.

5. Case on Restriction of Pronouncing Provisional Execution in Party Suit against State

[2020Hun-Ka12, February 24, 2022]

In this case, the Court held that Article 43 of the Administrative Litigation Act, which prescribes that a provisional execution shall not be pronounced in a case where a party suit is instituted against the State, violates the principle of equality and thus is unconstitutional.

Background of the Case

The plaintiff in this case was reinstated by an ordinary court's decision to revoke the disposition of *ex officio* dismissal. Thereafter, the plaintiff filed a lawsuit seeking for awarding of back pay since January 2017 and the interest thereon with a declaration of a provisional execution, arguing that the plaintiff has not received wages from the Minister of Education. Before deciding on whether to allow the plaintiff's claim of seeking the back pay in accordance with the revocation judgment, the requesting court requested *sua sponte*, on August 24, 2020, for a constitutional review of Article 43 of the Administrative Litigation Act, which prescribes that a provisional execution shall not be pronounced in a case where a party suit is instituted against the State.

Subject Matter of Review

The subject matter of this case is whether Article 43 of the Administrative Litigation Act (wholly amended by Act No. 3754 on December 15, 1984, hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Administrative Litigation Act (wholly amended by Act No. 3754 on

December 15, 1984)

Article 43 (Restriction on Sentence of Provisional Execution)

In a case where a party suit is instituted against the State, a provisional execution shall not be sentenced.

Summary of the Decision

Whether the Provision at Issue violates the principle of equality

The State, a public entity, and other subjects of rights shall stand as a defendant in a party suit. However, under the Provision at Issue, a provisional execution may not be sentenced only in a case where a party suit is instituted against the State. Therefore, in the case of a party suit, whether a provisional execution can be pronounced with a winning verdict depends on who the defendant is, and this can be considered a discriminatory treatment based on the Provision at Issue. In other words, the Provision at Issue treats differently the case where the defendant is a public entity or other subjects of rights from the case where the defendant is the State among party suits claiming the right to property.

A sentence of provisional execution deters unnecessary abuses of appeals and allows expedited enforcement of rights, thereby protecting property rights and the right to speedy trial of the people (see *88Hun-Ka7*, January 25, 1989). Typically, a party suit means a suit concerning legal relations, cause of which is a disposition, etc., issued by an administrative agency, and a suit over legal relations under public law, in which one of the parties to the legal relationship is a defendant (Article 3, Item 2 of the Administrative Litigation Act). This includes party suits recognized under the current Act, including a suit related to an increase or decrease in compensation (Article 85, Section (2) of the Act on Acquisition of and Compensation for Land for Public Works Projects), a suit pertaining to contracts under public law whose subject matters are rights under public law or the legal relationship itself between equal parties in conflict, and a lawsuit claiming monetary

payment under public law. There may be some party suits over legal relations under public law that are practically based on the same legal provision, but the parties are different. For example, in a suit claiming an increase in compensation for land acquisition (see Article 85 Section (2) of the Act on Acquisition of and Compensation for Land for Public Works Projects), the project operator who is the defendant may be housing redevelopment associations, public corporations, local municipalities or the State depending on the content and nature of the project. If who the defendant is determines whether a provisional execution may be pronounced for lawsuits claiming monetary payment under public law, which all have the same nature of seeking an increase in compensation, this leads to unreasonable discrimination against the plaintiff, who is the other party to the lawsuit.

We find no reasonable grounds for the State to be favored in a party suit against the State merely due to the fact that the claim concerning the right to property is premised on legal relations under public law, and it seems difficult to believe that there is a practical difference between the State and local governments, etc. in terms of the possibility of executing the court's judgment. At times, it may become difficult to restore the original condition, resulting in a loss to the national treasury when the judgment is overturned at the appeal after provisionally executing it. However, this problem is not exclusive to when the State is the defendant but general to the entire practice of provisional execution. Like all other instances, this problem can be addressed by weighing the good cause for not issuing the order, requiring a deposit of a security, or using exemptions (see Article 213 of the Civil Procedure Act). Therefore, this problem cannot be the reason for excluding the State from orders of provisional execution (see *88Hun-Ka7*, January 25, 1989). Furthermore, since a party can get a return of what has been provided by the pronouncement of a provisional execution, including the money, by applying for a refund of provisional payments without waiting for a final judgment and claim, if any, for damages incurred by

the provisional execution or that incurred by efforts to obtain the exemption thereof (see Article 215, Section (2) of the Civil Procedure Act), the difficulty of restoring provisional execution to original status caused by the altered judgment can be relieved to a certain extent. Further, since the defendant in the ruling with a declaration of provisional execution can discharge his/her obligations to avoid the provisional execution of the ruling, the defendant State can consider whether to discharge its obligations to avoid any disruption of the government accounting caused by the provisional execution. If the State discharges its obligations, interest will no longer be accrued, thereby reducing the risk of a loss to the national treasury to a certain extent.

Taken together, the Provision at Issue discriminates against a party suit filed against the State in comparison to a case where the defendant is not the State but a public entity or other subjects of rights without reasonable grounds by restricting the sentencing of a provisional execution in a case where a party suit is instituted against the State. Therefore, it violates the principle of equality.

Summary of Concurring Opinions of Five Justices

The Provision at Issue treats a civil suit differently from a party suit when determining whether a provisional execution may be sentenced even though they are both a claim of property right against the State. Thus, a civil suit against the State and a party suit against the State are the two groups that need to be compared in determining whether it violates the principle of equality.

Under the Provision at Issue, a provisional execution shall not be pronounced in a case where a party suit is instituted against the State. A party suit, which is a suit over legal relations under public law, is distinguished from a civil suit, which is a suit over legal relations under private law. However, if the right to recover through litigation is the

right to property that can be assessed financially, there is practically little gain in distinguishing between a party suit and a civil suit. This is because the disputes do not concern the exercise of public authority itself, and one of the parties to the legal relationship is a defendant in both suits, and the two take similar forms, such as the claim sought and the cause of action. In other words, a party suit and a civil suit claiming the right to property have essentially no difference in that they involve a dispute over the right that can be assessed financially based on the relationship between equal holders of rights. Also, while an order of provisional execution is attached to a judgment, there is no difference between a party suit and a civil suit in the “holding of a judgment” to which an order of provisional execution is attached. Some differences in the method of hearing cases between the two merely derive from the purpose of ensuring a more prompt and efficient remedy of citizens’ rights by processing administrative cases in a professional manner.

Taken together, in terms of the objectives of an order of provisional execution, which are to deter unnecessary abuses of appeals and allow expedited enforcement of rights, there is essentially no difference between a civil suit and a party suit, as the judgment concerns a claim of the right to property. Accordingly, since there is no reasonable ground for the Provision at Issue to favor the State who is the defendant in a party suit, thereby discriminating against the plaintiff, the Provision violates the principle of equality.

6. Case on Failure of Criminal Compensation Act to Provide Criminal Compensation for Excessive Confinement

[2018Hun-Ma998, 2019Hun-Ka16, 2021Hun-Ba167 (consolidated), February 24, 2022]

The Court held nonconforming to the Constitution the failure (pseudo legislative omission) of Article 26, Section (1) of the Act on Criminal Compensation and Restoration of Impaired Reputation to provide any prerequisite to compensation for the following case: Where the execution of a sentence of confinement in the original judgment exceeds a sentence pronounced in the judgment on retrial; the retrial proceeding is initiated due to the Court's decision of unconstitutionality of an aggravated penalty clause that served as the basis for the original judgment; and the charging document is amended on retrial to replace citations of statutory provisions allegedly violated, and in consequence, the defendant does not receive a final judgment of acquittal, but is given a final judgment imposing a sentence lighter than that prescribed by the overturned aggravated penalty clause. The Court reasoned that the abovementioned failure infringes the right to equality of Complainants and Claimant.

Background of the Case

1. H.T., Complainant in case no. 2018Hun-Ma998, was sentenced to a term of imprisonment with labor of two and a half years for, *inter alia*, "Punishment of Violence, Etc. Act" violations (assault by mob, deadly weapon, etc.), and completed serving the term of imprisonment. Thereafter, on September 24, 2015, the Court, in case no. 2014Hun-Ba154, etc., ruled unconstitutional, inter alia, the part of Article 3, Section (1) of a former Punishment of Violence, Etc. Act relating to "any person who commits the crime of violence prescribed in Article 260, Section (1) of the Criminal Act by carrying a deadly weapon or other dangerous articles." Thereupon, the above Article 3, Section (1),

etc. were deleted in the Punishment of Violence, Etc. Act revised by Act No. 13718 on January 6, 2016.

Subsequently, in a retrial proceeding of H.T., the prosecutor filed an application to the court to amend the charging document with respect to the crimes of "Punishment of Violence, Etc. Act" violations (assault by mob, deadly weapon, etc.) that had been convicted in the original judgment. The application did not seek to amend the facts constituting the offenses charged, but sought, *inter alia*, to change the name of the charged offense to "special violence" and to replace the provisions cited as allegedly being violated with "Criminal Act, Article 261 and Article 260, Section (1)." The court granted the application. Thereafter, H.T. was given a final judgment imposing a sentence of two-year imprisonment with labor for his offenses, including special violence.

Subsequently, on October 2, 2018, H.T. filed the constitutional complaint in this case, arguing that his fundamental rights are infringed by Article 2 of the Act on Criminal Compensation and Restoration of Impaired Reputation (hereinafter referred to as the "Criminal Compensation Act"), which fails to provide criminal compensation for a case, other than a case of acquittal, in which the sentence decreased in a retrial proceeding.

2. K.T., Claimant in the underlying case of case no. 2019Hun-Ka16, was sentenced to a term of imprisonment with labor of two years for crimes of "Act on the Aggravated Punishment of Specific Crimes" violations (larceny, etc.), and completed serving the term of imprisonment. Thereafter, on February 26, 2015, the Court, in case no. 2014Hun-Ka16, etc. ruled unconstitutional the part of Article 5-4, Section (1) of the former Act on the Aggravated Punishment, Etc. of Specific Crimes relating to Article 329 of the Criminal Act. Thereupon, the above Article 5-4, Section (1) was deleted in the Act on the Aggravated Punishment, Etc. of Specific Crimes revised by Act No. 13717 on January 6, 2016.

Subsequently, in a retrial proceeding of K.T., the prosecutor filed an application to the court to amend the charging document with respect to the crime of the "Act on the Aggravated Punishment, Etc. of Specific Crimes" violation (larceny) that had been convicted in the original judgment. The application did not seek to amend the facts constituting the offense charged, but sought to change the name of the charged offense to "habitual larceny" and to replace the provision cited as allegedly being violated, i.e., "Act on the Aggravated Punishment, Etc. of Specific Crimes, Article 5-4, Section (1)," with "Criminal Act, Article 332." The court granted the application. Thereafter, K.T. was given a final judgment imposing a sentence of two-year imprisonment with labor for his offenses, including habitual larceny.

K.T. then lodged a claim for criminal compensation, arguing that "criminal compensation should be allowed for the time spent in confinement (six months) that exceeds the term of imprisonment with labor of one and a half years pronounced in the judgment on retrial." Following rejection of the claim, he filed an instant appeal with the Seoul High Court. On May 1, 2019, the appellate court, *sua sponte*, requested constitutional review of Article 26, Section (1) of the Criminal Compensation Act.

3. P.J., Complainant in case no. 2021Hun-Ba167, was sentenced to a term of imprisonment with labor of one and a half years for "Act on the Aggravated Punishment, Etc. of Specific Crimes" violation and completed serving the term of imprisonment. Thereafter, on February 26, 2015, the Court, in case no. 2014Hun-Ka16, etc., rendered the abovementioned decision of unconstitutionality.

Subsequently, in a retrial proceeding of P.J., the prosecutor filed an application to the court to amend the charging document. The application did not seek to amend the facts constituting the offense charged, but sought to change the name of the charged offense to "habitual larceny," and to replace the provision cited as allegedly being violated, i.e., "Act

on the Aggravated Punishment, Etc. of Specific Crimes, Article 5-4, Section (1)," with "Criminal Act, Article 332." The court granted the application. P.J. was then given a final judgment imposing a sentence of one-year imprisonment with labor for habitual larceny.

Thereafter, on October 7, 2020, P.J. lodged a claim for criminal compensation, arguing that "criminal compensation should be allowed for the time spent in confinement that exceeds the term of imprisonment with labor of one year pronounced in the judgment on retrial." On the same date, he petitioned the court to request constitutional review of Article 26, Section (1) of the Criminal Compensation Act. Following rejection of both the claim and petition, he filed the constitutional complaint in this case against Article 26, Section (1) of the Criminal Compensation Act on June 22, 2021.

Subject Matter of Review

Complainant H.T. contests the failure of Article 2 of the Criminal Compensation Act to provide criminal compensation for a case in which the sentence decreased in a retrial proceeding. The issue contested by Complainant H.T., who has not received a judgment of acquittal, is germane to the scope of regulation of Article 26, Section (1) of the Criminal Compensation Act, which recognizes the right to criminal compensation "for certain cases in which a person has not received a judgment of acquittal but is practically equivalent to having received one." Thus, the subject matter of review in case no. 2018Hun-Ma988 is changed to Article 26, Section (1) of the Criminal Compensation Act. As such, the subject matter of review in this case is whether Article 26, Section (1) of the Criminal Compensation Act (wholly amended by Act No. 10698 on May 23, 2011) (hereinafter referred to as the "Provision at Issue") infringes the fundamental rights of Complainants and Claimant and violates the Constitution. The text of which is as follows:

Provision at Issue

The Criminal Compensation Act (wholly amended by Act No. 10698 on May 23, 2011)

Article 26 (Cases of Release from Prosecution, etc.)

(1) In cases falling under any of the following Items, compensation for confinement may also be claimed to the State:

1. A defendant whose judgment of release from or dismissal of the prosecution, as provided under the Criminal Procedure Act, became final and conclusive would have had strong and clear grounds to receive a judgment of acquittal if there had not been grounds meriting the judgment of release from or dismissal of the prosecution;
2. Where the case of medical treatment and custody of a candidate for medical treatment and custody for whom an independent application for medical treatment and custody is filed pursuant to Article 7 of the Medical Treatment and Custody Act is finalized by a judgment of dismissal of the application, for the case is found not to constitute an offense or falls into the time when there is no evidence of criminal facts.

Summary of the Decision

1. Whether the right to equality is violated

The circumstances at issue in this case all involve the execution of a sentence of confinement in the original judgment that exceeded a sentence pronounced in the judgment on retrial. Each retrial proceeding was initiated due to the Court's decision of unconstitutionality of an aggravated penalty clause that had served as the basis for the original judgment. On retrial, the charging document was amended to replace citations of statutory provisions allegedly violated. In consequence, each

defendant did not receive a final judgment of acquittal, but was given a final judgment imposing a sentence lighter than that prescribed by the overturned aggravated penalty clause.

Complainants and Claimant could have received judgments of acquittal on retrial, but could not receive those judgments due to "amendment of a charging document to replace citations" under the procedural law. This amendment was possible because the statutory provisions originally cited as allegedly being violated were unconstitutional special law clauses that provide an aggravated penalty without prescribing any aggravating element other than the elements of provisions of the Criminal Act (general law). It cannot be assumed that the decreased sentences pronounced in the retrial proceedings were simply the result of the sentencing discretion of the judges; this is because of the distinctness of the statutory sentences *per se*, which lie at the core of the principle of *nulla poena sine lege* and form the foundation of the penalty pronounced by the judge. Thus, the Court cannot deny the correlation of the application of the unconstitutional statute with the portion, in whole or in part, of the sentence in the original judgment that exceeds the sentence in the judgment on retrial. If this correlation is acknowledged, the excess portion of the original sentence should be regarded as corresponding to a sentence imposed for a charge for which there is a finding of acquittal. Specifically, if, at the time the judgment on retrial becomes final and conclusive, the period already spent in confinement does not surpass the sentence imposed in the retrial judgment, relief would be obtained through executing the sentence only within the period imposed in the retrial judgment. However, if the time spent in confinement has already surpassed the sentence imposed in the retrial judgment, such confinement amounts to excessive incarceration arising from the execution of the unconstitutional statute. In such a case, the Court cannot help but note that the risks inherent in the criminal justice process have caused significant harm to the physical freedom of the defendant. Excluding that case from criminal compensation is inconsistent

with the intent of Article 47, Sections (3) and (4) of the Constitutional Court Act, which prescribe the retroactive effect of an unconstitutionality decision for a penalty clause, and the right to retrial, respectively.

The circumstances at issue in this case are, in essence, no different from those the Provision at Issue specifies as being subject to criminal compensation. The difference lies in the fact that the reason for not receiving a judgment of acquittal was the "amendment of a charging document to replace citations of statutory provisions allegedly violated." The Court notes in this respect that the procedure of amending a charging document was established with the intent to realize both the proper exercise of penal authority and the promotion of judicial economy while guaranteeing the right of a defendant to present a defense. This procedure was not established to justify incarceration arising from the result of risks inherent in the criminal justice process. Even if a criminal justice authority has prevented a judgment of acquittal on retrial—a procedure of extraordinary relief for the defendant—by, *inter alia*, amending the charging document, if the physical freedom of the defendant has already been harmed significantly in that criminal justice process, it is contrary to the purpose of the constitutional right to criminal compensation to make him or her suffer such harm as an individual. Therefore, where consequently unjust incarceration has already caused significant harm to the physical freedom of the defendant, the fact that a judgment of acquittal is avoided due to amendment of the charging document does not constitute a reasonable ground for treating the defendant differently from others in deciding whether to recognize the right to criminal compensation.

Thus, the Court finds that an evident and arbitrary discrimination exists in the failure to provide any prerequisite to compensation for the following case: Where the execution of a sentence of confinement in the original judgment exceeds a sentence pronounced in the judgment on retrial; the retrial proceeding is initiated due to the Court's decision of unconstitutionality of an aggravated penalty clause that served as the

basis for the original judgment; the charging document is amended on retrial to replace citations of statutory provisions allegedly violated; and, in consequence, the defendant does not receive a final judgment of acquittal, but is given a final judgment imposing a sentence lighter than that prescribed by the overturned aggravated penalty clause.

As such, the abovementioned failure infringes the right to equality of Complainants and Claimant by violating the principle of equality.

2. The need for the decision of nonconformity to the Constitution and for the order for temporary application

If the Provision at Issue is declared unconstitutional, a legal vacuum would occur in which criminal compensation claims may not be filed for other cases specified in the Provision at Issue. Thus, the Court renders a decision of nonconformity to the Constitution, instead of a decision of simple unconstitutionality, for the Provision at Issue. The Provision at Issue shall continue to apply until the legislature removes its unconstitutionality and makes reasonable amendment by December 31, 2023, at the latest.

Summary of Dissenting Opinion of Three Justices

The legislature has discretion to specifically decide the subject of criminal compensation in consideration of a number of different factors, such as the constitutional spirit of the criminal compensation scheme and national finances. This discretion should be respected unless it undermines the constitutional spirit of the criminal compensation scheme.

The right to criminal compensation is vested in an individual where he or she is a “consequently” “innocent person” confined by the State during the operation of the criminal justice system. However, the instant case does not involve the confinement of a “consequently” “innocent person.” Complainants and Claimant were sentenced by judgment based on proof of crimes committed in violation of general provisions of the

Criminal Act. Nowhere in the holding and reasoning sections of the judgments do the courts find Complainants and Claimant not guilty. The facts constituting the charges, as well as the numbers of the convicted offenses, were exactly the same in both the original trials and retrials.

At the same time, inasmuch as the force and effect of the special law provisions applied to the original judgments against Complainants and Claimant expired, it was possible—and necessary for the proper exercise of the State's penal authority—to amend the charging document during retrial proceedings to replace those special law provisions with general law provisions, which had been precluded from application during original trial proceedings because of concurrence of laws. This amendment was also consistent with the spirit and intent of decisions of the Court. We do not assume other types of amendment of the charging document, and thus, do not believe that Complainants and Claimant could have practically received a judgment of acquittal.

Sentencing in a specific case is the result of a judge's comprehensive consideration of numerous and various factors in their entirety. We cannot conclude with certainty that the reduction of the sentences imposed on Complainants and Claimant arises from the unconstitutionality of the special law provisions providing for aggravated punishment. Even though the period of time Complainants and Claimant spent in confinement already exceeded the term of the sentence imposed under the judgment on retrial, we do not find that the excess period is distinguished from a sentence reduction available in the general criminal proceedings at a different level of court.

Thus, the circumstances at issue in this case are essentially different from those the Provision at Issue prescribes as being subject to criminal compensation, and they do not practically require criminal compensation. Therefore, the Provision at Issue does not violate the Constitution by infringing the right to equality or to criminal compensation.

6. Case on Failure of Criminal Compensation Act to Provide Criminal Compensation for Excessive Confinement

Summary of Concurring Opinion of One Justice

Our Constitution prescribes the right to criminal compensation in Article 28, which precedes Article 29 on the right to claim State compensation. This is because it recognizes the limitation that a risk of infringement of an individual's physical freedom is inevitably inherent in the criminal justice process of the State, and because it views that, in a State governed by the rule of law where an individual's rights of freedom are guaranteed and supported, it is the State's responsibility and duty to legitimately compensate, even retroactively and monetarily, if a lawful criminal justice action consequently infringes the physical freedom of an individual. As such, given that the constitutional right to criminal compensation is a constitutional attempt to practically secure the legitimacy of criminal justice action of the State and to strengthen the value of the physical freedom of an individual, the phrase "judgment of acquittal" in Article 28 of the Constitution should be construed to encompass cases in which a person, in appearance or formally, has received a judgment of acquittal, and in which an individual is practically equivalent to having received one.

The Supreme Court observes that criminal compensation may also be claimed where a reference to a finding of not guilty is contained in the reasoning section of a judgment. Under this view, the amendment of a charging document to "add" a new fact opens a way for claiming criminal compensation for a period in confinement that was necessary for investigation and judicial consideration of a fact constituting a charge for which the defendant was found not guilty, if this finding is stated in the reasoning section of the judgment; whereas the amendment of a charging document to "delete" or "change" an existing fact does not open ways for claiming criminal compensation for a period in confinement that was necessary for investigation and judicial consideration of the existing fact that is deleted. However, we do not see a difference between these two cases that would determine whether to permit the filing of a criminal

compensation claim, in light of the fact that criminal compensation provides a remedy for any damage and loss arising from an inevitable risk inherent in the criminal justice process—without regard to the fault or negligence on the part of a criminal justice authority. Where a fact contained in a charging document constitutes a charge for which the defendant would be found not guilty, the document may be amended to lawfully eliminate the existing fact. Even so, if the actual time served in confinement—which was necessary for investigation and judicial consideration of the existing facts in the charging document, including the one for which the defendant would have been found not guilty—exceeds a term of the sentence imposed for his or her conviction, this amounts to a case that is practically equivalent to that of a judgment of acquittal, even if, in appearance or formally, there is no such judgment.

7. Case on Prohibiting Non-Medical Providers from Performing Tattooing Procedures

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

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

Background of the Case

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

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

Subject Matter of Review

The subject matter of review in this case is whether the following

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

The Provisions at Issue read as follows:

Provisions at Issue

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

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

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

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

Article 5 (Punishment for Persons Providing Illegal Medical Services)

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

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

Summary of the Decision

1. Assessment of the Provisions at Issue

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

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

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

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

Thus, the decision on whether to implement this alternative is within

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

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

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

2. Assessment of the Legislative Failure

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

Summary of Dissenting Opinion of Four Justices

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

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

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

Allowing the professional engagement in tattooing only after a physician's license is obtained represents, in essence, a prohibition on the professional practice of tattooing procedures by non-medical providers,

infringing the freedom of occupational choice of Complainants. Therefore, the part of the phrase “medical act” in the Provisions at Issue concerning a tattooing procedure violates the Constitution.

8. Case on Prohibition of Multi-Party Membership

[2020Hun-Ma1729, March 31, 2022]

In this case, the Court held that Article 42, Section (2) of the Political Parties Act, which bans membership of two or more political parties, does not infringe on the freedom of joining political parties and of political party activities.

Background of the Case

Complainant "Transition Korea" (hereinafter referred to as "Complainant Party") is a political party that completed the registration as the central party with the National Election Commission, and Complainant C.J. is a member and the representative of Complainant Party. The rest of the Complainants (hereinafter referred to as the "Rest of the Complainants"), excluding Complainant Party and Complainant C.J., are members of either Complainant Party or the Democratic Party of Korea.

Complainants, who wish to engage in political activities in the way that members of different political parties unite by joining the same political party, filed a constitutional complaint on December 29, 2020, arguing that Article 42, Section (2) of the Political Parties Act, which stipulates that "no one shall become a member of two or more political parties," and Article 55 of the same act that punishes those in case of violation infringe on the freedom of joining political parties, etc. of Complainants.

Subject Matter of Review

Though Complainants requested an adjudication on Article 55 of the Political Parties Act on this case, they do not argue its own unconstitutionality by stating that the statutory sentence of the provision is against the systemic legitimacy or is excessive; the aforementioned

provision is exempt from the adjudication. (Refer to the Constitutional Court of Korea's rulings of 2013Hun-Ma450, October 27, 2016 and 2017Hun-Ma408, June 24, 2021.)

Therefore, the subject matter for review of this case is whether Article 42, Section (2) (hereinafter referred to as "Provision at Issue") of the Political Parties Act (wholly amended by No.7683 on August 4, 2005) infringes on the fundamental rights of Complainants. The Provision at Issue is as follows:

Provision at Issue

Political Parties Act (wholly amended by No.7683 on August 4, 2005)
Article 42 (Prohibition of Forced Membership, etc.)
(2) No one shall become a party member of two or more political parties.

Summary of the Decision

1. Whether the Request for Adjudication on Complainants Transition Korea and C.J. was Justiciable

Due to the Provision at Issue, Complainant C.J. could not become a member of another political party as he was a member of Complainant Party. But according to records, it is confirmed that Complainant C.J., a co-representative of Complainant Party, left Complainant Party to be nominated as a member of another political party. If so, it is reasonable to believe that Complainant Party and Complainant C.J. had known the occurrence of the grounds for infringement of fundamental rights due to the Provision at Issue by April 3, 2020, when Complainant Party was converted to an emergency planning committee following the representative's defection of the political party, so the constitutional complaint filed 90 days later has elapsed the period of request and is thus nonjusticiable.

2. Whether the Rest of Complainants' Freedom of Joining Political Parties and of Political Party Activities was Infringed

The Provision at Issue aims to preserve the identity of political parties and prevent illegitimate and unjust intervention between political parties so as to protect and foster party politics. These legislative purposes are just as they protect the constitutional function of the political party that greatly affects the formation of people's political opinions, and the prohibition of multi-party membership serves as a suitable means to accomplish the legislative purpose.

If multi-party membership is permitted, there may be unjust interference between political parties, or their identity may weaken. As a consequence, there is a concern that political parties will not be able to carry out the constitutional task of participating in the formation of people's political opinions and preparing themselves to be the necessary organization. Though the Provision at Issue bans multi-party membership without exception, considering the facts that there is no restriction on joining, withdrawing, and rejoining the party under the Political Parties Act, there is no alternative to effectively prevent the expected side effects while allowing multi-party membership, and there are still diverse ways to express political opinions, such as running for publicly open election of another political party, the Provision at Issue is not against the rule of the least restrictive means.

Moreover, the restriction on Complainants' freedom of joining another political party and of political activities is not considered more important than the public interests to protect and foster party politics.

Hence, the Provision at Issue does not infringe on the Rest of Complainants' freedom of joining political parties and of political party activities.

9. Case on Criminally Punishing Strikes as Interference with Business

[2012Hun-Ba66, May 26, 2022]

In this case, the Court held that Article 314, Section (1) of the Criminal Act, which criminally punishes a strike as interference with business, does not violate either the void-for-vagueness doctrine under the *nulla poena sine lege* principle or the principle of proportionality between criminal liability and punishment, and thus, does not infringe the right to collective action.

Five justices filed an opinion for unconstitutionality of the portion of the provision at issue concerning a "simple strike"—a collective refusal, unaccompanied by any affirmative action, to provide labor—which is part of an industrial action for enhancing working conditions. While the justices in favor of partial unconstitutionality constituted the majority, the Court pronounced a decision of constitutionality because a quorum necessary for a holding of unconstitutionality was not satisfied.

Background of the Case

Complainants were charged with the crime of interference with business by reason of carrying out a strike suddenly at a point in time unforeseeable by the management and thereby causing a serious confusion or tremendous damage to the management's business operations. The trial court entered judgment of conviction against Complainants. Complainants pursued appeals to an appellate court and then to the Supreme Court. While their case was pending before the Supreme Court, Complainants petitioned the court to request constitutional review of Article 314, Section (1) of the Criminal Act, which criminally punishes a strike as interference with business by force. Following the court's rejection of the petition, Complainants filed the constitutional complaint in this case on February 17, 2012.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the portion "A person who interferes with the business of another by force" of Article 314, Section (1) of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (this portion hereinafter referred to as the "Provision at Issue"). The Provision at Issue reads as follows.

Provision at Issue

The Criminal Act (amended by Act No. 5057 on December 29, 1995)
Article 314 (Interference with Business)
(1) A person who interferes with the business of another by the method of Article 313 or by force, shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 15 million won (emphasis added).

Summary of the Decision

1. Whether the void-for-vagueness doctrine under the *nulla poena sine lege* principle is violated

In the decisions of 97Hun-Ba23 on July 16, 1998, 2003Hun-Ba91 on March 31, 2005, and 2009Hun-Ba168 on April 29, 2010, the Constitutional Court has held that the Provision at Issue does not violate the void-for-vagueness doctrine under the *nulla poena sine lege* principle. Thereafter, the Supreme Court, in the *en banc* judgment of 2007Do482 on March 17, 2011, reduced the scope of the crime of interference with business by force to a scope narrower than that recognized at the time the above decisions were made, based on the standards of suddenness and severity. Despite this, a question may still remain whether a given act constitutes the elements of the crime in a specific case, yet this

question is inevitable in light of the generality and abstractness of a criminal law norm. Thus, a penal law norm cannot be regarded as vague by the mere existence of such question. Therefore, the Court does not see that there is a change of circumstances warranting a departure from the precedents.

2. Whether the principle of proportionality between criminal liability and punishment is violated

It is true that the sentences under the Provision at Issue are heavier than those under the penalty clauses of the Trade Union and Labor Relations Adjustment Act (hereinafter referred to as the "Trade Union Act"). However, this is because of the difference in protected legal interest or gravity of crime and because different factors should be considered in prescribing the statutory sentences. Additionally, the Provision at Issue does not provide any minimum limits to the statutory sentences. Therefore, it does not violate the principle of proportionality between criminal liability and punishment.

3. Whether the right to collective action is infringed

A. Summary of constitutionality opinion of four justices

The Supreme Court, in the *en banc* judgment of 2007Do482, proposed a sound construction of the Provision at Issue, and the Constitutional Court should respect this in assessing the constitutionality of the provision. Thus, the question in this case is whether the Provision at Issue infringes the right of workers to collective action by criminally punishing as the crime of interference with business by force the "collective refusal to provide labor" that has been carried out suddenly at a point in time unforeseeable by the management and has thereby caused a serious confusion or tremendous damage to the management's business operations.

9. Case on Criminally Punishing Strikes as Interference with Business

The Provision at Issue aims to strike a social balance in the formation of relations between workers and employers. Specifically, it serves the purposes of preventing the freedom of business of employers (Article 15 of the Constitution) from being violated to an extent going beyond the necessary, guaranteeing both the transactional order and the freedom of enterprises and individuals in economic affairs (Article 119, Section (1) of the Constitution), and on occasion, deterring conduct that negatively affects the daily lives of citizens or the economic functions of the State. Thus, the Provision at Issue is an appropriate means to these legitimate ends.

Exercising the right to collective action amounts to exercising group power, and as such has the element of force. Thus, the Court does not find that such conduct is unconditionally exempted from criminal or civil liability merely because it is an exercise of the right to collective action. An exercise of the right to collective action can be limited if it violates patently employers' property rights, freedom of occupation, or freedom in economic affairs, or has a severe impact on the transactional order or national economy.

In the case of a conflict between the fundamental rights of private persons, the regulation and intervention by the legislature commonly takes the form of restricting the fundamental rights of individual holders. This is equally so in the case of relations between workers and employers. The Court finds that an issue could arise whether State intervention in private relations has been within the constitutional limit, but private relations cannot be the reason for precluding the State from intervening.

In three previous decisions, 97Hun-Ba23 on July 16, 1998, 2003Hun-Ba91 on March 31, 2005, and 2009Hun-Ba168 on April 29, 2010, the Court has already declared the Provision at Issue constitutional. Further, in the decision of 97Hun-Ba23, the Court pointed out that it is inconsistent with the purport of guaranteeing the right to collective action to criminally punish industrial action that is in the nature of an exercise of

a right. Also, in the decision of 2009Hun-Ba168, the Court noted that "the interpretation that an act, which is legitimate under the Constitution as exercise of the right to collective action satisfying the elements required by the Labor Act, is criminal but the act is justified excessively curtails the scope of protection for the fundamental rights under the Constitution by statute."

After the above decision of the Court, the Supreme Court, in the *en banc* judgment of 2007Do482, changed its stance. It gave a limited construction to the concept of "force" in the Provision at Issue and curtailed the scope of that concept applicable in the stage of determining whether an act satisfies the elements under the Provision at Issue. For this reason, it is concluded that the issues pointed out in the precedents of the Constitutional Court, i.e., undue restrictions on the right to collective action and the possible chilling thereof, have been resolved.

All in all, the Provision at Issue does not infringe the right to collective action by violating the rule against excessive restriction, because, in the interest of protecting the transactional order or freedom of occupation or in economic affairs, the object of the criminal punishment under the Provision at Issue is confined to the "collective refusal to provide labor" that has been carried out suddenly at a point in time unforeseeable by the management and has thereby caused a serious confusion or tremendous damage to the management's business operations and, thus, can be evaluated as the suppression or confusion of a free will concerning continuance of business.

B. Summary of partial unconstitutionality opinion of five justices

The issue in this case is whether the Provision at Issue infringes the right to collective action by criminally punishing as interference with business by force a part of an industrial action, i.e., the "collective refusal to provide labor" that is carried out by workers by way of merely not reporting to work, unaccompanied by any tangible force

(hereinafter referred to as the "Simple Strike"). The Supreme Court, in the *en banc* judgment of 2007Do482 on March 17, 2011, curtailed the scope of encompassment of "force" relating to the Simple Strike, but the content of the norm subjecting the Simple Strike to criminal punishment did not change as a result of this curtailment.

The Provision at Issue criminally punishes as interference with business by force the Simple Strike that lacks legitimacy for failing to meet the elements of the Trade Union Act. In doing so, the Provision at Issue prevents business or operational performance of the employer from being interfered with by unlawful industrial action, and fairly coordinates labor relations, thus serving the purposes of maintaining industrial peace and contributing to the development of the national economy. As such, the Provision at Issue serves legitimate legislative ends and is an appropriate means to accomplish them.

Meanwhile, the Trade Union Act already has clauses in place that restrict, *inter alia*, the subject, timing, procedure, and method of an industrial action, and that prohibit both an industrial action with a particular purpose and an industrial action by a person engaged in particular work. To ensure the effectiveness of these clauses, the Trade Union Act also contains provisions on criminal penalties. Nonetheless, the Provision at Issue allows for criminal punishment to be imposed for the Simple Strike *per se* in a broad manner, as "interference with business by force," and at the same time, prescribes punishments heavier than those under most of the penalty clauses of the Trade Union Act.

The Simple Strike, an industrial action protected by the constitutional right to collective action, is a passive method of exercising power, not including any element of affirmative conduct other than the collective refusal of workers to provide labor. The Simple Strike, in terms of its essence, is equivalent to the "non-performance of an obligation" that refuses to provide the labor under the labor contract. Subjecting the Simple Strike *per se* to criminal punishment, in effect, amounts to

forcing the workers to perform their obligation to provide labor, through deterrence by criminal sanctions. There is also a risk that such subjection could render the constitutional guarantee of the right to collective action an empty formality, because it might undermine the negotiating power on the part of the worker, breaking the equality of such powers in the relationship between workers and employers.

Indeed, the Supreme Court, in the *en banc* judgment of 2007Do482, has limited the scope of encompassment of "force" by suggesting the standards of "suddenness" and "severity of consequences" in deciding whether the Simple Strike constitutes force. However, the degree of legitimacy of an industrial action is determined *ex post* by considering the situations collectively before and after the industrial action, the developments of the industrial action, etc. For this reason, it is difficult to expect that workers, who may be laypersons in law, could clearly decide *ex ante* the question of legitimacy of industrial action under the Trade Union Act. Eventually, workers always have to take the risk of criminal punishment by the Provision at Issue, even when they are merely on the Simple Strike—an industrial action in the form of passive refusal to provide labor—and this fact, by itself, could chill the exercise of the right to collective action.

The Simple Strike is, in terms of its essence, equivalent to the non-performance of an obligation under the labor contract. Thus, the resulting damage and other issues can be sufficiently resolved without relying on criminal penalties. Therefore, it is difficult to say that choosing criminal punishment as the means of sanctions despite this fact is consistent with both the principles of subsidiarity and *ultima ratio* of penal measures. In today's major countries, an industrial action that lacks legitimacy is mainly addressed as an issue of civil or disciplinary liability. Cases in which a strike lacking legitimacy is *per se* subject to criminal punishment are hard to find.

For the foregoing reasons, the Provision at Issue, which punishes the

Simple Strike *per se* as interference with business by force, does not satisfy the least restrictive means test by unduly limiting workers' exercise of their right to collective action.

Moreover, in addition to the criminal penalties under the Trade Union Act, further criminal penalties for the Simple Strike—a passive form of industrial action protected by the constitutional right to collective action—not only upends the balance between workers and employers that is fairly struck by the Trade Union Act, but also represents a failure to properly establish a precondition for the development of an autonomous work relationship between workers and employers. Thus, because the private interest restricted by the Provision at Issue outweighs the public interest it aims to serve, it does not meet the balance of interests test as well.

Therefore, the right to collective action is infringed by the portion of the Provision at Issue concerning the Simple Strike—the collective refusal to provide labor—which is part of an industrial action for enhancing working conditions.

10. Case on Korean Bar Association's Regulations Governing Attorney Advertising

[2021Hun-Ma619, May 26, 2022]

In this case, the Court held that certain provisions of the Korean Bar Association's Regulations on Attorney Advertising, which govern, *inter alia*, the content and method of attorney advertising, violate the principle of statutory reservation or the principle against excessive restriction and thus infringe upon Complainants' freedoms of expression and occupation.

Background of the Case

Complainants are lawyers and an online legal service provider. The Korean Bar Association wholly amended the Regulations on Attorney Advertising on May 3, 2021. Complainants filed this constitutional complaint on May 31, 2021, arguing that some of the provisions infringe, among others, their freedoms of expression and occupation.

Subject Matter of Review

In this case, the subject matter of review is whether Article 3, Section (2), Article 4, Items 12 and 13, and the part "an advertisement including content that is contrary to the authoritative interpretation of the Association" of Item 14 in the same Article, Article 5, Section (2), Items 1, 2, 3 and 5, the main text of Article 8, Section (1), Section (2), Items 2 and 3, and the part "where its purpose or means is an act that is in violation of the authoritative interpretation of the Association" of Item 4 in the same Section of Korean Bar Association's Regulations on Attorney Advertising (wholly amended on May 3, 2021, hereinafter referred to as the "Regulations at Issue") (the above provisions are hereinafter collectively referred to as the "Provisions at Issue") infringe upon Complainants' fundamental rights. The Provisions at Issue read as follows:

Provisions at Issue

Article 3 (Subject of Advertisement)

(2) Attorneys-at-law, etc. shall not display the name, business name, or other trade names of other attorneys-at-law, non-lawyers, individuals, groups, business entities, etc. (hereinafter referred to as "others") in advertisement for the purposes, *inter alia,* of sales or promotion of others.

Article 4 (Restrictions on Contents of Advertisement, etc.)

Attorneys-at-law, etc. shall not conduct any advertisement listed below directly by themselves or through others:

12. Advertisement that carries details concerning the acceptance of cases or legal affairs for free or at unfairly low fees, which may disrupt the fair acceptance of cases
13. Advertisement that carries details that predict the results of dispositions by investigative and administrative agencies and court decisions, etc.
14. Advertisement containing information that is in violation of statues, Code of Ethics for Attorneys, or regulations of the Korean Bar Association (hereinafter referred to as "the Association") and local bar associations or which is contrary to the authoritative interpretation of the Association

Article 5 (Restrictions on Methods of Advertisement, etc.)

(2) Attorneys-at-law, etc. shall not make a request for, or participate, or cooperate in advertising, publicizing, or introducing persons (regardless of who they are, including individuals, legal entities, and other organizations) who perform any of the following acts:

1. The act of connecting attorneys-at-law and consumers or advertising, publicizing, or introducing attorneys-at-law, etc., in order to introduce, broker, or solicit in relation to a legal consultation or the acceptance of a legal case, etc. in exchange for money or other economic considerations (arrangement fee,

brokerage fee, commission, membership fee, subscription fee, or advertising fee, regardless of how they are called, either on a regular or non-regular basis) from attorneys-at-law or consumers;

2. The act by persons other than the subject of advertisement—attorneys-at-law, etc.—of connecting attorneys-at-law, etc., and consumers, or advertising, publicizing, or introducing attorneys-at-law, etc. by means of indicating their names, company names, or trade names, or other methods of revealing themselves;

3. The act of dealing or providing services that predict the results of dispositions by investigative and administrative agencies and court decisions, etc. even though they are not attorneys-at-law, etc.;

5. The act of indicating the dealing or provision of services offered by attorneys-at-law, etc. or any other act that may mislead consumers to believe that they are attorneys-at-law, etc. even though they are not.

Article 8 (Advertisement for Legal Consultation)

(1) Attorneys-at-law, etc. shall be prohibited from running an advertisement by means of offering free-of-charge or unfairly low-priced legal consultation. Provided, this provision shall not apply if such advertisement is not likely to disrupt the fair acceptance of cases, such as in the public interest.

(2) Attorneys-at-law, etc. shall not conduct any advertisement listed below concerning legal consultation or allow others with such business structures to do so:

2. Where attorneys-at-law, etc. or consumers offer money or other economic considerations for arrangement or brokerage (arrangement fee, brokerage fee, commission, membership fee, subscription fee, or advertisement fee regardless of how they are called, either on a regular basis or non-regular basis) of legal consultation to others

3. Where attorneys-at-law, etc. participate in legal consultation offered as part of others' sales or promotion strategy

4. Where its purpose or means is an act that is in violation of statutes, regulations, or the authoritative interpretation of the Association

Summary of the Decision

1. Whether the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association violates the principle of statutory reservation (positive)

The part concerning "an advertisement containing information that is contrary to the authoritative interpretation of the Association" in Article 4, Item 14 of the Regulations at Issue, and the part "where its purpose or means is an act that is in violation of the authoritative interpretation of the Association" in Article 8, Section (2), Item 4 of the Regulations at Issue (hereinafter referred to as the "provisions prohibiting advertisements in violation of the authoritative interpretation of the Association") prohibit lawyers from running advertisements which contain information that is in violation of the authoritative interpretation of the Association.

The above provisions only indicate advertisements "in violation of the authoritative interpretation of the Association" while they do not specify the content and method of advertisements banned thereunder. Even after examining the Attorney-At-Law Act and relevant regulations of the Association, it is difficult to know what information constitutes such prohibited advertisements. Considering that a breach of the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association may serve as a ground for disciplinary action, at least attorneys-at-law who are the norm-addressees should get a brief understanding of what information may constitute such violations.

However, the Provisions at issue are so vague as to hamper the predictability of regulation and allow for arbitrary interpretation by law enforcement authorities.

Since it is difficult to believe that the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association clearly define the scope of regulation within the authority delegated by the enabling Act, these provisions violate the principle of statutory reservation and thus infringe upon Complainants' freedoms of expression and occupation.

2. Whether the provision prohibiting advertisements in exchange for economic considerations violates the principle against excessive restriction (positive)

Attorneys-at-law, the norm-addresses of the Regulations at Issue, are subject to regulation under the part of "the act of advertising, publicizing or introducing attorneys-at-law" in Article 5, Section (2), Item 1 of the Regulations at Issue (hereinafter referred to as the "provision prohibiting advertisements in exchange for economic considerations"), and the act of the other party subject to regulation is the act of advertising, publicizing or introducing attorneys-at-law, etc. in order to introduce, broker or solicit in relation to legal consultation or cases, etc. in exchange for economic considerations from attorneys-at-law or consumers."

Given that the above provision specifies that the purpose of the act of advertising, publicizing, and introducing regulated thereunder is to introduce, broker, or solicit while it does not confine the scope of application to certain attorneys-at-law and that the above-mentioned act is designed to persuade consumers and induce them to purchase services, the provision prohibiting advertisements in exchange for economic considerations cannot be deemed to simply regulate again the act of introduction, brokerage and solicitation banned under the Attorney-At-Law Act. In other words, the act of advertising, publicizing, and introducing

an unspecified number of lawyers for introduction or solicitation with respect to a legal consultation or the acceptance of a legal case, etc. is understood to fall within the scope of acts banned under the above provision.

While attorney advertising needs to be reasonably regulated, considering that advertising expression has the character of a fundamental right, it is desirable to accept a broad range of advertisements except for restrictions absolutely necessary in relation to the content and method of advertising. In light of the intent of Article 23(1) of the Attorney-at-law Act, which allows, in principle, attorney advertising through different media, it should be understood that attorneys-at-law, etc., are allowed to pay advertisers in different media channels for advertising. Thus, the above provision banning such acts uniformly cannot be deemed an appropriate means to accomplish the legislative objectives.

The legislative objectives can be achieved not only by the provision prohibiting advertisements in exchange for economic considerations but also by the Attorney-at-Law Act and other regulations and lesser means, such as restricting advertisements that contain information that may disrupt the fair acceptance of cases or cause harm to consumers can also achieve the legislative purposes to the same extent. Further, while it is unclear whether the legislative objectives can be achieved by the above provision, it practically bans lawyers from requesting an advertising agency to place an advertisement in exchange for a fee, which would lead to a significant restriction on Complainants' freedoms of expression and occupation. Thus, the above provision failed to meet the requirements of the least restrictive means and balance of interests.

Therefore, the provision prohibiting advertisements in exchange for economic considerations infringes upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.

Summary of Dissenting Opinion of Three Justices Concerning the Provision Prohibiting Advertisements in Exchange for Economic Considerations

The provision prohibiting advertisements in exchange for economic considerations should be interpreted to ban attorneys-at-law, etc., from asking for an advertisement from persons who run an advertisement in order to introduce, broker, or solicit cases, etc. to certain lawyers in exchange for economic considerations rather than banning lawyers, etc. from engaging in any advertising activities. This conforms to the intent of delegating authority as specified in Article 23, Section (2), Item 7 of the Attorney-at-law Act.

While attorney advertising takes the form of an advertisement, it should be regulated if it practically intends to broker, among others, cases in exchange for economic considerations. However, there may be a vacuum in regulating such acts under the existing Attorney-at-law Act. Also, as the methods and forms of advertisements become diverse with technological advancement, some advertisements may go further than the traditional methods of advertising, which simply inform services, and they themselves have the effect of introducing, brokering, and soliciting services. Moreover, attorneys-at-law, etc., are allowed to ask for placing an advertisement that is not intended to introduce, broker, and solicit cases, etc. Further, Korean Bar Association has broad discretion delegated by the Attorney-at-law Act in determining the methods, etc., of advertisements banned thereunder. In light of the above, the provision prohibiting advertisements in exchange for economic considerations meets the requirement for the least restrictive means test, and it meets the balance of interests condition because the private interest restricted by the Provision at Issue is outweighed by the public interest of ensuring the fair acceptance of cases, among others.

Therefore, the provision prohibiting advertisements in exchange for

economic considerations does not infringe upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.

Summary of Concurring Opinion of Four Justices Concerning the Provisions Prohibiting Advertisements in Violation of the Authoritative Interpretation of the Association

The authoritative interpretation of the Association can easily change according to its will because there is no regulation on the procedures of establishing and appealing the authoritative interpretation. Therefore, it is difficult to believe that it provides norm-addressees with predictability or excludes the possibility of arbitrary interpretation by law enforcement authorities. Furthermore, a violation of the provisions prohibiting advertisements in violation of the authoritative interpretation by the Association immediately constitutes grounds for disciplinary action, which is likely to undermine the freedom of expression. If the appearance of a new type of advertisement that cannot be addressed by the existing regulations creates a vacuum in regulation, it should be regulated by amending the relevant regulations of the Association.

Accordingly, the above provisions infringe upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.

11. Case on Refusal to Allow Inspection and Copying of Documents of Related Criminal Case

[2019Hun-Ma356, June 30, 2022]

In this case, the Court confirmed the unconstitutionality of the refusal of a prosecutor to allow inspection and copying of a document of a separate case that became final and was placed in the custody of the prosecutor after the institution of prosecution of that case. This prosecutor refused to permit inspection and copying of the document by denying its relevance to Complainant's criminal case, despite the ruling of a court allowing such inspection and copying. The Court explained that this refusal has infringed the rights of Complainant to a speedy and fair trial and to counsel.

Background of the Case

Complainant is a public official who served as the director of a division in charge of construction of an ecological boardwalk at Lake Baekwoon in the city of Uiwang. G.C. served as a policy advisor who provided assistance for both the planning business of the city and the business of its mayor. H.C. is a broker who has arranged for the supply of goods to government entities. L.J. is a confidant of the mayor who served in roles including as the chairman of the Uiwang city committee for prestigious creative city development and an executive member of the Uiwang city committee of the Democratic Party of Korea.

On April 17, 2018, Complainant was charged with receiving, in conspiracy with G.C., a bribe from H.C. in regard to the appointment of a supplier of decking materials for the above construction. On August 24, 2018, the trial court pronounced a judgment of conviction of Complainant. He then appealed.

Meanwhile, L.J. received from H.C. a request for help regarding the

supply of decking materials for the above construction. L.J. agreed to help the supply of materials for the above construction by using his connections with public officials of the city of Uiwang, and then said, “Make a pitch for the handrails instead of the decks. Good things would happen. Give me some of your commission fees if things go well.” Thereafter, on July 10, 2018, he was charged with an Attorney-at-Law Act violation for receiving from H.C. money and other things of value. On December 20, 2018, a judgment of his conviction was pronounced, and on December 28, 2018, the judgment became final.

On January 10, 2019, L.J. appeared at Complainant’s trial in an appellate court as a witness. Counsel of Complainant asked him, “Has the witness been interviewed by the prosecution in connection with this case?” He answered, “Yes, I have been interviewed about what I received from H.C.” Subsequently, in reply to the question, “Have you written or given a witness statement?” he answered, “Yes.”

In response, counsel of Complainant attempted to inspect and copy the “Witness Statement Given by L.J.” but was refused. On January 24, 2019, counsel of Complainant applied to the appellate court for permission to inspect and copy documents, including the “Witness Statement Given by L.J.” On January 28, 2019, the presiding judge of the appellate court asked the prosecutor, Respondent, for an opinion on the inspection and copying. Respondent suggested denial of the inspection and copying, reasoning that “L.J. was interviewed after the defendant was charged. There was no interview of L.J. at the time of the investigation of the defendant. Also, after the charging of the defendant, L.J. was interviewed not in regard to the defendant’s case, but in regard to a separate case. For these reasons, this instance involving the witness statement given by L.J. amounts to a case where allowing inspection and copying of a witness statement given by a person involved in a separate case is likely to patently harm the person’s reputation, the secrecy of his/her private life, the security of his/her life or body, or the peace of his/her life. However, on January 30, 2019, the appellate court ordered

Respondent to permit the inspection and copying of documents, including the "Witness Statement Given by L.J."

On January 31, 2019, counsel of Complainant requested, in accordance with the above order of the court, that Respondent permit him to inspect and copy documents, including the "Witness Statement Given by L.J.," but Respondent refused to allow inspection and copying of the "Witness Statement Given by L.J."

In response, on April 2, 2019, Complainant filed the constitutional complaint in this case, arguing that Respondent's refusal to allow inspection and copying of the "Witness Statement Given by L.J." has infringed his fundamental rights.

Meanwhile, on February 12, 2019, Complainant received from the appellate court a judgment of conviction of the crime of aiding an "Act on the Aggravated Punishment, Etc. of Specific Crimes" violation (bribery). Subsequently, he appealed to the Supreme Court. On May 10, 2019, the appeal was rejected, and the judgment of the appellate court became final.

Subject Matter of Review

The subject matter of review in this case is whether the fundamental rights of Complainant have been infringed by Respondent's January 31, 2019 refusal of the application—filed by Complainant's counsel in accordance with the January 30, 2019 decision of the 3rd criminal panel of the Seoul High Court permitting inspection and copying in regard to case no. 2018No2548 of the Seoul High Court, the case involving an "Act on the Aggravated Punishment, Etc. of Specific Crimes" violation (bribery), etc.—for inspection and copying of the "Witness Statement Given by L.J." (such refusal hereinafter referred to as the "Refusal").

Summary of the Decision

1. Assessment of justiciability – whether a justiciable interest exists

The Court has confirmed the unconstitutionality of a prosecutor's refusal of counsel's application, filed in accordance with Article 266-4 of the Criminal Procedure Act, for inspection and copying of investigative records (Court 2009Hun-Ma257, June 24, 2010; Court 2015Hun-Ma632, December 28, 2017). However, those cases differ from this case because, in those cases, the matter under review involved the inspection and copying of investigative records of the relevant criminal case, whereas the matter at bar concerns the inspection and copying of a document of a separate case that became final and was placed in the custody of the prosecutor after institution of prosecution of that case. Further, Respondent made the Refusal on the grounds that the requested document does not exist in trial and investigative records on Complainant, and that the criminal case in which the requested document is filed is separate and apart from that of Complainant. The Court finds that it is highly likely that similar types of invasive acts, as in this case, will recur in the future. Therefore, there still exists a justiciable interest with respect to Complainant's claim in this case.

2. Assessment of the merits

The Criminal Procedure Act provides for the right of a defendant or counsel to inspect or copy investigative documents after the institution of prosecution. At the same time, it has an appeal procedure against a prosecutor's refusal to allow such inspection or copying. The legislature devised this procedure based on a policy judgment that it is necessary to offer more prompt and effective remedies instead of indirect remedial measures, such as the existing constitutional complaints or the administrative litigation procedures under the Freedom of Information Act, given that the defense's right to inspect or copy investigative

documents constitutes a critical part of the constitutional rights to a speedy and fair trial and to counsel.

Insofar as the court ordered the prosecutor to allow inspection and copying of the investigative documents, finding that the prosecutor's refusal has no just cause and thus violates the constitutional fundamental rights of the defendant, the prosecutor, under the principles of the rule of law and separation of powers, should comply with the court's ruling without delay. This is equally so in the case involving the records in a related separate criminal case that have become final after the institution of prosecution of that case.

If the prosecutor fails to promptly follow the court order permitting inspection and copying, he/she will not merely be denied the right to file a motion for admission of relevant witnesses and documents as evidence. In fact, his/her action of denial will violate the defendant's right to inspect and copy case documents and, furthermore, infringe on the defendant's right to a speedy and fair trial and the right to counsel as well. Accordingly, the Refusal of Respondent has infringed the rights of Complainant to a speedy and fair trial and to counsel.

12. Case on Annulment of Judgments

[2013Hun-Ma496, July 21, 2022]

In this case, the Court annulled courts' judgments that had denied the binding effect of the Court's prior decision, which found a statutory provision conditionally unconstitutional. It reasoned that those court judgments have infringed the right of Complainant to trial. However, it held nonjusticiable claims against the courts' other judgments that became final before the above unconstitutionality decision was issued, and a claim against an administrative action that imposed taxes on Complainant and later became final through courts' rulings. It noted that such judgments and taxation decision are not subject to a constitutional complaint.

Background of the Case

On October 1, 1990, Complainant, GS Caltex Corporation, conducted asset revaluation and declared and paid taxes, including corporate tax, accordingly on the premise that it would list its stock on Korea Exchange pursuant to Article 56-2 of the former Act on Regulation of Tax Reduction and Exemption (before amended by Act No. 4285 on December 31, 1990). However, Complainant did not list its stock on Korea Exchange by December 31, 2003, which was the due date according to the Enforcement Decree of the same statute. In response, Respondent, the head of Yeoksam Tax Office, imposed taxes, including corporate and asset revaluation taxes, of 70 billion won on Respondent's income for business years starting from 1990. The income was recomputed pursuant to Article 23 of the Supplementary Provisions of the former Act on Regulation of Tax Reduction and Exemption (amended by Act No. 4285 on December 31, 1990).

Pending trial (Seoul High Court Judgment 2008Nu37574) of a vacated and remanded administrative suit seeking revocation of the above tax

imposition, Complainant petitioned the court to request constitutional review of Article 23 of the Supplementary Provisions of the former Act on Regulation of Tax Reduction and Exemption (amended by Act No. 4285 on December 31, 1990), which formed the basis of the tax imposition. Following rejection of the petition, Complainant filed a constitutional complaint under Article 68, Section (2) of the Constitutional Court Act.

On May 31, 2012, the Court issued a decision of conditional unconstitutionality that "It is violative of the Constitution to interpret, despite the enforcement of the former Act on Regulation of Tax Reduction and Exemption (wholly amended by Act No. 4666 on December 31, 1993), Article 23 of the Supplementary Provisions of the former Act on Regulation of Tax Reduction and Exemption (amended by Act No. 4285 on December 31, 1990) as not having lost its effect" (Constitutional Court 2009Hun-Ba123, etc., May 31, 2012, such decision hereinafter referred to as the "Conditional Unconstitutionality Decision").

Following the Conditional Unconstitutionality Decision, Complainant requested a retrial of the Seoul High Court's 2008Nu37574 Judgment—the final judgment that had already been entered on June 4, 2009 for Complainant's vacated and remanded case—pursuant to Article 75, Section (7) of the Constitutional Court Act. However, the court rejected that request, denying the binding effect of the Conditional Unconstitutionality Decision (Seoul High Court 2012JaeNu110 Judgment, June 26, 2013). An appeal against it was also rejected through the discontinuance of the trial (Supreme Court 2013Du14665 Judgment, November 15, 2013).

In response, Complainant filed a constitutional complaint seeking annulment of the following: the retrial rejection, the appeal rejection, the Supreme Court's vacation and remand entered before the Conditional Unconstitutionality Decision, the vacated and remanded judgment of which retrial was requested, and the taxation decision by Respondent.

Subject Matter of Review

The subject matter of review in this case is whether the following infringe the fundamental rights of Complainant: 1) the 2012JaeNu110 Judgment pronounced on June 26, 2013 by the Seoul High Court (hereinafter referred to as the "Retrial Rejection") and the 2013Du14665 Judgment of November 15, 2013 by the Supreme Court (hereinafter referred to as the "Appeal Rejection"); 2) the 2008Nu37574 Judgment, of vacation and remand, pronounced on May 13, 2009 by the Seoul High Court (hereinafter referred to as the "Retrial-Requested Judgment") and the 2006Du17550 Judgment pronounced on December 11, 2008 by the Supreme Court (hereinafter referred to as the "Vacation and Remand"); and 3) the portion of the April 16, 2004 decision imposing on Complainant business years' taxes of 70,767,838,129 won, including corporate and asset revaluation taxes (hereinafter referred to as the "Taxation Decision")

Summary of the Decision

The Constitution confers on the Court the power of judicial review of statutes. An unconstitutionality decision on a statute, the result of exercising the power of judicial review afforded to the Court by the Constitution, binds all State entities, including other courts, and local governments. A conditional unconstitutionality decision, the result of the Court's review of constitutionality of statutes and its constitutional statutory interpretation, is a type of partial unconstitutionality decision and, as such, is recognized as having binding effect on all State entities and local governments. A court judgment denying the binding effect of an unconstitutionality decision on a statute is, in itself, not only contrary to the binding effect of the Court's decisions but also frontally violative of the Constitution's determination conferring on the Court the power of judicial review of statutes.

Although Article 68, Section (1) of the Constitutional Court Act excludes, in principle, court judgments from being subject to constitutional complaints, in order to permit constitutional complaints against court judgments in exceptional cases, the Court pronounced an unconstitutionality decision in the 2014Hun-Ma760, etc. ruling on June 30, 2022, stating that "the part 'judgment contrary to the binding effect of a decision of unconstitutionality of a statute' of 'judgments of the courts' of the main clause of Article 68, Section (1) of the Constitutional Court Act (amended by Act No. 10546 on April 5, 2011) is in violation of the Constitution."

1. Assessment of the Retrial Rejection and the Appeal Rejection

Due to the Conditional Unconstitutionality Decision, the following portion lost its effect: the portion of the scope of Article 23 of the Supplementary Provisions of the former Act on Regulation of Tax Reduction and Exemption (amended by Act No. 4285 on December 31, 1990) which applies after January 1, 1994, the date of enforcement of the former Act on Regulation of Tax Reduction and Exemption (wholly amended by Act No. 4666 on December 31, 1993). The Conditional Unconstitutionality Decision is recognized as having binding effect on all State entities, including other courts, and local governments.

Complainant is the party to the case underlying the case in which the Conditional Unconstitutionality Decision was rendered. After the Conditional Unconstitutionality Decision was pronounced, Complainant requested, pursuant to Article 75, Section (7) of the Constitutional Court Act, a retrial of its lost case, the judgment for which had already become final before the Conditional Unconstitutionality Decision. However, the competent courts rejected such request, as well as the appeal against the rejection, denying the binding effect of the Conditional Unconstitutionality Decision.

Therefore, because both the Retrial Rejection and the Appeal Rejection are "judgment contrary to the binding effect of a decision of

unconstitutionality of a statute," a constitutional complaint against these rejections is permitted, and because the rejections infringe the constitutional right of Complainant to trial, they should be annulled in accordance with Article 75, Section (3) of the Constitutional Court Act.

2. Assessment of the Retrial-Requested Judgment and the Vacation and Remand

A judgment to which is applied a statute that has not been declared unconstitutional by the Court cannot be subject to a constitutional complaint, for unlawful exercise of governmental power, by reason of an unconstitutionality decision following the judgment. The Retrial-Requested Judgment and the Vacation and Remand were rendered before the Conditional Unconstitutionality Decision was issued against Article 23 of the Supplementary Provisions of the former Act on Regulation of Tax Reduction and Exemption (amended by Act No. 4285 on December 31, 1990). Because those judgments are not contrary to the binding effect of the decision of unconstitutionality of the statute, they are, exceptionally, not subject to a constitutional complaint.

Therefore, Complainant's claims challenging the Retrial-Requested Judgment and the Vacation and Remand are nonjusticiable.

3. Assessment of the Taxation Decision

A constitutional complaint against an administrative action that has become final through courts' rulings (hereinafter referred to as the "Original Administrative Action") is, in principle, not allowed. This disallowance was made in consideration of, *inter alia*, the legislative intent of Article 68, Section (1) of the Constitutional Court Act excluding, in principle, court judgments from being subject to constitutional complaints, and the concern over a conflict with the *res judicata* effect of final judgments. However, where a court judgment that adjudicated the

Original Administrative Action is exceptionally the subject of a constitutional complaint, and thus that judgment itself is annulled, a constitutional complaint may exceptionally be filed against the Original Administrative Action.

The court judgment that adjudicated the Taxation Decision is neither the Retrial Rejection nor the Appeal Rejection, but the Retrial-Requested Judgment; yet, as examined above, the Retrial-Requested Judgment does not amount to a court judgment that is exceptionally the subject of a constitutional complaint.

Therefore, because the court judgment that adjudicated the Taxation Decision may not, exceptionally, be the subject of a constitutional complaint and thus cannot be annulled, Complainant's claim challenging the Taxation Decision, the Original Administrative Action, is nonjusticiable.

Summary of Dissenting Opinion of Two Justices as to Taxation Decision

A constitutional complaint against the Original Administrative Action, an administrative action that has become final through courts' rulings, is not absolutely barred. Rather, it may be assessed differently where the intent of Article 68, Section (1) of the Constitutional Court Act to prohibit, in principle, a constitutional complaint against a judgment no longer deserves respect, such as where a court infringes the fundamental rights of citizens by not recognizing the effect of the Court's unconstitutionality decision.

The Court ruled unconstitutional the statutory provision forming the basis of the Taxation Decision, and retrial procedures are provided in the Constitutional Court Act which allow annulment of the court judgments that adjudicated the Taxation Decision. Nevertheless, the courts themselves violated those procedures, producing a result that the judgments cannot be annulled. In such a case, there is no longer a reason to maintain legal

stability by means of the *res judicata* effect of final judgments of courts. Rather, there is the need for the Court to exceptionally permit a constitutional complaint to be filed against the Original Administrative Action in order to secure the practical effect of an unconstitutionality decision and, at the same time, to rectify the legal order of constitutional superiority undermined by the courts and provide an expedient and efficient remedy to fundamental rights of citizens.

13. Case on Loss of Entitlement to Survivors' Pension due to Remarriage

[2019Hun-Ka31, August 31, 2022]

In this case, the Court held that a former Public Officials Pension Act provision prescribing remarriage as a ground for loss of entitlement to a survivors' pension does not violate the Constitution, reasoning that this provision does not infringe the rights of a remarried spouse of a public official to a humane life and to property.

Background of the Case

Petitioner received decisions from the Government Employees Pension Service, including the one ending the payment of survivors' pension benefits to her, on the grounds that she lost her entitlement to those benefits due to her *de facto* remarriage relationship. She filed suit to nullify the above decisions. While her case was pending before the appellate court, she petitioned that court to request constitutional review of Article 59, Section (1), Item 2 of a former Public Officials Pension Act, prescribing remarriage as a ground for loss of entitlement to a survivors' pension. The court granted the petition and, on December 17, 2019, requested the constitutional review in this case.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the part of Article 59, Section (1), Item 2 of the former Public Officials Pension Act (amended by Act No. 11488 on October 22, 2012, and before amendment by Act No. 13927 on January 27, 2016) concerning a survivors' pension (hereinafter referred to as the "Provision at Issue"). The Provision at Issue reads as follows:

Provision at Issue

The former Public Officials Pension Act (amended by Act No. 11488 on October 22, 2012, and before amendment by Act No. 13927 on January 27, 2016)

Article 59 (Loss of Entitlement to Survivors' Pension or Survivors' Pension for Public Officials Who Died on Duty)

(1) Where a person entitled to receive a survivors' pension or survivors' pension for public officials who died on duty falls under any of the following Items, he/she shall lose such entitlement:

2. When he/she remarries (including where he/she is in a *de facto* marital relationship);

Summary of the Decision

Husband and wife assume the duties to live together and support and aid each other (Article 826, Section (1) of the Civil Act). For this reason, the Public Officials Pension Act designates as an "eligible beneficiary of a survivors' pension" a current or former public official's spouse who is supported by the public official at the time of his or her death, in order to protect the supported spouse against the risk of sudden income loss. The Public Officials Pension Act also recognizes not only a legal spouse but also a *de facto* spouse as a survivor, because the latter has the same duties of living together, supporting, and aiding as the former (*see* Supreme Court Judgments 97Meu544, 97Meu551, August 21, 1998). Since husband and wife assume the duties of living together, supporting, and aiding each other, a spouse enters into a new supporting relationship by remarrying and can be privately supported by his or her new spouse. In consideration of this factor, the Provision at Issue prescribes remarriage as a ground for loss of entitlement to a survivors' pension.

A survivors' pension was originally introduced to protect the livelihood of the family that has difficulty making a living as a result of the death

of the income earner. Thus, it is not a benefit determined in proportion to the payment of insurance premiums, but rather a derivative benefit determined according to the marital relationship and income dependency at the time of the death. Therefore, whether to recognize a spouse's entitlement to a survivors' pension should not necessarily be decided according to whether both spouses paid the contributions to the pension fund together.

The Public Officials Pension Act has a pension dividing scheme in place that considers the contribution of a public official's spouse to the public official's accrued pension in calculating and splitting it upon their divorce. Nonetheless, this scheme differs from a survivors' pension in terms of purpose or purport. Thus, the Provision at Issue cannot be regarded as patently arbitrary or unreasonable legislation by the mere fact that it did not proportionately reflect the contribution of a public official's spouse to the accrued pension during the period of marriage.

Further, the entitlement to a survivors' pension is transferred to another survivor if there is a ground for its loss. If one's entitlement to a survivors' pension may be reinstated based on economic circumstances, such as the death of or divorce from one's new spouse, this may cause unforeseeable harm to another survivor or may present complex legal issues.

Therefore, because the Provision at Issue prescribes remarriage as a ground for loss of entitlement to a survivors' pension in order to more effectively protect survivors by considering, *inter alia*, the need and significance of support within the scope of limited financial resources, the Provision at Issue does not go beyond the legislative limits and infringe the rights of a remarried spouse of a public official to a humane life and to property.

Summary of Dissenting Opinion of Four Justices

A spouse of a public official is a person who has contributed to the

accrued pension by, throughout the period of marriage, assisting the official with diligent performance of his or her work and constituting an economic community together with the official. It is not reasonable for legislation to permanently deprive the spouse, without due regard to his or her contribution to property, of the whole entitlement to a survivors' pension by mere reason of the fact that he or she lost the status of a survivor of the public official.

The Public Officials Pension Act allows the division of a retirement pension of a public official between the official and his or her spouse, when the spouse divorced the official after maintaining the marriage relationship for at least five years. Remarriage of the divorced spouse does not constitute a ground for loss of entitlement to a divided pension. We note in this regard that a spouse receiving a survivors' pension does not essentially differ from a spouse receiving a divided pension in that the former contributed to the accrued pension of a deceased public official during the marriage period and already terminated the marital relationship with the official. Despite this, the whole entitlement to a survivors' pension is extinguished upon remarriage by the mere reason of the fact that the death of a public official forms the basis of the entitlement to the pension. We find this inequitable.

A survivors' pension is a benefit in the nature of social security that ensures the lives of survivors. Thus, we should take into account its contributory role in protecting the livelihood of public officials' survivors after the deaths of the officials. The Provision at Issue, in this connection, gives no consideration to the aspect of specific livelihood security, including whether the surviving spouse can actually be supported through remarriage. Moreover, a *de facto* remarriage relationship, as compared to a *de jure* remarriage relationship, is in an unstable state, and as such, in the former case, the new spouse may not always provide support, and the expectations of continuous support are weak as well. Nevertheless, even this *de facto* marital relationship is deprived of the entitlement to a survivors' pension permanently and without any safeguards. We find

this inconsistent with the social security nature of a survivors' pension.

Further, there is more than one way to protect, within the limited scope of financial resources, a public official's surviving spouse who is unable to support himself or herself. One way is to reinstate, as in Germany and the United States, the surviving spouse's entitlement to a survivors' pension where his or her remarriage is dissolved by death of or divorce from the new spouse. Nonetheless, the Provision at Issue deprives the surviving spouse of the whole entitlement to a survivors' pension permanently upon the sole ground of his or her remarriage, without any safeguards. Thus, this provision infringes the rights of a remarried spouse of a public official to a humane life and to property.

The unconstitutionality of the Provision at Issue lies in permanently extinguishing the whole entitlement to a survivors' pension uniformly, without regard to any specifics, and not in prescribing *per se* of remarriage as a ground for loss of entitlement to a survivors' pension. Therefore, we find it reasonable to hold the Provision at Issue nonconforming to the Constitution instead of declaring it simply unconstitutional, in order that it continues to apply until amended by the legislature.

14. Case on Prohibiting Media Coverage of Identifiable Information of Child Abuse Offenders

[2021Hun-Ka4, October 27, 2022]

In this case, the Court held that the part of Article 35, Section (2) of the Act on Special Cases Concerning the Punishment, Etc. of Child Abuse Crimes regarding "child abuse offenders" does not infringe freedoms of speech and the press and a citizen's right to know. The relevant part provides that no employee of a broadcasting company, etc. shall, *inter alia*, broadcast personal information, etc. of child abuse offenders relevant to a child protection case, which enables the identification of those offenders.

Background of the Case

Petitioner is a reporter for a broadcasting company. Around September 2, 2019, he reported a case of child abuse crime through a news program of the broadcasting company, broadcasting the personal information of the child abuse offender, including her real name. He received a summary conviction from the Seoul Western District Court for such broadcasting.

Petitioner then moved to request a full trial. Thereafter, while his case was pending before the trial court, he petitioned that court to request constitutional review of the part "child abuse offenders" of Article 35, Section (2) of the Act on Special Cases Concerning the Punishment, Etc. of Child Abuse Crimes (hereinafter referred to as the "Child Abuse Punishment Act"). He contended that the relevant part infringes freedoms of speech and the press and a citizen's right to know. The court granted the petition and, on January 26, 2021, requested the constitutional review in this case.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the part of Article 35, Section (2) of the Child Abuse Punishment Act (amended by Act No. 12341 on January 28, 2014) concerning "child abuse offenders" (hereinafter referred to as the "Provision at Issue"). The Provision at Issue reads as follows:

Provision at Issue

The Act on Special Cases Concerning the Punishment, Etc. of Child Abuse Crimes (amended by Act No. 12341 on January 28, 2014)

Article 35 (Duties, including Duty of Confidentiality)

(2) No editor, publisher, or employee of a newspaper, no chief editor, head, or employee of a broadcasting company, and no author or publisher of any other publication shall include in publications, including newspapers, or broadcast through broadcast media, the address, name, age, occupation, or appearance of child abuse offenders, child victims, complainants, accusers, or informants relevant to a child protection case, or other personal information and photographs of them, which enable their identification (emphasis added).

Summary of the Decision

Society cannot yield the important legal interest of especially protecting children from abuse by adults and furthering their healthy development (2018Hun-Ba388, March 25, 2021). It includes not only the protection from child abuse itself, but also the protection from secondary victimization, including exposure of private life that may occur in the process of dealing with cases.

Most of the child abuse offenders have a close relationship with their child victims. Thus, it is highly likely that reporting by journalists,

including editors of newspapers and employees of broadcasting companies, of personal information, etc. enabling the identification of the offender (hereinafter referred to as “Identifiable Information”) will lead to secondary victimization of the child victim.

The court requesting this constitutional review first points out the unconstitutionality of a blanket prohibition against reporting Identifiable Information of child abuse offenders, indicating that this prohibition applies even to cases involving a low likelihood of secondary victimization of child victims, for example, where there is a low risk of identity exposure or is an insurance against it. However, given the high level of development of information and communications technology and media, it cannot be ruled out completely that reporting Identifiable Information about child abuse offenders may lead to secondary victimization. There is also an apprehension that permitting such reporting in this circumstance will discourage child victims from voluntarily giving statements or making a report. Thus, a uniform prohibition against reporting Identifiable Information of child abuse offenders is inevitable in this respect.

The court requesting this constitutional review secondly points out that the Provision at Issue can be an undue restriction, considering that in general criminal cases, the identity of a prime suspect is disclosed after an internal evaluation by investigative agencies if the case involves a public figure or draws national attention. However, the prohibition against reporting Identifiable Information about child abuse offenders does not fall within the context of criminal protection or a matter of interest to citizens. Rather, it serves to protect child victims who are in a developmental stage. As such, the prohibition against reporting Identifiable Information of child abuse offenders is, in terms of protected object and of purpose, distinct from cases disclosing Identifiable Information after an internal evaluation by investigative agencies. Thus, they cannot be compared on the same scale.

Meanwhile, it could be viewed that, in the case of media coverage

following voluntary reporting on the part of a child victim, the need to protect that victim is reduced, or such protection is already achieved, and thus, there is no need to prohibit reporting of Identifiable Information of the child abuse offender. However, the intent of the Provision at Issue is to specially protect children and further their healthy development. Therefore, whether to permit reporting cannot be entirely left up to the will of a child victim. Child victims may, on occasion, wish the Identifiable Information of their abuser to be reported, running the risks of, *inter alia*, exposing their identity and private life, but it is necessary for the State to ban such reporting in order that they avoid secondary victimization, such as identity exposure, and grow up healthy.

The Provision at Issue does not completely prohibit the reporting of child abuse cases. It merely prohibits the reporting of Identifiable Information of child abuse offenders. Thus, in cases receiving national attention, even if there is a substantial need for reporting in the interest of prevention of recurrence of crimes, the method of releasing reports of cases in redacted form would both perform the function of media faithfully and satisfy the right of a citizen to know.

All in all, the private interest restricted by the Provision at Issue is no more than the releasing of sensational reports of child abuse cases containing the Identifiable Information of child abuse offenders. By contrast, there is a vital public interest in healthy development of children, which the Provision at Issue aims to protect.

Accordingly, the Provision at Issue does not infringe freedoms of speech and the press and a citizen’s right to know by violating the rule against excessive restriction.

15. Case on Prohibition and Nullity of Marriage between Blood Relatives within Eighth Degree of Relationship

[2018Hun-Ba115, October 27, 2022]

In this case, the Court held that while Article 809, Section (1) of the Civil Act, which prohibits a marriage between blood relatives within the eighth degree of relationship, does not violate the Constitution, Article 815, Item 2 of the Civil Act, which declares null and void a marriage that is in violation of Article 809, Section (1) of the Civil Act, does not conform to the Constitution.

Background of the Case

On May 4, 2016, Complainant and H.S. registered their marriage. On August 1, 2016, H.S. filed an action for nullity of marriage on the grounds that he and Complainant are within the sixth degree of relationship. The Sangju branch of the Daegu Family Court found that the above marriage registration was one between blood relatives within the eighth degree of relationship, and confirmed its nullity based on Article 809, Section (1) and Article 815, Item 2 of the Civil Act (2016DeuDan646).

Complainant appealed to the Daegu Family Court (2017Leu5150). While the appeal was pending, she petitioned the court to request constitutional review of Article 809, Section (1) and Article 815, Item 2 of the Civil Act, which prohibits a marriage between blood relatives within the eighth degree of relationship and prescribes it as a ground for nullity of marriage, respectively (Daegu Family Court 2017JeuGi1432). Following rejections of both the appeal and petition on January 25, 2018, Complainant filed the constitutional complaint in this case on February 19, 2018.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of Article 809, Section (1) (hereinafter referred to as the "Marriage Prohibition Provision") and Article 815, Item 2 (hereinafter referred to as the "Nullity Provision," and together with the Marriage Prohibition Provision, hereinafter referred to as the "Provisions at Issue") of the Civil Act (amended by Act No. 7427 on March 31, 2005). The Provisions at Issue read as follows.

Provisions at Issue

Civil Act (amended by Act No. 7427 on March 31, 2005)
Article 809 (Prohibition of Consanguineous Marriage, etc.)
(1) A marriage may not be allowed between blood relatives (including the blood relatives of an adoptee before full adoption) within the eighth degree of relationship.

Article 815 (Nullity of Marriage)
A marriage is null and void if it falls under any one of the following Items:
2. Where the marriage is in violation of Article 809, Section (1);

Summary of the Decision

1. Whether the Marriage Prohibition Provision infringes freedom of marriage

The Marriage Prohibition Provision aims to prevent confusion that may arise in connection with the interrelationship, roles, and status among close blood kin due to consanguineous marriage, and to maintain the functions of the institution of family. This provision amounts to an appropriate means of achieving these legitimate legislative purposes. Its rationality is acknowledged, because it respects the intent of the

constitutional nonconformity decision of the Court on the former Civil Act's ban on marriage between persons with the same surname and clan origin—which prohibited marriage between patrilineal relatives regardless of the distance of the relation—and because it limits the scope of consanguineous relationship in which marriage is forbidden, based on the widely accepted scope of kinship in our society and based on the understanding and agreement on creating family relationship founded on gender equality. Since the Marriage Prohibition Provision cannot be considered as imposing restrictions unnecessary or excessive to achieve its legislative purposes, it does not fail the least restrictive means test. Further, the scope of limitation on the choice of a legal spouse covers blood relatives within the eighth degree, and thus cannot be regarded as broad. In contrast, there is a vital public interest in protecting and maintaining family order by prohibiting marriage between blood relatives within the eighth degree. Therefore, the Marriage Prohibition Provision does not fail the balance of interests test.

Accordingly, the Marriage Prohibition Provision does not infringe freedom of marriage by violating the rule against excessive restriction.

2. Whether the Nullity Provision infringes freedom of marriage

A. Constitutional nonconformity opinion of Justices Lee Seon-ae, Lee Eunae, Lee Jongseok, Lee Youngjin, and Lee Mison

The Nullity Provision aims to guarantee the effectiveness of the Marriage Prohibition Provision and is an appropriate means of achieving this legislative purpose. However, if marriage is rendered void uniformly and retroactively when the parties discharge the rights and duties of husband and wife after consanguineous marriage, and when they give birth to a child or circumstances exist where there seems to be expectations of trust and cooperation within the family, this may lead to results at odds with the original legislative purpose of maintaining the

functions of the family institution. The legislative purpose of the Nullity Provision would satisfactorily be attained even if a consanguineous marriage was rendered void in limited cases where it creates apparent confusion to, *inter alia*, the status and relationship of close blood relatives, and where it seriously impairs the functions of the family institution. If it is unclear what constitutes such cases, the functions of the family can be protected by providing for the allowance of the dissolution of a prospective marriage through annulment. For these reasons, the Nullity Provision is an excessive restriction that goes beyond the scope necessary to achieve its legislative purpose, and as such fails the least restrictive means test. Moreover, although the public interest served by the Nullity Provision is not insubstantial, given the significance of the private interest restricted by this provision, the Nullity Provision fails the balance of interests test.

Therefore, the Nullity Provision infringes freedom of marriage by violating the rule against excessive restriction.

B. Constitutional nonconformity opinion of Justices Yoo Namseok, Lee Suk-tae, Kim Kiyoung, and Moon Hyungbae

As will be stated in the dissenting opinion as to the Marriage Prohibition Provision, this provision is nonconforming to the Constitution due to the overly broad scope of the prohibition. Thus, the Nullity Provision is likewise nonconforming to the Constitution due to the too broad scope of consanguineous marriage that it renders null and void. If the scope of the ban on consanguineous marriage is constitutionally narrowed by amendment of the Marriage Prohibition Provision, the Nullity Provision is, within the narrowed scope of the marriage ban, recognized as satisfying the tests of legitimacy of legislative purpose and appropriateness of means. The legislative purpose of the Nullity Provision would satisfactorily be achieved if it rendered a marriage void in limited cases where the functions of the family institution are

seriously impaired by, for example, marriage between lineal blood relatives and between brother and sister; and if other prospective consanguineous marriage was dissolved by annulment. This would still be so, even if the existing legal status of the parties and their children was maintained. Nonetheless, the Nullity Provision renders null and void all cases of violation of the Marriage Prohibition Provision, thus failing the tests of least restrictive means and balance of interests.

Therefore, the Nullity Provision infringes freedom of marriage by violating the rule against excessive restriction.

C. The Court declares the Nullity Provision nonconforming to the Constitution in order that it continues to apply until legislative amendment is made by December 31, 2024. However, the case underlying the instant constitutional complaint shall be put on hold until the Nullity Provision is amended, such that revised new law shall apply to that case.

Summary of Dissenting Opinion of Four Justices as to the Marriage Prohibition Provision

The ban on consanguineous marriage under the Marriage Prohibition Provision derives from an incest taboo, a universally established norm of mankind. The legislative purposes of the Marriage Prohibition Provision are to maintain family order and protect the functions of the family institution. However, the marriage ban under the Marriage Prohibition Provision extends far beyond the scope of the incest ban, covering all blood relatives within the eighth degree. We do not believe that the notion in which blood relatives within the eighth degree are considered “close relatives” is nowadays still accepted universally, regardless of region or generation. Since there is no separate “status announcement” mechanism that enables the identification of kinship, it is difficult for relatively distant kin to learn of the existence or degree of blood-kin relationship. Further, the legislature should strive to create the institution

of marriage in consideration of the consistency with international norms, because the scope of proscription against marriage in a number of countries, specifically Germany, Austria, Switzerland, France, the United Kingdom, Japan, and China is relatively narrower than that of the Marriage Prohibition Provision, and because it is the globally accepted notion that freedom of marriage should be respected and protected as a universal human right. Nevertheless, the Marriage Prohibition Provision blindly sets forth the scope of the marriage ban, such that it matches the scope of kin under the Civil Act. When looking at the results of genetic research, we cannot find any scientific proof as to whether marriages between blood relatives within the eighth degree are uniformly harmful to the children or offspring in terms of genetics. Thus, a genetic perspective does not provide a reasonable ground to limit the freedom to choose a marriage partner.

Therefore, the Marriage Prohibition Provision is an excessive restriction that goes beyond the scope necessary to achieve its legislative purpose. As such, it violates the rule against excessive restriction and infringes freedom of marriage.

However, because the unconstitutionality of the Marriage Prohibition Provision lies in the broadness of the ban on consanguineous marriage, a decision of nonconformity to the Constitution is warranted in order that the legislature may newly create the institution of marriage after due consideration of methods to constitutionally amend the scope of prohibited marriages.

16. Case on Automatic Retirement of Public Official When Becoming Adult Ward

[2020Hun-Ka8, December 22, 2022]

In this case, the Court held the following clauses unconstitutional: the part of Article 69, Item 1 of the former State Public Officials Act (amended by Act No. 13618 on December 24, 2015, and before amended by Act No. 15857 on October 16, 2018) concerning an "adult ward" of Article 33, Item 1; the part of Article 69, Item 1 of the former State Public Officials Act (amended by Act No. 15857 on December 16, 2018, and before amended by Act No. 17894 on January 12, 2021) concerning an "adult ward" of Article 33, Item 1; and the part of Article 69, Item 1 of the current State Public Officials Act (amended by Act No. 17894 on January 12, 2021) concerning Article 33, Item 1. These clauses provide that when a public official becomes an adult ward, that official shall automatically be retired.

Background of the Case

Petitioners are the spouse and children of K.W., who served as a public official of the prosecution office since 1990. K.W. took a medical leave of absence for two years due to hypoxic brain damage incurred while at work. During the absence period, his spouse, Petitioner K.K., filed an application with a court for guardianship of K.W. in order to conduct financial transactions and other business on his behalf and in his name. The court established the guardianship of K.W. and appointed K.K. as his guardian.

Meanwhile, K.K. applied for K.W.'s honorable retirement, which he had previously considered on several occasions before his hypoxic brain damage. However, during the examination of K.W.'s eligibility for honorable retirement, the prosecutor general became aware of the fact that a guardianship had been established for him, and determined K.W.'s

ineligibility for honorable retirement and that he was deemed to have retired automatically under Article 69 of the State Public Officials Act from the day the guardianship was established.

Thereafter, K.W. received a request from the National Health Insurance Service for payment of his outstanding retiree health insurance premiums that should have been collected from the next day of his automatic retirement. Around that time, K.W. was also asked to return the benefits of group insurance for public officials and school officials that had been paid to him by an insurance company after the date of his automatic retirement. He was also requested by the chief prosecutor of the Busan High Prosecutors' Office to return 15 months of salary that had been paid to him after the date of his automatic retirement. As per these requests, Petitioners met all of these obligations.

K.W. filed suit against the defendant, Republic of Korea, seeking confirmation of his status as a public official. However, as he died after the suit was brought, Petitioners lodged a suit claiming the return of the money they paid off as above. While the suit was pending, Petitioners petitioned the court to request constitutional review of the whole of Article 33, Item 1 of Article 69, Item 1 of the State Public Officials Act. The court partly granted the petition and requested constitutional review of the part of Article 69, Item 1 of the State Public Officials Act relating to an "adult ward" of Article 33, Item 1.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the part of Article 69, Item 1 of the former State Public Officials Act (amended by Act No. 13618 on December 24, 2015 and before amendment by Act No. 15857 on October 16, 2018) relating to an "adult ward" of Article 33, Item 1, the part of Article 69, Item 1 of the former State Public Officials Act (amended by Act No. 15857 on October 16, 2018 and before amendment by Act No. 17894 on January

12, 2021) relating to an "adult ward" of Article 33, Item 1, and the part of Article 69, Item 1 of the current State Public Officials Act (amended by Act No. 17894 on January 12, 2021) relating to Article 33, Item 1 (the above three provisions are hereinafter collectively referred to as the "Provisions at Issue"). The Provisions at Issue read as follows.

Provisions at Issue

The former State Public Officials Act (amended by Act No. 13618 on December 24, 2015 and before amendment by Act No. 15857 on October 16, 2018)

Article 69 (Automatic Retirement)

In any of the following cases, a public official shall automatically be retired:

1. Where a public official falls under any Item of Article 33. However, Article 33, Item 2 shall apply only where a person declared bankrupt fails to file an application for immunity within the deadline for making the application, or where a decision not to grant immunity or the revocation of immunity becomes final under the Debtor Rehabilitation and Bankruptcy Act, and Article 33, Item 5 shall apply only where a public official commits any crime prescribed in Articles 129 through 132 or Article 303 of the Criminal Act, or Article 10 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, or in Article 355 or 356 of the Criminal Act with regard to his or her duties, and receives a suspended imposition of a sentence of imprisonment without labor or a heavier sentence;

The former State Public Officials Act (amended by Act No. 15857 on October 16, 2018 and before amendment by Act No. 17894 on January 12, 2021)

Article 69 (Automatic Retirement)

In any of the following cases, a public official shall automatically be

retired:

1. Where a public official falls under any Item of Article 33. However, Article 33, Item 2 shall apply only where a person declared bankrupt fails to file an application for immunity within the deadline for making an application, or where a decision not to grant immunity or the revocation of immunity becomes final under the Debtor Rehabilitation and Bankruptcy Act, and Article 33, Item 5 shall apply only where a public official commits any crime prescribed in Articles 129 through 132, Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, or Article 2, Item 2 of the Act on the Protection of Children and Youth against Sex Offenses, or in Article 355 or 356 of the Criminal Act with regard to his or her duties, and receives a suspended imposition of a sentence of imprisonment without labor or a heavier sentence;

The current State Public Officials Act (amended by Act No. 17894 on January 12, 2021)

In any of the following cases, a public official shall automatically be retired:

1. Where a public official falls under any Item of Article 33. However, Article 33, Item 2 shall apply only where a person declared bankrupt fails to file an application for immunity within the deadline for making an application, or where a decision not to grant immunity or the revocation of immunity becomes final under the Debtor Rehabilitation and Bankruptcy Act, and Article 33, Item 5 shall apply only where a public official commits any crime prescribed in Articles 129 through 132, Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, or Article 2, Item 2 of the Act on the Protection of Children and Youth against Sex Offenses, or in Article 355 or 356 of the Criminal Act with regard to his or her duties, and receives a suspended imposition of a sentence of imprisonment without labor or a heavier sentence;

Summary of the Decision

The Provisions at Issue are aimed at preventing deficiencies in the performance of duties of office and protecting public trust in the State public official system. As such, they serve legitimate legislative purposes. They also are an appropriate means of achieving these purposes in that they retire State public officials who are placed under guardianship due to continued mental incapacity to handle their duties.

The current State Public Officials Act requires an appointing authority to order a State public official who is unable to manage his or her duties of office due to mental disability to take a leave of absence for a period not exceeding two years (a maximum of three years in the case of a disease or injury arising from performance of official duties) (Article 71, Section (1), Item 1, Article 72, Item 1). This Act also provides for depriving a State public official of his or her employment through involuntary discharge procedures when he or she fails to return to, or is unable to manage, his or her duties of office after the leave of absence expires (Article 70, Section (1), Item 4). The legislative purposes of the Provisions at Issue would still be achieved if these provisions were applied to State public officials who are placed under guardianship. Under the alternative procedure, State public officials who become adult wards can be given a chance to make a recovery through leave of absence instead of being immediately and automatically retired. There is no need for additional organizational, temporal, or other public resources to provide the procedural guarantee.

All in all, since there is an alternative that would advance the legislative purposes of the Provisions at Issue to the same degree as the Provisions and would minimize impingement on the right to hold public office, the Provisions at Issue fail the least restrictive means test.

Because automatic retirement infringes the legal status of public officials significantly, stricter standards are required in weighing public

and private interests. The importance of the public interests the Provisions at Issue seek to achieve can only be recognized insofar as those interests harmonize with the guarantee of right to hold public office based on the social state principle in our Constitution.

The limitation imposed upon the private interest by the Provisions at Issue is excessive when considering the case of State public officials who are not placed under guardianship but have the same degree of mental disability as those under guardianship. Also, in light of the fact that an adult guardianship can be terminated by the court if the ward is no longer incapacitated, the degree of restriction on the private interest seems excessively harsh. Further, if the Provisions at Issue were to set forth the same grounds for both automatic retirement of State public officials and their disqualification from office, there must be sufficient public interest to warrant depriving State public officials of the positions they have accumulated during their service. However, the public interests sought to be achieved by the Provisions at Issue fall short of this.

Therefore, because the Provisions at Issue place too much priority on the public interests as compared to the private interest at stake, they fail the balance of interests test.

Accordingly, the Provisions at Issue infringe the right to hold office in violation of the rule against excessive restriction.

Summary of Dissenting Opinion of Three Justices

The Provisions at Issue prescribe that being an adult ward—whose guardianship is imposed by the court for continued incapacity to manage his or her affairs because of mental impairment—constitutes a ground for automatic retirement. As such, the Provisions at Issue serve legitimate legislative objectives of ensuring proper performance of duties of office by public officials and protecting public confidence in individual officials or public service. Automatically retiring a State public official when he

or she becomes an adult ward is an appropriate means of achieving those objectives.

Procedurally, establishing an adult guardianship requires both a petition by an eligible petitioner and an adult guardianship adjudication by the court. Based on objective and scientific evidence, the court determines the mental state and affairs management capacity of the prospective ward through a medical expert evaluation, court examination, home study, etc. from a caregiving perspective for the prospective ward, and in the process, his or her social status as a public official and other factors may be practically considered.

Adult guardianship requires “continued incapacity” to manage affairs because of mental impairment and that such incapacity be very unlikely to be terminated within a significant period. Thus, the Provisions at Issue minimize harm caused by severance from public employment in consideration of the severity and seriousness of the incapacity. Further, even if there is some capacity left in an adult ward, it is difficult to see it as meeting the job performance capacity required of a State public official, given the significant restrictions envisioned in principle for the ward’s right to self-determination concerning financial and personal affairs.

The alternative procedure proposed by the opinion of the Court, which allows an appointing authority to determine the job performance ability at its discretion and decide on the loss of public office, cannot be deemed less invasive to the public official than the adult guardianship adjudication, which is a judgment based on objective evidence obtained through professional evaluation procedures, home studies, etc. The adult guardianship system is divided into adult guardianship, limited guardianship, and specific guardianship and provides flexible and elastic protective measures in stages for the ward. Under this system, if a public official’s job performance ability is partially remaining or temporarily lacking, he or she can receive protection through limited or specific guardianship

and have the opportunity to make a recovery within the scope of the leave system under the State Public Officials Act. In this case, there is no effect of automatic retirement from public service.

Therefore, we do not find that the Provisions at Issue fail the least restrictive means test.

Public officials are servants of the entire people, and their duties of office themselves are for the public interest. Therefore, it is crucial to ensure smooth public service with the minimum level of expected job performance ability for public officials and to protect the trust of the people in such service. Even from the perspective of the public service system based on the social state principle, it cannot be said that public officials whose continued incapacity to perform duties is objectively recognized through the adult guardianship adjudication of the court, must be guaranteed their livelihood in a manner that they maintain their status as a public official. Rather, for public officials who have become adult wards, it is possible to promote the social state principle by providing them with livelihood benefits through separate social security schemes after their retirement. In the same vein, the State Public Officials Act requires that appropriate benefits be paid to public officials or their surviving families in the event of illness, injury, disability, retirement, death, or accidents as stipulated by statute (Article 77, Section (1)).

Considering together, *inter alia*, the fact that fairness can be ensured through procedures and investigations in adult guardianship adjudication proceedings and faithful and objective assessment, and that public officials can utilize specific guardianship as well as leave-of-absence systems under the State Public Officials Act according to their mental state and the wishes of themselves and their families to facilitate the recovery of their work capacity and delay the establishment of adult guardianship, we find that the disadvantages caused to the individual public officials by the Provisions at Issue do not outweigh the public interests the Provisions pursue. Therefore, the Provisions at Issue satisfy

the balance of interests test.

All in all, the Provisions at Issue do not infringe the right of a State public official to hold public office by violating the rule against excessive restriction.

Summary of Concurring Opinion of One Justice

Since the performance of public duties is for the benefit of the entire people, it is natural that those who have the ability to bear such responsibilities should be entrusted with them. However, this does not mean that public service should be composed only of a cold and exclusive elite group of highly capable individuals. On the contrary, the spirit of the Constitution is to strive for a warm and inclusive community that recognizes anyone who wishes to contribute to the public interest through his or her abilities as an equal member of the public service by providing opportunities to utilize his or her abilities for appropriate public duties, even if he or she has little to offer. For this reason, the Court has repeatedly emphasized that “merit-based recruitment is an important aspect of the right to hold public office, but it is not an absolute value and must be harmonized with other constitutional values, such as the social state principle.” This precedential rule is even more valid in the area governed by the Provisions at Issue that concerns the retirement of State public officials who have already been recognized for their abilities.

Adult guardianship is a system that embodies the fundamentals of our Constitution, such as human dignity and worth, equality, the State’s special duty to protect disabled persons, and the constitutional principle of the social state. The Provisions at Issue, which definitively deprive State public officials who become adult guardians of their reinstatement opportunities, undermine the constitutional values of the adult guardianship system and make it difficult for the State to fulfill its obligations under the Convention on the Rights of Persons with Disabilities to support the

reinstatement of the persons who incurred disability during their employment period. These flaws of the Provisions at Issue are clearly evident from actual cases where individuals overcame their mental impairments within the period of leave of absence under the State Public Officials Act and received an adjudication terminating their guardianship. Therefore, considering the Court's mission and function of protecting the fundamental rights of minorities and the weak, who are especially powerless in the face of the logic of the majority, I cannot but acknowledge the unconstitutionality of the Provisions at Issue.

17. Case on Identity Verification System on Message Boards of Public Institutions

[2019Hun-Ma654, December 22, 2022]

In this case, the Court held that Article 44-5, Section (1), Item 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. does not infringe a fundamental right of Complainant. The relevant clause provides that Public Institutions that intend to install and operate a message board on information and communications networks shall take necessary measures, as prescribed by Presidential Decree, including preparation of methods and procedures for verifying the identity of users of the message board.

Background of the Case

On June 19, 2019, Complainant intended to publish his opinions on the "Korean National Human Rights Commission's Free Discussion Board," "Seoul's Dongjak District's Free Message Board," and other online message boards of a public enterprise, quasi-government agency, local government-invested public corporation, and local government public corporation. However, he could not immediately publish his opinions on the message boards because the operator of each message board was taking measures to verify the identity of its users.

On June 21, 2019, Complainant filed the constitutional complaint in this case, arguing that his fundamental rights were infringed by Article 44-5, Section (1), Item 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc., which provides that a State agency, local government, public enterprise, etc. that intend to install and operate a message board on information and communications networks shall take necessary measures, as prescribed by Presidential Decree, including preparation of methods and procedures for verifying the identity of users of the message board.

Subject Matter of Review

The subject matter of review in this case is whether Article 44-5, Section (1), Item 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (amended by Act No. 9119 on June 13, 2008) (hereinafter referred to as the "Provision at Issue") infringes a fundamental right of Complainant.

Provision at Issue

Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (amended by Act No. 9119 on June 13, 2008)

Article 44-5 (Identity Verification of Users of Message Boards)

(1) If any of the following persons intends to install and operate a message board, he or she shall take necessary measures, as prescribed by Presidential Decree (hereinafter referred to as "Identity Verification Measures"), including preparation of methods and procedures for verifying the identity of users of the message board:

1. A State agency, local government, public enterprise, or quasi-government agency under Article 5 (3) of the Act on the Management of Public Institutions, or a local government-invested public corporation or a local government public corporation under the Local Public Enterprises Act (hereinafter individually referred to as a "Public Institution" or collectively as "Public Institutions");

Summary of the Decision

1. Fundamental rights restricted

The Provision at Issue requires a user of a message board to provide

data for identity verification when publishing information on the message board. It thereby restricts freedom of anonymous expression—a type of freedom of expression that allows message board users to express and disseminate their ideas and opinions anonymously, without revealing their identity to anyone.

2. Whether freedom of anonymous expression has been infringed

Identity Verification Measures, under the Provision at Issue, minimize the adverse effect due to, *inter alia*, the anonymity of information and communications networks, and thus, serve the purpose of ensuring and strengthening the accountability in using message boards of Public Institutions. Identity Verification Measures also discourage users of message boards from engaging in acts including verbal abuse, defamation, and spreading illegal information, thus serving the purpose of fostering a sound internet culture. For these reasons, the Provision at Issue has legitimate purposes and is an appropriate means of achieving those purposes.

The message boards regulated by the Provision at Issue are, in terms of their nature, a place where issues of public nature are usually discussed. This space requires a stronger responsibility as a member of the community because its users can be anyone, and this tends to be more so in such space than message boards installed and operated by entities other than Public Institutions. Where data embodying verbal abuse, defamation, illegal information, etc. are published on the message boards installed and operated by Public Institutions, this may undermine the credibility of those message boards, resulting in harm to their users and interruption of normal operation of Public Institutions. Therefore, there is a high need to maintain the public nature and credibility of the message boards installed and operated by Public Institutions, through Identity Verification Measures, which *ex ante* ensure accountability and soundness. It does not seem unduly burdensome to ask users to verify their identity as a condition of

using the message board. Therefore, the Provision at Issue satisfies the least restrictive means test.

The degree to which the fundamental right is limited by the Provision at Issue is not substantial in light of the following factors: that the use of message boards is not the only way for anonymous expression directed at Public Institutions; that Public Institutions cannot be considered to have a general statutory obligation to install and operate message boards; that the Provision at Issue limitedly applies to the message boards installed and operated by Public Institutions. In contrast, there is a significant public interest in fostering a sound internet culture by preventing verbal abuse, defamation, and distribution of illegal information on the message boards installed and operated by Public Institutions. Therefore, the Provision at Issue satisfies the balance of interests test.

Accordingly, because the Provision at Issue is in compliance with the rule against excessive restriction, it does not infringe the freedom of anonymous expression of Complainant.

Summary of Dissenting Opinion of Four Justices

If data including verbal abuse, defamation, or illegal information are published on a message board, a number of actions can be taken, including deletion of the data by a message board administrator; issuance of an order requiring a message board administrator or operator to refuse, suspend, or restrict transmitting illegal information; and holding the user civilly or criminally liable for publishing the data in question. Through these means, it is possible to achieve the legislative purpose of fostering a sound internet culture. Depending on the objective or character of a message board installed and operated by Public Institutions, there may be occasions where freedom of anonymous expression needs to be limited, such as when a Public Institution runs a message board where complaints or petitions can be posted. In such cases, however, a statutory basis can

be formed, as the provisions of the Act on Complaint Processing or the Petition Act, in such a way that permits identity verification that fits specific purposes. Therefore, the Provision at Issue fails the least restrictive means test.

Anonymous expression enables individuals to freely manifest and disseminate their thoughts and ideas without succumbing to explicit or implicit external influences, and makes it possible to criticize the State authorities or the prevailing opinions of society. This, in turn, opens the possibility for the views of politically and socially marginalized groups to be considered in policy decision-making by the State. In this respect, anonymous expression cannot be separated from the content of freedom of expression. Further, anonymous expression on the internet forms public opinion that is free from social class, status, age, and gender, based on the speed and interactivity of internet communication. This promotes a more equitable reflection of the will of the people and contributes to the development of democracy. Considering the democratic implications of freedom of anonymous expression, this freedom should be even more strongly protected in public areas regulated by the Provision at Issue than in areas that are not. However, under the Provision at Issue, identity verification is a prerequisite for publishing information on all message boards installed and operated by Public Institutions. This fundamentally blocks the opportunity for those who have not verified their identity to express themselves on message boards operated by Public Institutions, and increases the likelihood that those who wish to manifest their ideas or opinions on such boards will engage in self-censorship regarding the content, tone, etc. of their expression. As such, we cannot help but find that the Provision at Issue is an undue limitation of freedom of anonymous expression. Thus, the Provision at Issue fails the balance of interests test.

In conclusion, the Provision at Issue violates the rule against excessive restriction, and thus, infringes the freedom of anonymous expression of Complainant.

Appendix

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.

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